

SECTION 1983 EXPERT WITNESSES & The Recent Rule 702 Amendment

Natalie Adeeyo • 2024 IMLA Mid-Year Seminar • Washington D.C.

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Rule 702 Amendments: Accomplishments



1. Preponderance of the evidence standard
2. Judges as gatekeepers
3. Limit expert conclusions



FRE 702

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:

(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 has reliably applied the principles and methods to the facts of the case.



A History: The Frye Test

A “well-recognized scientific principle or discovery” that has “gained general acceptance in the particular field in which it belongs.”

A History: 1990s Supreme Court Cases



- *Daubert v. Merrell Pharmaceuticals, Inc. (1993)*
- *General Electric Co. v. Joiner (1997)*
- *Kumho Tire Co., Ltd. v. Carmichael (1999)*



The trial court's "gatekeeping" role:
(1) Scientific knowledge
(2) Assist the trier of fact

Whether proffered expert testimony is based on a reliable methodology

Flexible nature in admitting shaky but admissible evidence



(1) Reliability test applied to an expert's reasoning process, not just general methodology
(2) Abuse of discretion standard



Reliability Test – Applies to all expert testimony, whether nonscientific or scientific

Rule 702: Pre-2000



"If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

- Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Sat. 1937 (1975) (establishing the Federal Rules of Evidence)

A History: 2000 Amendments



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Misapplications of Rule 702

Milward v. Acuity Products Group, Inc. (1st Cir. 2011)



Inconsistent Application

Preponderance standard only applied to Rule 702(c) (reliable principles and methods) and **not** to Rule 702 (b) (sufficient facts or data)

United States v. Gipson (8th Cir. 2004)



Ignoring Parts of Rule 702

- Cited to cases predating 2000 Amendments to Rule 702
- Didn't apply subpart (d)

City of Pomona v. SQM North America Corp. (9th Cir. 2014)



Lenient Standards

- Allowing "shaky but admissible evidence"
- Issues better suited for cross examination

McLean v. 988011 Ontario, Ltd. (6th Cir. 2000)



Misinterpreting Rule

- Unsupported factual basis
- Leaving decision to jury



Lawyers for Civil Justice: Study

1059
Trial Court Opinions

65%
No Standard Cited

57
Judicial Districts

6%
Cited Two Standards



"[M]any 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."

- Chief United States District Court Judge Patrick Schiltz of the District of Minnesota



The 2023 Amendment

Rule 702

Testimony by Expert Witnesses

(additions underlined and deletions indicated as a strike-through)

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 has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.



Rule 702

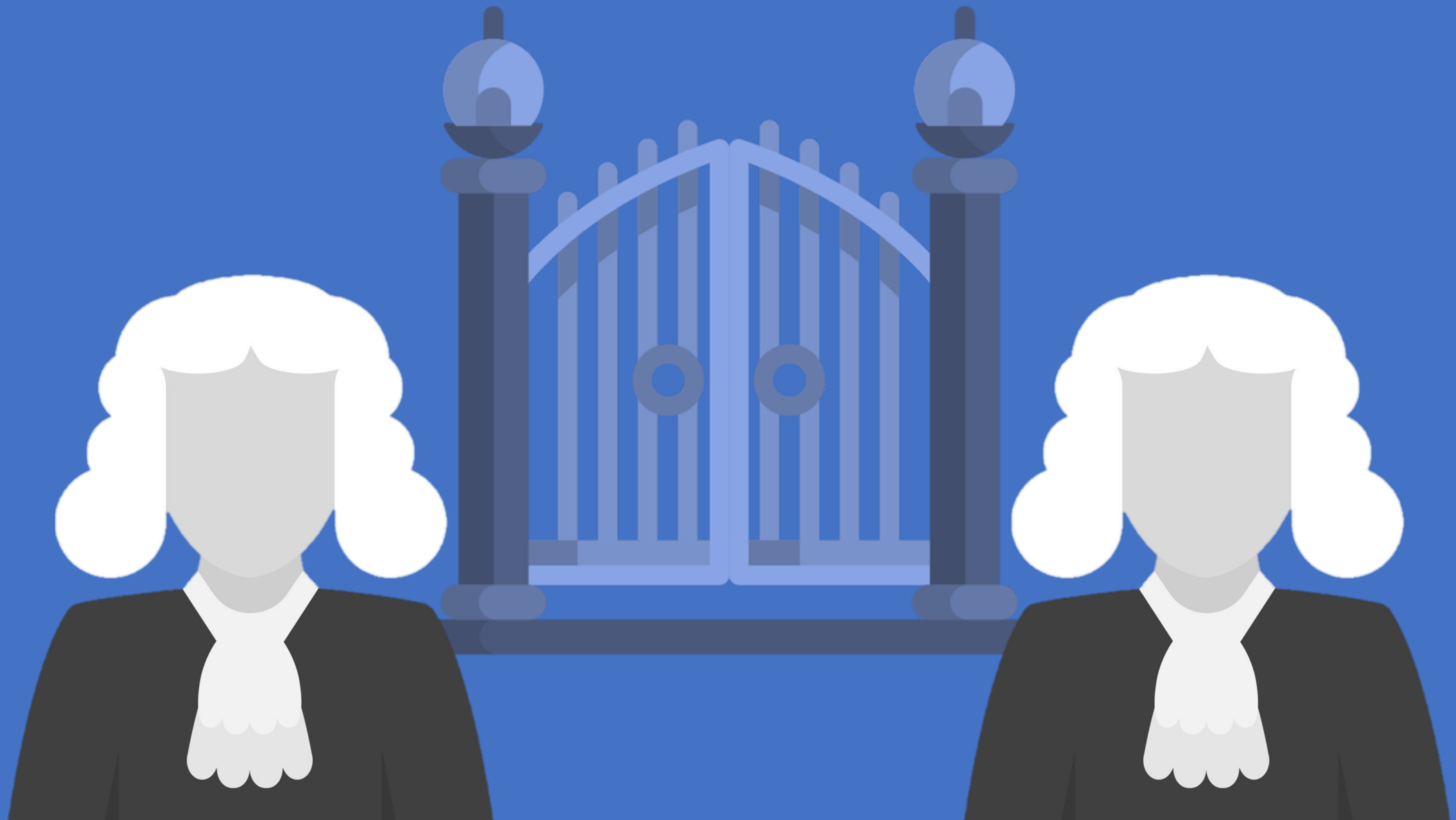
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The Role of Courts as Gatekeepers





Current Applications

***Boyer v. Citi of Simi Valley* (C.D. Cal. 2024)**

Courts are "required to analyze the expert's data and methodology at the admissibility stage more critically than in the past."

***In re Onglyza Prods. Liab. Litig.* (6th Cir. 2024)**

"District courts may allow juries to evaluate and weigh ***only*** relevant and reliable expert testimony."

***United States v. Uchendu* (D. Utah 2024)**

"Questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight."

Current Applications

***Greene v. Ledvance LLC* (E.D. Tenn. Dec. 13, 2023)**

"The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000-requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard."

***Leakas v. Monterey Bay Military Housing* (N.D. Cal. 2024)**

Invoking the differential-diagnosis methodology was not adequate to overcome an admissibility challenge where the plaintiffs "have not met their burden to establish" that the expert "reliably linked" plaintiffs' alleged exposure to health conditions subsequently experienced.



Impact on Section 1983



Strategies for Rule 702 Motions & Preparing Your Experts

Rule 702 Motions



- Note what is new
  - Point out incorrect caselaw
- Highlight Opinions AND Methodology
  - Emphasize conclusions MUST flow from methodology
- Stress the Standard
  - Remind courts about the preponderance standard

Rule 702 Motions



- **Use Newer Cases**
  - Avoid Pre-2000 cases
- **Cite the Committee**
  - Use the comments like a playbook
- **Pretrial Hearings**
  - Prepare to argue

Your Experts



- Be Selective
- Prepare to Defend
- Pretrial Hearings
- Generally Accepted Methods Only
- Must Fit the Facts
- Stick to Conclusions

The *Daubert* Misnomer

The standard for expert admissibility is Rule 702, NOT *Daubert*.

The continued reference to the "*Daubert* standard" has perpetuated reliance on case law that predates the 2000 Amendment to Rule 702 and, in some cases, even predates *Daubert* itself. Thus, it is best to avoid the shorthand "*Daubert*" or "*Daubert* motion" — opt for "Rule 702" or "Rule 702 motion" instead.





Key Takeaways for Litigators



QUESTIONS?

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