New Federal Rule of Evidence Rule 702: A Circuit-by-Circuit Guide to Overruled "Wayward Caselaw"

By: Eric Lasker and Joshua Leader (Editors)

Eric Lasker litigates a wide variety of complex civil matters, with a current focus on toxic torts, environmental litigation, and pharmaceutical product liability. He has successfully represented his clients' interests as lead counsel in multidistrict, serial, and mass tort litigation, in jury trials and bench proceedings, and in oral argument in multiple federal courts of appeal and state supreme courts. Along with George Mason University law professor David Bernstein, Mr. Lasker authored "Defending Daubert*: It's Time to Amend Federal Rule of Evidence 702,"*[1] *which triggered the Advisory Committee on Evidence Rules review of the text of Rule 702. At the Committee's invitation, Mr. Lasker participated in a 2018 roundtable discussion on a potential amendment to Rule 702, and he also testified before the Committee in 2022 in support of the amendment. Mr. Lasker is the founding Chair of the IADC's Rule 702 Sustainability Committee.*

Joshua Leader is a partner at Leader Berkon Colao & Silverstein LLP in New York City. He manages a diverse range of litigation in areas including complex commercial, securities, product liability, toxic tort, entertainment, employment, and intellectual property actions in both state and federal courts across the country. Josh approaches litigation from a holistic perspective, assisting clients in meeting their business goals, either through strategic litigation decisions or through litigation avoidance efforts. He is an active member of the IADC's Toxic & Hazardous Substances Litigation and Rule 702 Sustainability Committees.

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[1] 57 WILLIAM & MARY L. REV. 1 (2015).

ON December 1, 2023, Federal Rule of Evidence 702 was amended for the first time in twenty-three years to address what the Advisory Committee on Evidence Rules ("Advisory Committee") identified as a pervasive problem of "wayward caselaw" in which federal courts had been "far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow."[2] The language of Rule 702 now reads as follows (with changes in highlights and strikeouts):

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

The amendments confirm three key elements of the Rule 702 admissibility standard that the Advisory Committee determined had been most frequently ignored in prior decisions. First, Rule 702 now makes clear that the court should not defer to the jury in factual determinations of whether the expert satisfies the admissibility criteria of the Rule. Second, the Rule explains that the court must find that the proponent of the expert testimony satisfies each of the four elements of Rule 702 by a preponderance of the evidence. Third, the Rule requires courts to go beyond the checkbox approach of simply confirming the existence of factual bases and an expert methodology to evaluate whether the expert's opinion reflects a reliable application of the methodology to the facts. And by expressly focusing the court's inquiry on the expert's opinion, this

[2] Daniel J. Capra, Reporter, Mem. To: Advisory Committee on Evidence Rules Re: Public comment suggesting an amendment to Rule 702, at 4 (Oct. 1, 2016) *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER AGENDA BOOK, 262 (Oct. 21, 2016), available at https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf.

amendment further establishes that the court's gatekeeping responsibility is an ongoing one that continues through trial to guard against experts overstating the conclusions that can be reliably reached from their analyses.

As important as each of these amendments will be going forward, the new Rule 702 is equally important in what it says about the existing body of Rule 702 case law. Opponents of the amended Rule will no doubt seek solace in prior cases that take a more liberal view of the admissibility of expert testimony. But as *Daubert* itself explained in one of the remaining lasting legacies of that foundational opinion, "under the Federal Rules no common law of evidence remains."[3] It is the language of Rule 702, not case law, that governs. And any question of the continued significance of prior case law is laid to rest in the Advisory Committee Note and drafting history, which repeatedly call out this liberal-admissibility case law as wrongly decided.

The Advisory Committee was remarkably frank in its condemnation of prior case law. In its Advisory Committee Note, the Committee admonishes the "many courts [that] have held that the critical questions of sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight, not admissibility," finding that "[t]hese rulings are an incorrect application of Rule 702 and 104(a)."[4] The Note continues, "[t]he Committee concluded that emphasizing the preponderance standard in Rule 702 was made necessary by the Courts that have failed to apply correctly the reliability requirements of the rule."[5] The Note explains "[t]he amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000 [when the Rule was previously amended] – requirements that many courts have incorrectly determined to be covered by the more permissive Rule 104(b) standard."[6] And the Note specifically calls out courts that had abdicated their responsibility to rigorously review the expert's application of their stated methodology to the facts, noting that "judicial gatekeeping is essential because just as jurors may be unable, due to a lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods

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[3] Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579, 588 (1993) (citation omitted).

[4] Advisory Comm. on Evidence Rules, Proposed Amendments to the Federal Rules of Evidence, Rule 702, advisory comm. Note 1.

[5] *Id*.

[6] *Id.*

underlying an expert's opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reasonably support."[7]

The drafting history of the Committee's deliberations are equally damning of prior case law. In his initial legal memorandum to the Advisory Committee assessing the need to amend Rule 702 in response to a 2015 law review article, the Reporter to the Advisory Committee, Professor Capra concluded that "courts have defied the Rule's requirements," that "wayward courts simply don't follow the rule" and that, as a result, "Evidence Rules are being disregarded by courts."[8] Following its own extensive review, the Advisory Committee reached the same conclusion, bemoaning the "pervasive problem" that in "a number of federal cases … judges did not apply the preponderance standard of admissibility to [Rule 702's] requirement of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were one for the jury."[9] In the Report of the Advisory Committee to the Committee on Rules of Practice & Procedure, Committee Chair Judge Schultz explained that "[t]he Committee has determined 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."[10]

We are thus left, following the amendment to Rule 702, not simply with new Rule language to be applied going forward, but with a large body of case law that has now been emphatically rejected and overruled. This case law had previously guided, if not governed, lower court expert admissibility rulings. To help navigate through this debris field, the International Association of Defense Counsel's Rule 702 Sustainability Committee has prepared the following Circuit-by-Circuit guide of wayward Rule 702 case law. This guide identifies key cases by judicial circuit and identifies the manner in which this prior precedent fails to meet the standards of Rule 702.

[7] *Id.*
[8] *See supra* note 2, at 262.
[9] Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 13, 2020, at 3 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL AGENDA BOOK, 17 (Apr. 30, 2021), available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules – agenda_book_spring_2021.pdf.
[10] Hon. Patrick J. Schultz, Report of the Advisory Committee on Evidence Rules, at 5 *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY AGENDA BOOK, 445 (Jan. 5, 2021), available at https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.

While the product of extensive work and analysis, this guide is not exhaustive – the decades of judicial defiance of the Rule's admissibility requirement would make any such effort unattainable. And of course, practitioners using this guide must use their own judgment in explaining to courts why the identified decisions should no longer be followed. But – we hope – the guide provides a quick reference that will help relegate this wayward caselaw to the dustbin of legal history and clear the field for the proper application of Rule 702 moving forward.

The Sixth Circuit

By: David T. Schaefer, M. Trent Spurlock, and Jasamine R. Chenault-Diehlmann

David Schaefer is a partner in the Louisville office of Dinsmore & Shohl. In his 38-year career, he has defended hundreds of product liability and personal injury cases in Kentucky, Indiana and surrounding states. His trial and appellate product liability practice includes complex motor vehicle, pharmaceutical and medical device cases, and multidistrict litigation.

Trent Spurlock is a partner in the Louisville office of Dinsmore & Shohl. Trent has maintained a civil trial practice throughout his career, defending and advising clients in the manufacturing, retail, pharmaceutical, and insurance industries regarding commercial disputes and liabilities arising from product defects, toxic exposures, insurance coverage, premises liability, and catastrophic injuries.

Jasmine Chenault-Diehlmann is a litigation associate in the Louisville office of Dinsmore & Shohl. Her practice focuses on tort litigation, including personal injury, insurance defense, premises liability, and motor vehicle collisions. Jasmine received trial experience in her first few years of practice, where she successfully tried a bench trial in state court.

Best v. Lowe's Home Centers, Inc.[1]

IN a personal action arising from permanent anosmia (loss of sense of smell) sustained by a customer after pool chemicals spilled onto his face and clothes in defendant's store, the plaintiff offered an otolaryngologist, Dr. Francisco Moreno, to establish medical causation between the chemical spill and plaintiff's injuries by use of a "differential diagnosis" methodology. The district court found the doctor's opinion to be inadmissible, which resulted in summary judgment for defendant. On appeal, the plaintiff argued that the doctor's opinions should not have been excluded. The Court of Appeals reversed the decision of the district court and the resulting summary judgment.

On appeal, the Sixth Circuit analyzed and dismissed all of the district court's criticisms of Dr. Moreno's opinions. Most of the analysis did not implicate any concerns about the application of Rule 702. However, the court relied upon Eighth Circuit and Third Circuit authorities and stated that any weaknesses in Dr. Moreno's methodology would affect the weight to be given his testimony, not its admissibility.[2]

This statement is facially inconsistent with the current version of Rule 702 in describing how an expert's methodology should be evaluated. Under Rule 702(c), courts should determine whether the proponent of the testimony has demonstrated that the expert's testimony is, more likely than not, the product of reliable principles and methods. Weaknesses in methodology affect the admissibility of testimony and do not just go to the weight that the expert's opinion.

Brown v. Wal-Mart Stores, Inc.[3]

Brown is a premises liability case arising from an injury to a customer's eye after she was struck by an aerosol can that allegedly fell from an overhead shelf. The proffered expert witness was a retail store safety expert. The primary issue was whether the retail store safety expert had sufficient facts to render his opinion against Wal-Mart. The trial court denied Wal-Mart's motion to exclude the expert.

[1] 563 F.3d 171 (6th Cir. 2009).

[2] *Id.* at 182.

[3] No. 98-5965, 1999 U.S. App. LEXIS 32031 (6th Cir. Nov. 24, 1999).

The Sixth Circuit affirmed, holding that (1) where an expert's opinion has a reasonable factual basis, it should not be excluded, and (2) whether an expert opinion should be accepted as having a reasonable factual basis is for the jury to decide.

Under Rule 702, the test of whether an expert's testimony is based on sufficient facts is not satisfied by simply determining that the testimony "has a reasonable factual basis," then leaving it for the jury to decide whether the factual basis is "adequate" to support the expert's opinions. Rather, the decision on whether an expert's testimony is based on sufficient facts is a matter to be determined by the court, applying a preponderance of the evidence standard.

In re *Scrap Metal Antitrust Litig.*[4]

In an antitrust action, industrial scrap-generating companies alleged that defendant scrap metal brokers and dealers violated the Sherman Act by conspiring to restrain and eliminate competition in the purchase of unprocessed industrial scrap metal. The proffered expert witness was an economist, Dr. Jeffrey Leitzinger.

Following a jury verdict against one of the defendants, Columbia Iron and Metal Company ("Columbia"), Columbia appealed. Among the issues on appeal was whether the district court erred in denying Columbia's motion to exclude the testimony of Leitzinger due to errors in his damages calculations, which were based in part on inaccurate information from *Iron Age* magazine's Scrap Price Bulletin ("SPB"). The Court of Appeals affirmed the decision of the district court, observing that rejection of expert testimony is the exception rather than the rule, and finding no abuse of discretion because the record contained at least "*some* factual basis" for Leitzinger's opinions.[5]

Following earlier Sixth Circuit decisions (*L.E. Cooke Co.* and *McLean*[6]) and contrary to the current version of Rule 702, this opinion does not apply a preponderance of the evidence standard to test the sufficiency of the facts and data upon which the expert's opinions were based and was instead satisfied if the opinions had at least "some factual basis," leaving any further deficiencies in the expert's data for consideration by the jury. In addition, this opinion suggests, contrary to the current version of Rule 702, that a court should not analyze an expert's ultimate opinions for reliability, but should stop its admissibility inquiry at determining whether the expert applied a reliable methodology.

[4] 527 F.3d 517 (6th Cir. 2008).

[5] *Id.* at 532 (emphasis in original).

[6] Each described *infra*.

This opinion is frequently cited[7] by Sixth Circuit courts for propositions such as:

- "[A] determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion."[8]
- "The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation."[9]
- A court "will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record."[10]
- "[W]eaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility."[11]

McLean v. 988011 Ontario, Ltd.[12]

A personal injury lawsuit arose from a plane crash allegedly caused by negligent servicing of the aircraft by the defendant. The district court granted the defendant's motion for summary judgment, concluding that plaintiffs had failed to sufficiently establish causation. In reaching its conclusion, the district court refused to consider the opinions of plaintiffs' two expert witnesses regarding causation for several reasons, including that the experts contradicted each other as to the cause of the crash, and they relied on circumstantial evidence whose factual basis was undermined by defendants' evidence.

On appeal, the Sixth Circuit reversed the summary judgment, concluding that the district court had improperly discounted the opinions of the plaintiff's experts. In doing so, the court reasoned that the experts' opinions were at least grounded in some record evidence: "An expert's opinion, where based

[7] *See* United States v. Stafford, 721 F.3d 380, 393-94 (6th Cir. 2013); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 45 F. Supp.3d 724, 754 (N.D. Ohio 2014); Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C., 520 F. Supp.3d 872, 877, 879-880, 885, 887-878 (E.D. Michigan 2021); *See also* Stephenson v. Family Sols. of Ohio, Inc., 645 F. Supp.3d 755, 766, 771-772 (N.D. Ohio 2022); *In re* Ascent Res.-Utica, LLC, No. 21-0307, 2022 U.S. App. LEXIS 17437 at *7-9 (6th Cir. June 23, 2022).

[8] 527 F.3d at 529.

[9] *Id.* at 529-530.

[10] *Id.* at 530.

[11] *Id.*

[12] 224 F.3d 797 (6th Cir. 2000).

on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.'"[13]

This opinion is an example of a court, in evaluating the admissibility of an expert's testimony, only requiring that the testimony be based on some evidence in the record, with any contrary facts or weaknesses to be analyzed by the jury in determining how much weight to give the testimony. This is inconsistent with the current version of Rule 702.

United States v. Bonds[14]

In an appeal of a criminal conviction based on the admissibility of expert testimony about DNA evidence obtained from a blood sample of the defendant, the court affirmed the admissibility of the testimony, holding in relevant part:

> Accordingly, we hold that general acceptance is required as to the principles and methodology employed. The assessment of the validity and reliability of the conclusions drawn by the expert is a jury question; the judge may only examine whether the principles and methodology are scientifically valid and generally accepted.
>
> Thus in this case, the criticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.[15]

Under Rule 702, the *Bonds* court's inquiry should not have stopped at assessing the principles and methodology. Rather, pursuant to Rule 702(d), a court should also assess whether it is more likely than not that an expert's resulting opinions (conclusions) reflect a reliable application of the principles and methods, and this determination should not be left to the jury.

[13] *Id.* at 801-802 (internal citations omitted).

[14] 12 F.3d 540 (6th Cir. 1993).

[15] *Id.* at 563.

United States v. L.E. Cooke Co.[16]

The United States government sought to condemn and acquire land and award just compensation to the owners. Defendant corporation had interests in coal leases on the land, and a trial was held to determine their value. One of the government's experts was mining engineer Samuel Fish, who had performed a coal study and appraisal of the coal leases. The district court denied a motion to strike Fish's testimony, and this ruling was one of the issues on appeal.

The court affirmed the trial court's decision not to strike Fish's testimony. The court held:

> The Federal Rules of Evidence allow an expert great liberty in determining the basis of his opinions and whether an expert opinion should be accepted as having an adequate basis is a matter for the trier of fact to decide. Because [the expert's] testimony was clearly relevant to the issue at trial and did have some factual basis, it was admissible.[17]

Contrary to the language of this opinion, whether an expert's testimony is based on sufficient facts is a matter to be evaluated first by the court, applying a preponderance of the evidence standard to determine whether the testimony is reliable and admissible. The decision of whether the expert had a sufficient basis for his opinions should not have simply been left to the jury to decide after the court concluded that the expert's testimony met a threshold of "some factual basis."

This case is frequently cited[18] for the following propositions that are now inconsistent with Rule 702:

- "Where the opinion has a reasonable factual basis, it should not be excluded."[19]
- "Any weaknesses in the factual basis of an expert witness' opinion, including unfamiliarity with standards, bear on the weight of the evidence rather than on its admissibility."[20]
- "Whether an expert opinion should be accepted as having an adequate basis is a

[16] 991 F.2d 336 (6th Cir. 1993).
[17] *Id.* at 342 (internal citations omitted).
[18] *See Brown, supra* note 3; *McLean*, *supra* note 12; *In re Scrap Metal*, *supra* note 4; *In re Whirlpool*, *supra* note 7.
[19] 991 F.2d at 342.
[20] *Id.*

matter for the trier of fact to decide."[21]

United States v. Stafford[22]

Stafford was an appeal of a criminal case following the conviction and sentencing of defendant for being a felon in possession of a firearm and ammunition. Defendant Stafford appealed the district court's denial of his motion to exclude the results of gunshot-residue analysis and related expert testimony by gunshot residue expert Robert Lewis.

The court, citing the Sixth Circuit's decision in *In re Scrap Metal Antitrust Litigation*, failed to analyze the reliability of the expert's ultimate opinions, instead focusing only on the methodology in determining admissibility, and stating that any questions about the conclusions were for the jury to analyze. This is inconsistent with the current version of Rule 702's requirements that courts determine whether the proponent of the testimony has demonstrated that the expert's opinions, more likely than not, reflect a reliable application of the principles and methods to the facts of the case.

Benton v. Ford Motor Co.[23]

In a product liability action in which the plaintiff alleged that the defective design of the vehicle caused it to roll over and injure the plaintiff during a motor vehicle accident, the plaintiff offered Andrew Lawyer, an electrical engineer specializing in accident reconstruction and safety analysis, to testify that the vehicle had a low stability index and high propensity to roll over, which caused the accident. The defendant auto manufacturer filed a motion to exclude Lawyer's opinions. The court denied the motion to exclude, holding in pertinent part that the reliability of Lawyer's conclusions "must be weighed by the trier of fact."[24]

Contrary to this opinion, a court's inquiry into the reliability and admissibility of an expert's opinion does not stop at whether the expert is utilizing reliable methods. Pursuant to Rule 702(d), a court should also analyze the expert's conclusions and whether they, more likely than not, reflect a reliable application of the methodology.

[21] *Id.*
[22] 721 F.3d 380 (6th Cir. 2013).
[23] 492 F. Supp.2d 874 (S.D. Ohio 2004).
[24] *Id.* at 879.

In re *Whirlpool Corp. Front-Loading Washer Products Liability Litig.*[25]

This product liability litigation related to alleged defects in front-loading washing machines which caused them to accumulate residue, mold and mildew. This opinion contains rulings on numerous motions by the plaintiffs and defendant to exclude testimony of multiple experts for each side. The court denied the defendant's motion to exclude the testimony of the plaintiff's design expert, Gary Wilson; the plaintiffs' motion to exclude the testimony of mechanical engineer, Paul Taylor; and the defendant's motion to exclude the testimony of survey and market researcher, Sarah Butler.

The court's opinion is based on prior Sixth Circuit authorities supporting admissibility of an expert's opinion as long as the opinion has support in the record, and that weaknesses in the expert's factual support go to weight, not admissibility.

Contrary to the current version of Rule 702, this opinion places in the hands of the jury most of the analysis of an expert's methodology and the sufficiency of facts and data considered by the expert.

Innovation Ventures, L.L.C. v. Custom Nutrition Laboratories, L.L.C.[26]

In a breach of contract case, the plaintiff and defendant each filed motions to exclude each other's damages experts, Rodney Crawford for the plaintiff and Dr. Christopher Pflaum for the defendant. The court denied both motions.

In admitting the opinions of both parties' experts, the court observed that rejection of expert testimony is the exception, rather than the rule. The court relied on prior authorities permitting expert testimony based in part on erroneous facts, as long as there is some factual support for the opinion. This opinion, like many opinions before it, does not cite to any burden of proof for the admissibility of expert testimony. Rather, it repeats the idea that the bar for admitting expert testimony is very low, that excluding such testimony is the exception not the rule, and that most of the analysis of expert testimony should be performed by a jury in deciding how much weight to afford the testimony. This opinion also puts on display the inconsistencies between the current version of Rule 702 and the Sixth Circuit's holding in *In re Scrap Metal*.[27]

[25] 45 F. Supp.3d 724 (N.D. Ohio 2014).

[26] 520 F. Supp.3d 872 (E.D. Michigan 2021).

[27] 527 F.3d 517, 529 (6th Cir. 2008).