

Floodgates Not Gatekeeping: How FRE 702 Continues to be Misunderstood By Courts

Over the last 20 years, misunderstandings about how Rule 702 was intended to function have only grown as the courts have embraced those misunderstandings and produced a striking departure from the Rule's intended approach for evaluating the admissibility of opinion testimony. Today, court assessments often bear little resemblance to the analytical process outlined in the Rule and described by the Advisory Committee's Note.

The patterns exhibited include:



Ignoring the sponsor's burden of establishing admissibility



Deferring to the jury determinations that the court must decide



Allowing presentation of ancillary opinions without subjecting them to scrutiny.

Below are several notable examples where these departures from the analytical approach directed by Rule 702 and the Committee Note create confusion about the admissibility standard, undermine the goal of uniformity, and expose juries to the misleading influence of unreliable opinion testimony.

Unless these patterns are displaced with a new amendment, courts can be expected to continue addressing the admissibility of opinion testimony in ways that depart from the intent of Rule 702.

Example	Misapplication of Rule	Rule/Advisory Committee Note	Proposed Remedy
Prico v. General Motors, LLC (W.D. Okla. 2018)	"[T]here is a presumption under the Rules 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."	Courts need direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production.
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."	Courts need direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production.
In Re Zyprexa Prod. 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."	Courts need direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production.
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."	Courts need direction that Rule 702 does not incorporate a presumption of admissibility or otherwise prefer admitting over excluding proffered opinion testimony, but instead requires the sponsor to fulfill the burden of production.
Alvarez v. State Farm Lloyds (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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
Falenoude 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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
Wichermann Partners, Inc. v. Nashville Hospitality Capital LLC (W.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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
United States v. Hodges (5th Cir. 2017)	"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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
Katzmeier v. Blackpowder Foods, 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 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 under Rule 702."	Courts need additional guidance that an expert's factual basis only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
Murphy-Sims v. Owens 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 expert has reliably applied the principles and methods to the facts of the case."	Courts need additional guidance that an expert's application of methodology to the facts of issue only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
AmGuard Ins. Co. v. Jones Stet Legal Aid (S.D. Tex. 2020)	"[D]irections 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 expert has reliably applied the principles and methods to the facts of the case."	Courts need additional guidance that an expert's application of methodology to the facts of issue only becomes a credibility matter for the jury to decide after the court initially determines that the proponent has met the burden of establishing by a preponderance of the evidence that expert meets the standard of admissibility.
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 first 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."	Courts should be alerted that they must monitor opinion testimony to preclude overstatement and overreaching.
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 first 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."	Courts should be alerted that they must monitor opinion testimony to preclude overstatement and overreaching.