

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 702. Testimony by Expert Witnesses**

2 A witness who is qualified as an expert by
3 knowledge, skill, experience, training, or education may
4 testify in the form of an opinion or otherwise if the proponent
5 has demonstrated by a preponderance of the evidence that:

6 (a) the expert's scientific, technical, or other
7 specialized knowledge will help the trier of
8 fact to understand the evidence or to
9 determine a fact in issue;

10 (b) the testimony is based on sufficient facts or
11 data;

12 (c) the testimony is the product of reliable
13 principles and methods; and

14 (d) ~~the expert has reliably applied~~ expert's
15 opinion reflects a reliable application of the

¹ New material is underlined in red; matter to be omitted is lined through.

16 principles and methods to the facts of the
17 case.

Committee Note

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that Rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000. But of course other admissibility requirements in the rule—such as that the expert must be qualified—are governed by the Rule 104(a) standard as well. The amendment focuses on subdivisions (b)-(d) because those are the requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable to evaluate

meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert's basis and methodology.

The amendment's reference to "a preponderance of the evidence" is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not.