

The Amended FRE 702: No Charlatans on the Stand

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The amended language of Federal Rule of Evidence 702, which governs the admissibility of expert testimony in federal court, takes effect on December 1, 2023. Even though the Advisory Committee comment stresses that it intended no substantive alteration, and sought only to clarify the Rule's proper application, [\[1\]](#) the changes are not merely semantic.

As amended, Rule 702 now reads as follows (new text is in bold):

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 proponent demonstrates to the court that it is more likely than not that:**

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.

Both these amendments reinforce the important principle that under Rule 702, the trial court serves a substantive gatekeeping function. At the threshold, before an opinion is admitted from an expert, the trial court must find it "more likely than not" that the expert's testimony is well grounded in two distinct ways. It must arise from (i) a reliable methodology and (ii) a sound application of that methodology to the facts and assumptions at hand. Only after such a finding, which renders the evidence admissible, will the opinion (and the challenges to it) become matters to be weighed by the jury.

1. Reliability of Methods

The amended language in the primary clause of the Rule clarifies that the proponent of the expert opinion must satisfy its admissibility requirements under a preponderance standard - showing that the opinion is "more likely than not" to be helpful to the factfinder. [\[2\]](#) To be clear, this was always the standard, but it now appears in the language of the Rule itself.

This standard applies to the procedures used in forming the opinion, not its outcome; in other words, the proponent need not demonstrate, and the court does not decide, that the expert's assessments are correct. Rather, admissibility depends on a showing that it is more likely than not that the expert's opinions are the product of a generally reliable method, applied in reliable fashion.

[\[3\]](#)

This amendment may help mitigate an error that often arises when federal courts incorrectly resolve questions about expert methodology by deferring to the fact-finder. The hallmark of this error is reliance on the old, and often misleading, adage that challenges to an expert opinion go to the weight, not the admissibility, of the expert's testimony. In truth, issues of methodology and its sound application to the facts are for the court, not for the jury. By inserting the "more likely than not" language - a lenient standard, representing a preliminary stamp of approval without full ratification of the opinion's substance - the amendment defines the trial judge's gatekeeping role precisely.

Under the correct standard, the court must scrutinize the evidence for a threshold level of reliability. It does not decide that all challenges are invalid, only that they do not outweigh the soundness of the expert's approach. It is at that point, once the trial court has found it "more likely than not" that the expert's testimony is reliable, that challenges to the expert's reliability can be weighed by the jury.

2. Reliability of the Expert's Application of Those Methods

The amendment to subsection (d) builds on the first amendment, and clarifies that the trial judge's gatekeeping role does not end once the trial court determines that the expert's methodology is reliable. Rather, the trial judge must also assess the way the expert's conclusions draw on that methodology.

In sharpening the focus on the viability of the opinion being offered - which must be shown to harmonize with the facts and assumptions at issue in the case - this amendment aligns with the U.S. Supreme Court's holding in *General Electric Co. v. Joiner*.^[4]

In *Joiner*, the Court held that, no matter how sound the proffered methodology might be, Rule 702 does not require trial courts to admit an expert's opinion where it is not properly grounded in that method of analysis. The court must consider whether the opinion is unreliable because there is "too great an analytical gap between the data and the opinion proffered."^[5]

Despite the rule expressed in *Joiner*, many trial courts have refused to conduct this analysis, relying on the bromide that such an inquiry goes to the weight of the evidence instead of admissibility. To be admissible, an expert opinion must withstand scrutiny from a federal judge, and must "reflect[] a reliable application" of the methods that met the reliability test under subsection (c).

3. Implications of Amended Rule 702 for Practitioners

Because the amended Rule 702 reminds trial courts to conduct actual scrutiny of an opinion's foundation before admitting expert testimony into evidence, it may increase obstacles to the admissibility of certain methodologies.

The Advisory Committee's note expressly identifies the impact of the amendments on forensic experts whose testimony is subjective and thus subject to error. The court, not the factfinder, must assess the reliability of such opinions in light of the principles underlying them and the facts at issue. In the criminal context, this could affect the admissibility of fingerprint assessments, bloodstain pattern or arson analysis, and firearms identification. In the civil context, the changes may make it more difficult to admit the testimony of a financial expert, particularly on issues that turn on speculative judgment calls such as the value of intellectual property.

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[1] Fed. R. Evid. 702 advisory committee note to 2023 amendment.

[2] *See Bourjaily v. United States* , 483 U.S. 171, 175 (1987) (“The preponderance of the evidence standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”).

[3] Fed. R. Evid. 702 advisory committee note to 2000 amendment (quoting *In re Paoli R.R. Yard Litig.* , 35 F.3d 717, 744 (3d Cir. 1994).

[4] 522 U.S. 136 (1997).

[5] *Id.* at 146; *see also id.* at 142