From Clarification to Consensus:

WHY TENNESSEE SHOULD ADOPT THE 2023 AMENDMENT TO FEDERAL RULE OF EVIDENCE 702

CLARIFYING THE STANDARD FOR EXPERT TESTIMONY

Few decisions in trial practice are as consequential as whether a jury hears an "expert" and what that expert is allowed to say. Yet courts have long struggled to draw a clear line between what constitutes reliable testimony and what merely carries weight, often allowing testimonial evidence that does not meet the rigorous standards set by Federal Rule of Evidence 702 ("Rule 702"). This can lead to costly, confusing, and sometimes unjust outcomes for parties on both sides of the "V" and litigants on both sides of the bar.

That amendment to Rule 702 from December 1, 2023[1] was designed precisely to address this issue. While it did not change the law, the amendment clarified the process for admitting expert testimony, emphasizing that it is the trial judge, not the jury, that must decide whether expert testimony meets the stringent criteria laid out in Rule 702.

Under the clarified rule, the proponent of expert testimony must prove, by a preponderance of the evidence, or that it is more likely than not, that:

1. The expert's knowledge will help the trier of fact understand the evidence or determine a fact in issue;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert's opinion reflects a reliable application of those principles and methods to the facts of the case.[2]

As the Advisory Committee on Evidence Rules pointed out, the Rule 702 change was not a shift in the law but a reaffirmation of the proper gatekeeping role of judges. Even before the amendment took effect, federal courts began recognizing its clarifying purpose. For instance, the United States Court of Appeals for the Fourth Circuit cited the then-proposed rule to reverse a verdict founded on unsupported expert testimony, emphasizing "the indispensable

BRENDON PASHIA is an Associate in the Gordon, Rees, Skully and Mansukhani law firm's Nashville office. Brendon's practice primarily focuses on commercial litigation and other general liability matters for clients across the United States. Mr. Pashia may be reached at bpashia@grsm.com.

1 See, e.g., H.R. Doc. No. 118-33, 118th Cong., 1st sess. (2023); Fed. R. Evid. 702 Advisory Committee's Note to 2023 Amendment; United States Supreme Court, Amendments to Federal Rules of Evidence: Communication From the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Evidence That Have Been Adopted By the Court, Pursuant to 28 U.S.C. 2072, U.S. G.P.O (2023), https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf.

2 Fed. R. Evid. 702 (2023).

nature of district courts' Rule 702 gatekeeping function."[3]

The amendment reinforces the idea that expert testimony must be based on more than credentials or confidence. Expert testimony must rest on sound, reliable methods. With Rule 702 (2023), courts are not only required to actively ensure the reliability of expert testimony but are also paving the way for states to revise their own rules to enhance consistency and trust in expert evidence.

WHY TENNESSEE SHOULD ACT NOW

Tennessee is well-positioned to take the next step toward adopting the December 2023 amendment to Rule 702. Through various organizations, including the Tennessee Bar Association ("TBA"), Lawyers for Civil Justice ("LCJ"), DRI, and the Tennessee Defense Lawyers Association ("TDLA"), various active members, executives, and task forces are preparing and poised to submit a white paper to the TBA's Executive Committee and Litigation Section. And plans are in the works for the TBA to then present it to the Tennessee Supreme Court. The aforementioned coalition is also preparing to advocate before the Court in support of legislative ratification, a process that is typically routine and procedural.

By acting soon, Tennessee can align its rule with federal practice and avoid inconsistency between state and federal courts in the State. The purpose of adoption is not to make expert testimony harder to admit, or to side either with plaintiffs/prosecution or the defense. Rather, adoption of Rule 702 (2023) is all about making the standard clearer. As national guidance explains, states should confirm the following: (1) judges, not juries, determine whether an expert's opinion meets the rule's reliability standards; (2) the proponent bears the burden of establishing sufficiency and reliability by a "more likely than not" standard; and (3) experts may not express confidence in opinions unsupported by facts or methods that meet those standards.

THE DELAWARE SUPREME COURT LEADS THE WAY: CLARIFYING RULE 702 WITHOUT AMENDMENT

Via the matter of *In re Zantac (Ranitidine) Litigation*, the Delaware Supreme Court became the first state high court to apply the 2023 Federal Rule 702 amendment as binding jurisprudence, even though Delaware had not yet amended its own rule.[4] The court emphasized that the federal changes merely clarified existing standards and rejected the trial court's "weight" rather than "admissibility" approach, and confirmed that reliability remains a threshold question for judges, not juries.[5] The court further said that "because the Advisory Committee has explained that the 2023

3 *Sardis v. Overhead Door Corp., 10 F.4th 268, 283–84 (4th Cir. 2021).*

4 *In Re Zantac (Ranitidine) Litigation, 342 A.3d 1131, 1145-46 (Del. 2025).*

5 *Zantac, 342 A.3d at 1149.*

amendments are not substantive and instead only clarified the existing federal standard, we view the committee's recent guidance as important material to consider in reviewing our trial courts' decisions and providing guidance to litigants."[6] The court also noted that "[n]othing in the recent amendments conflicts with our existing precedent, and the commentary accompanying those amendments offers additional guidance as trial courts confront the difficult task of evaluating the admissibility of an expert opinion."[7] The *Zantac* decision demonstrates that even without adopting the new language, a court can bring about this change, as the language merely serves to clarify the existing standard. It is fitting that the "First State" in the country leads the way on this issue by creating a binding rule without formal amendment to its companion Rule 702.

IMPORTANT LESSONS FROM THE FEDERAL COURTS

Recent appellate decisions at the federal level demonstrate how courts are implementing—or failing to implement—the clarified rule, underscoring why Tennessee's adoption is necessary.

The United States Court of Appeals for the Sixth Circuit, which of course includes Tennessee's federal courts, expressly held the amended Rule 702 is the governing standard.[8] The court affirmed exclusion of a materials-science expert whose methods lacked demonstrable reliability, explaining that the proponent bears the burden of proof under a preponderance standard for each element of Rule 702.[9] Federal courts in Tennessee are already applying the clarified text; state courts, and namely the Tennessee Supreme Court, should do the same for consistency and predictability.

The United States Court of Appeals for the Ninth Circuit also recently enforced amended Rule 702(c) and (d) by affirming exclusion of a plaintiff's expert who relied on undisclosed post-hoc rationalizations.[10] The court emphasized that each conclusion, not merely the methodology, must be proven dependable by a preponderance of the evidence.[11]

In a United States District Court for the District of Arizona[12] case, the court excluded an engineering expert's causation opinions for lack of empirical testing and failure to apply methods reliably to the facts.[13] Lawyers for Civil Justice submitted an amicus brief to the Ninth Circuit seeking that the Court uphold the District of Arizona' decision that an expert's "differential etiology" assessment did not satisfy FRE 702(c) or 702(d) when employed to identify a subject fire's cause.[14] Overall, the *Jensen* lower court decision reinforces that speculation cannot substitute for analysis supported by data.

The Seventh Circuit, in a toxic-exposure lawsuit on appeal from the United States District Court for the Northern District of Illinois, [15] is also expected to weigh and address whether Rule 702(d) requires proof that each conclusion rests on a reliable application of methodology. The upcoming decision may further strengthen the nationwide move toward strict preponderance-based admissibility.

Meanwhile, although unrelated to products liability or more "scientific" expertise matters, the Fifth Circuit in a 2025 case titled *Nairne v. Landry*, cited amply to the amended Rule 702(b) in affirming exclusion of unreliable statistical expert testimony in a voting-rights case.[16] The decision shows that the clarified rule applies across all subject areas, with all kinds of experts, in various kinds of litigation.

Together, these federal cases highlight a clear national trend – admissibility of expert testimony hinges on proven reliability, not mere reputation. Across the eleven circuits, courts are consistently enforcing Rule 702's "more likely than not" standard before allowing expert testimony to reach the jury. Tennessee stands at the threshold of joining this movement. By adopting the 2023 amended Rule 702, Tennessee's judiciary can lead with clarity and consistency, setting

6 *Id. at 1146.*
7 *Id.*
8 *Hill v. Med. Device Bus. Servs., Inc., 2025 WL 1950300, at **4-5 (6th Cir. July 16, 2025).*
9 *Id.*
10 *Engilis v. Monsanto Co., 151 F.4th 1040, 1048-50 (9th Cir. 2025).*
11 *Id. at 1050.*
12 *Jensen v. Camco Mfg., LLC, 2024 WL 4566781, at *7 (D. Ariz. Oct. 24, 2024).*
13 *Of note, Jensen is currently on appeal to the Ninth Circuit on November 22, 2024, and scheduled for oral argument in November 2025.*
14 *Brief of Lawyers for Civil Justice, as Amicus Curiae, in support of Defendant-Appellee Camco Manufacturing, LLC, Jensen v. Camco Mfg., LLC, No. 24-7092 (July 21, 2025), on appeal from Jensen, 2024 WL 4566781 at *1.*
15 *Zurbriggen v. Twin Hill Acquisition Co., 338 F. Supp. 3d 875 (N.D. Ill. 2018), on appeal as Zurbriggen v. Twin Hill Acquisition Co., No. 25-1963 (June 4, 2025). Of note, the LCJ also filed an amicus brief in Zurbriggen on October 17, 2025.*
16 *Nairne v. Landry, 151 F.4th 666, 697-99 (5th Cir. 2025).*

a standard that reflects the strength and fairness of our legal system. From Memphis to Nashville to Eastern Tennessee, aligning with this clarified rule would ensure Tennessee's courts maintain the delicate balance between expertise and accountability, keeping pace with the nation's most reliable jurisprudence.

THE "BACKSLIDE" IN THE FOURTH CIRCUIT FROM THE MATTER OF SOMMERVILLE V. UNION CARBIDE CORP. (2025)

Not all courts have followed the clarified standard. The United States Court of Appeals for the Fourth Circuit reversed a district court that had excluded a plaintiff's air-dispersion expert.[17] The Fourth Circuit's appellate majority concluded the lower court over-scrutinized the expert's methodology as it "was not a true critique of [the expert's] methodology", but a veiled attack on credibility.[18] The Fourth Circuit, in turn, treated reliability disputes as jury questions.[19] Notably, a petition for rehearing *en banc* is pending before the Court in *Somerville.* However, the case nonetheless should serve as a warning: without clear state rules, courts can revert to pre-amendment habits that blur the judge's gatekeeping role.

WHY THIS MATTERS FOR TENNESSEE

States across the country are moving to align their evidence rules with the amended federal standard. For example, Arizona, Delaware, Kentucky, Louisiana, Michigan, Oklahoma, and Ohio have already adopted parallel amendments. Missouri, New Jersey, and at least a handful of other states are currently considering similar updates. Only Maryland has deferred rule reform.

For Tennessee, the advantages to adopting the 2023 amendment to Rule 702 are practical and immediate:

- **Uniformity:** State and federal courts will apply the same burden and analysis.
- **Predictability:** Litigants will know what must be proven and when.
- **Integrity:** Unreliable "expert" opinions will no longer reach juries under a mistaken "weight versus admissibility" rationale.
- **Efficiency:** Clearer rules mean fewer contested hearings and cleaner appellate records.
- **Public confidence:** Clarified standards promote trust in the judicial process.

To put it simply, admitting unsupported expert testimony can mislead juries, undermine civil justice, and erode public confidence in our courts. Clarification is not about restricting expert testimony; it is about ensuring every opinion heard in Tennessee courts is grounded in the reliable methods and factual foundations our rules already demand.

THE ROAD AHEAD

The TDLA and TBA working group are preparing a white paper modeled on successful efforts in New Jersey. That document will include examples from federal and state court cases, amicus templates, and, ideally, a coordinated presentation to the Tennessee Supreme Court next year.

If adopted ideally in 2026, Tennessee would join the growing number of jurisdictions ensuring that Rule 702's clarified burden of proof (by a preponderance of the evidence) guides expert admissibility decisions. Both plaintiff and defense bar practitioners, as well as criminal law practitioners, will benefit from the consistency and transparency of standards that make trials fairer and more efficient.

CONCLUSION

Rule 702 has always required reliability; the 2023 amendment simply clarified that the burden of proof rests with the proponent and that admissibility must be demonstrated by a preponderance of the evidence. Adopting this language state-wide in Tennessee would strengthen the integrity of our courts, align our practices with federal standards, and ensure that juries hear only expert opinions based on reliable principles and sound data.

In essence, clarification is *not* change, it *is* restoration. It would return Tennessee courts to the original gatekeeping role envisioned by *Daubert* and reinforced by the federal amendment.

17 *Sommerville v. Union Carbide Corp.*, 149 F.4th 408, 413 (4th Cir. 2025)

18 *Id. at 423.*

19 *Id. at 423-24.*