



Federal Courts' Misunderstanding of Rule 702 Demonstrates Need for Amendment

Federal Rule of Evidence 702 was designed to make courts gatekeepers in determining the admissibility of expert opinions. The rule directs that the judge must determine if the expert's factual basis and application of methodology are reliable, but some courts see such questions as addressing only the weight and not the admissibility of the expert testimony.

Over the past 20 years, this confusion has produced inconsistent application of the Rule 702 standard, allowing flawed and unreliable testimony that courts should have excluded to be presented to juries.

Moreover, in high-stakes Multidistrict Litigation (MDL) cases, these mischaracterizations of Rule 702 can lead to flawed rulings that affect hundreds – if not thousands – of individual cases. These problematic

decisions create enormous pressure on defendants to settle and have led to billions of dollars changing hands.

A thorough review and analysis of both MDL and non-MDL cases reveals a persistent and wide-spread misunderstanding of Rule 702 and demonstrates the need for an amendment to the Rule that clarifies the Rule 702 standards for admissibility of expert opinion testimony. Importantly, the amendment must clarify that an expert's factual basis and application of methodology are threshold issues of admissibility.

The 28 examples below – drawn from cases in all 11 regional circuits over the past two decades – show how courts have departed from the Rule 702 standard and why clarification is needed in order to bring clarity and uniformity across jurisdictions.

 = From MDLs

1st Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
United States v. Shea (1st Cir. 2000)	"[A]ny flaws in [an expert]'s application of an otherwise reliable methodology went to weight and credibility and not to admissibility."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

2nd Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
Crawford v. Franklin Credit Mgt. Corp. (S.D.N.Y. 2015)	"In light of the 'presumption of admissibility of evidence,' that opportunity [for cross-examination] is sufficient to ensure that the jury receives testimony that is both relevant and reliable."	Advisory Committee Note to 2000 Amendments to Rule 702: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."
In Re Zyprexa Prod. Liab. Litig. (E.D.N.Y. 2007)	"Since 'Rule 702 embodies a liberal standard of admissibility for expert opinions,' the assumption the court starts with is that a well-qualified expert's testimony is admissible."	Advisory Committee Note to 2000 Amendments to Rule 702: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."
In re Mirena IUD Prods. Liab. Litig. (S.D.N.Y. 2016)	The court "expresse[d] no opinion on the validity of" a study, noting that "because the parties so vehemently disagree on its credibility, it is a suitable topic for cross-examination before a jury."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

3rd Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
In re Zoloff (Sertraline Hydrochloride) Prods. Liab. Litig. (3rd Cir. 2017)	Several problems identified by the district court—including reliance on studies with overlapping populations and drawing conclusions from a study opposite those reached by its authors—were "inquiries . . . more appropriately left to the jury."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

4th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
Patenaude v. Dick's Sporting Goods, Inc. (D.S.C. 2019)	"More fundamentally, each of these arguments goes to the factual basis of the report.... and it is well settled that the factual basis for an expert opinion generally goes to weight, not admissibility."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Prods. Liab. Litig. (D.S.C. 2016)	Arguments indicating an expert misapplied the Bradford Hill criteria were "a matter for cross-examination, not exclusion."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

5th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
Alvarez v. State Farm Loyds (W.D. Tex. 2020)	"To the extent State Farm wishes to attack the 'bases and sources' of Dr. Hall's opinion, such questions affect the weight to be assigned to that opinion rather than its admissibility and should also 'be left for the jury's consideration.'"	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
In re Taxotere (Docetaxel) Prods. Liab. Litig. (E.D. La. 2019)	Court accepted the expert's "personal judgment in deciding what articles to review and include in her analysis," holding that "[i]f an expert cannot articulate support for a particular factor, this goes to the weight of the expert's opinion, not its admissibility."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
United States v. Hodge (5th Cir. 2019)	"As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
MCI Communications Service Inc. v. KC Trucking & Equip. LLC (W.D. La. 2019)	"As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
Puga v. RCX Solutions, Inc. (5th Cir. 2019)	"As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
AmGuard Ins. Co. v. Lone Star Legal Aid (S.D. Tex. 2020)	"[O]bjections [that the expert could not link her experience-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."
Puga v. RCX Solutions, Inc. (5th Cir. 2019)	A police officer testifying as an expert in "accident investigation" who did not reconstruct the crash sequence or inspect the subject truck was nonetheless allowed to testify that the accident was caused because the truck driver "must have been driving too fast for the conditions or taken a faulty evasive maneuver."	Advisory Committee Note to 2000 Amendments to Rule 702: "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted."

6th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
In Re Scrap Metal Antitrust Litig. (6th Cir. 2008)	"'[R]ejection of expert testimony is the exception, rather than the rule,' and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record."	Advisory Committee Note to 2000 Amendments to Rule 702: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."
Wischermann Partners, Inc. v. Nashville Hospitality Capital LLC (M.D. Tenn. 2019)	"[T]he court will not exclude expert testimony 'merely because the factual bases for an expert's opinion are weak.'"	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."

7th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
Manpower, Inc. v. Ins. Co. of Pa. (7th Cir., 2013)	"The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note on 2000 Amendment: "Courts both before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: ... (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion..."
In re Testosterone Replacement Therapy Prods. Liab. Litig. (N.D. Ill. 2017)	"The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the jury."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]"

8th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig. (D. Minn. 2017)	"Generally, the credibility of an expert's basis goes to weight."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
Katzenmeier v. Blackpowder Prods., Inc. (8th Cir. 2010)	"As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
In re Prempro Prods. Liab. Litig. (E.D. Ark. 2012)	"In most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."
In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig. (D. Minn. 2017)	Expert testimony could be excluded only if "so fundamentally unsupported that it can offer no assistance to the jury," stating that the credibility of an expert's basis, the need to conduct more thorough testing, and bias in conducting a scientific literature review were issues that went to weight rather than admissibility.	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."
In re Celexa & Lexapro Prods. Liab. Litig. (E.D. Mo. 2013)	"There is no requirement that [an expert] reach the same conclusion as [a study's author] just because he relied on [the author's] data."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case." Advisory Committee Note on 2000 Amendment: "When an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied."
Lombardo v. St. Louis City (E.D. Mo. 2019)	Allowing opinion testimony that the "main cause of death" was forcible restraint-induced asphyxia despite expert's inability to "specify where the Defendant Officers exerted pressure" or to rule out the decedent's "admittedly significant cardiovascular disease or noted chronic methamphetamine use[.]"	Advisory Committee Note to 2000 Amendments to Rule 702: "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted."

9th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
City of Pomona v. SQM N. Am. Corp. (9th Cir., 2014)	"[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony."	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

10th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
Price v. General Motors, LLC (W.D. Okla. 2018)	"[T]here is a presumption under the Rule that expert testimony is admissible."	Advisory Committee Note to 2000 Amendments to Rule 702: "[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."
Murphy-Sims v. Owners Ins. Co. (D. Colo. 2018)	"Concerns surrounding the proper application of the methodology typically go to the weight and not admissibility[.]"	Rule 702(d): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the expert has reliably applied the principles and methods to the facts of the case."

11th Circuit

Case	Misapplication of Rule	Rule/Committee Note Text
In re Chantix (Varenicline) Prods. Liab. Litig. (N.D. Ala. 2012)	"The factual basis of an expert opinion is assessed by the jury."	Rule 702(b): "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if... [the court finds] the testimony is based on sufficient facts or data[.]" Advisory Committee Note to 2000 Amendments to Rule 702: "The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided [by the court] under Rule 702."

Sources:

1: Mickus, Lee, "Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings About Expert Evidence." Washington Legal Foundation. Critical Legal Issues Working Paper Series No. 217, May 2020: <https://www.wlf.org/wp-content/uploads/2020/05/0520MickusWPfinal-for-web-002.pdf>

2: Sheehan, Thomas J., Canaan, Eva, and Glasgow, Joshua, "Re: Amending Federal Rule of Evidence 702 – A Review of Gatekeeping Practices in Multidistrict Litigation," June 9, 2020: <https://phillipslytle.com/wp-content/uploads/2020/06/Letter-to-Advisory-Committee-re-Rule-702-C.pdf>