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Attorneys and Courts Should Immediately Rely on the Forthcoming Rule 702 Amendment

by Lee Mickus and Alex Dahl

In anticipation of the forthcoming amendment to Federal Rule of Evidence 702, practitioners and courts are already changing their approach to challenging the admissibility of opinion testimony. Although the amendment will officially take effect December 1, 2023, judges are taking notice that the amendment is intended to align how courts and litigators approach gatekeeping with the rule's existing requirements. It does not alter the substance of the admissibility standard, but instead clarifies what assessments courts must make when determining if a jury will hear an expert's opinion testimony. The corrective nature of the amendment means that implementation of its directives should begin immediately.

The Rule 702 amendment clarifies that: (1) expert testimony may not be admitted unless the proponent demonstrates to the court that the proffered testimony meets the admissibility requirements of the rule; (2) the preponderance standard applies to the rule's three reliability-based requirements; and (3) the expert's opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology.

The Advisory Committee on Evidence Rules intends the Rule 702 amendment to change how some courts conduct the gatekeeping analysis. In its May 15, 2022, report to the Judicial Conference Committee on Rules of Practice and Procedure announcing unanimous approval of the proposed amendment, the Advisory Committee describes the purpose of the amendment as confirming the burden of production that courts must apply in exercising the gatekeeping function, so that all components of Rule 702 are given effect as admissibility requirements:

> [T]he Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence. The Committee concluded that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence -- essentially treating these questions as ones of weight rather than admissibility, which is contrary to the Supreme Court's holdings that under Rule 104(a), admissibility requirements are to be determined by court under the preponderance standard. . . . [U]ltimately the Committee unanimously agreed that explicitly weaving the Rule 104(a) standard into the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other

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> rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard.[1]

Because the amendment *clarifies* how the rule should be understood in order to remedy misunderstandings and misapplications of Rule 702, practitioners and courts can properly take guidance now from the amendment and the Advisory Committee's analysis to bring their Rule 702 practice in line with the proper approach to Rule702 gatekeeping. In fact, several federal courts are already citing to and drawing upon the amendment and the accompanying Advisory Committee's Note to guide how they conduct Rule 702 admissibility determinations. For example, the Fourth Circuit in *Sardis v. Overhead Door Corp*., 10 F.4th 268, 283-84 (4th Cir. 2021), recognized that the amendment seeks to correct the misguided practices that some courts follow:

> We conclude with one final observation. Our insistence on district courts' compliance with Rule 702's plain gatekeeping requirement stems not from an arbitrary adherence to a procedural formality. Rather, because Rule 702 grants experts 'wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation,' '[e]xpert evidence can be both powerful and quite misleading.' *Daubert*, 509 U.S. at 592, 595, 113 S.Ct. 2786 (citations and internal quotation marks omitted). As such, 'the importance of [the] gatekeeping function cannot be overstated.' *United States v. Barton*, 909 F.3d 1323, 1331 (11th Cir. 2018) (citation and internal quotation marks omitted).
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> That much is confirmed by the Advisory Committee on Evidence Rules' current proposal to amend Rule 702. On April 30, 2021, the Committee unanimously approved a proposal to amend Rule 702, part of which is motivated by its observation that in 'a number of federal cases ... judges did not apply the preponderance standard of admissibility to [Rule 702's] requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury.' Advisory Comm. on Evidence Rules, *Agenda for Committee Meeting* 17 (Apr. 30, 2021) [saved as ECF opinion attachment]. In order to address this 'pervasive problem,' *id.* at 18, both of the current draft amendments to Rule 702 would contain the following language in the advisory committee's notes:
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> > [U]nfortunately many courts have held that the critical questions of the sufficiency of an expert's basis [for his testimony], and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a) and are rejected by this amendment.
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> *Id.* at 105, 107. That clearly echoes the existing law on the issue. *See, e.g.*, *Daubert*, 509 U.S. at 589, 113 S.Ct. 2786 ('[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'); *Kumho Tire*, 526 U.S. at 147, 119 S.Ct. 1167 (extending *Daubert* to 'all expert testimony'); Fed. R. Evid. 702 advisory committee's note to 2000 amendments ('The trial court's gatekeeping function applies to testimony by any expert.'). Consistent with that existing law—and in accordance with the Committee's pending rule—we confirm once again the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged on relevance and/or reliability grounds.

[1] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2022) at 6, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUNE 2022 AGENDA BOOK 866 (2022).

Several district courts have subsequently drawn on the *Sardis* citation to the amendment to shape how they approach gatekeeping. In *Bishop v. Triumph Motorcycles (America) Ltd*., No 3:18-CV-186, 2021 WL 4316810, at *7 n. 8 (N.D.W.Va. Sept. 22, 2021), the court observed that the Rule 702 amendment is motivated by courts' frequent failure to recognize that all of the reliability components set forth in Rule 702 establish admissibility criteria that courts must decide:

> The Court rejects the Plaintiffs' argument that Bloch's inference that the heated handgrips were activated at the time of the accident is 'an assumption of fact that he is allowed to make as an expert witness' and 'a question of fact for the jury [to] decide.' ECF No. 176-3 at 19. In a recent decision, the Fourth Circuit rejected the argument that 'relevance and reliability impact[ ] only the weight of the [expert's] testimony, not [its] admissibility.' *Sardis*, 2021 WL 3699753, at *6. The court noted there is such a 'pervasive problem' of district courts not performing their gatekeeping duties that the Advisory Committee on Evidence Rules approved including the following language in the advisory committee notes to Rule 702:
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> > [U]nfortunately many courts have held that the critical questions of the sufficiency of an expert's basis [for his testimony], and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a) and are rejected by this amendment.
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> *Id*. at *8 (citing Advisory Comm. on Evid. Rules, *Agenda for Committee Meeting* 105, 107 (Apr. 30, 2021)). Thus, in order for the Court to perform its 'gatekeeping' duties under *Daubert*, it must make the finding that Bloch's assumption is reliable -- not the jury.

In two additional decisions, the court cited to the *Sardis* decision's recognition that the amendment requires courts to consider if an expert's opinions fulfill all of the Rule 702 criteria using the preponderance of proof standard:

> Rule 702 provides four requirements that a witness qualified as an expert must meet in order to testify: (1) the expert's specialized knowledge will 'help the trier of fact to understand the evidence'; (2) the testimony has a sufficient factual basis; (3) the testimony is the result of reliable methodologies; and (4) the expert reliably applied the methodologies to the facts. Fed. R. Evid. 702(a)-(d). The 'proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence' pursuant to Federal Rule of Civil Procedure 104(a). *See* Fed. R. Evid. 702 Advisory Committee notes to 2000 amendment; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283 (4th Cir. 2021) (noting that the Federal Rule of Evidence Advisory Committee has recently stated that judges must 'apply the preponderance standard of admissibility to Rule 702's requirements.') (quoting Advisory Comm. on Evidence Rules, *Agenda for Committee Meeting* 17 (Apr. 30, 2021)).[2]

Most recently, the court in *In re Anderson* acknowledged that the amendment intends to guide courts toward a consistent gatekeeping practice that is not always followed today:

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[2] *White v. City of Greensboro*, 586 F. Supp. 3d 466, 478 (M.D.N.C. 2022). *See also Howard v. City of Durham*, No 1:17cv477, 2021 WL 5086379, at *15 (M.D.N.C. Nov. 2, 2021) (similar statement with reference to *Sardis* and the Advisory Committee's 2021 agenda book).

> It has come to the Court's attention that there are newly proposed amendments to *Rule 702* set to go into effect December 1, 2023, provided they pass review by the Judicial Conference, are approved by the Supreme Court, and are not disapproved by Congress. Though not yet in effect, *Rule 702* in its newest form and the associated Committee Notes may be relied upon and cited to as persuasive authority "because, as the Committee explains, they are 'simply intended to clarify' how *Rule 702* should have been applied all along." In fact, the United States Court of Appeals for the Fourth Circuit is among the first courts to rely on the proposed amendments. *See Sardis v. Overhead Door Corp.,* 10 F.4th 268 (4th Cir. 2021). This Court is similarly persuaded by, and will observe, the amendments being made to *Rule 702* from this point forward to ensure a faithful application of the proper standard.
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> *Rule 702*, as it is to be amended, reads:
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> > 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 has demonstrated by a preponderance of the evidence that:
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> > (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;
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> > (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 has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.
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> *Fed. R. Evid. 702*. The underlined portions of the Rule reflect the changes being made by the Advisory Committee. To reiterate, these changes are not substantive; rather, they clarify how the Rule was meant to be applied since it was first amended in 2000. The new language makes clear that the burden is on the proponent to demonstrate to the Court that an expert's testimony more likely than not meets the four enumerated requirements for admissibility.[3]

Following the lead of these courts, litigants and judges should begin now to rely upon and apply the direction set forth by the Advisory Committee in the language of the forthcoming amendment and committee note to change their approach to gatekeeping. Misunderstandings about Rule 702's requirements compelled the amendment to the rule, and the process of correcting that confusion to achieve a consistent approach to gatekeeping should start today.

[3] *In re Anderson*, No 15-21681, 2023 Bankr. LEXIS 153, at *7-*9 (Bankr. W.D. Tenn. Jan. 19, 2023).

