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Amended Rule 702 in 2025: Circuit Courts Embrace the Changed Standard

by Lee Mickus

The 2023 amendment to Federal Rule of Evidence 702 sought to correct longstanding and frequently repeated misconceptions about the standard for determining if expert testimony should be admitted. In particular, many courts did not perceive that the factual basis for an expert's opinion, or the expert's application of methodology to the circumstances at issue in the case, were proper gatekeeping considerations for judges to address. Instead, these issues were often brushed aside as being nothing more than matters of credibility for the jury to determine. Also, some judges thought the admissibility standard should be applied to favor the conclusion that the opinion evidence should be admitted. These misunderstandings widely affected Rule 702 admissibility determinations: during the rulemaking process that led to the 2023 amendment, the Reporter to the Advisory Committee on Evidence Rules bemoaned that such misstatements were "made by circuit courts and district courts in a disturbing number of cases."[1]

Facing entrenched court practices, the 2023 amendment initially received a decidedly mixed reception from district courts. Some judges recognized that because of the amendment, courts were "required to analyze the expert's data and methodology at the admissibility stage more critically than in the past." *Boyer v. City of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal. Feb 13, 2024). These judges observed that caution must be exercised when relying on caselaw pre-dating the 2023 rule change, because "the amendments are intended to correct some courts' prior, inaccurate application of Rule 702." *Cleaver v. Transnation Title & Escrow, Inc.*, 2024 WL 3326848, at *2 (D. Idaho Jan. 29, 2024). One court even declared that prior decisions holding the expert's factual foundation does not constitute an admissibility consideration should be disregarded because those rulings reflect "the precise type of weight v. admissibility distinction the recent amendment to Rule 702 aimed to correct." *West v. Home Depot, U.S.A., Inc.*, 2024 WL 1834112, at *4 (N.D. Ill. Apr. 26, 2024).

In contrast, other courts were reluctant to move away from relying on circuit decisions that had long shaped their approaches to gatekeeping. So, for example, because "the Eighth Circuit has held that expert testimony should be liberally admitted," one judge found that Rule 702 should still be applied to "favor admission over exclusion." *Blue Buffalo Co. v. Wilbur-Ellis Co.*, 2024 WL 111712, at *4 (E.D. Mo. Jan. 10, 2024) (cleaned up). And even the amendment's emphasis that the factual foundation for an expert's opinion must be established "to the court" by a preponderance

[1] Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 90 (2021), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-evidence-rules-april-2021.

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of proof was not enough in the minds of some courts to overcome the history that, "in the Eighth Circuit, the factual basis of an expert goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Jason M. Hatfield, P.A. v. Ornelas*, 2024 WL 1555019, at *5 (W.D. Ark. Apr. 10, 2024).

Because district courts have reacted inconsistently to the Rule 702 changes, determining whether the 2023 amendment will fulfill its purpose of correcting misunderstandings of the gatekeeping process and establishing a uniform admissibility standard has fallen to the circuit courts. At this point, a number of circuits have issued rulings in cases that directly address application of Rule 702, and the 2023 amendment has changed how courts address their gatekeeping responsibilities. Although these new decisions have not explicitly overturned the approaches taken in pre-amendment cases, the circuit courts are now embracing the notion that an insufficient factual basis or an unreliable application of the expert's methodology are valid grounds for excluding opinions—conclusions that would have been impossible if caselaw precedents were followed. Several opinions issued during the summer of 2025 brought circuit courts more into broad alignment with the purposes of the amendment.

U.S. Court of Appeals for the Federal Circuit

The Federal Circuit's *en banc* ruling in *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (Fed. Cir. 2025) signaled that trial courts must take notice of the 2023 amendment to Rule 702. The text of Rule 702 was changed to remedy an ongoing problem: "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)." *Id. at* 1339 (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment). The amendment confirms Rule 702(b)'s directive that an adequate factual basis is "an essential prerequisite" for admissibility. *Id.* at 1339. Accordingly, "the gatekeeping function of the court" requires it "to ensure that there are sufficient facts or data for [the expert's] testimony." *Id.* at 1343. When that factual basis is found lacking, the opinions are "unreliable and therefore inadmissible under Rule 702." *Id.* at 1346.

Applying this understanding of Rule 702's requirements, the court found the district court's admission of opinion testimony erroneous because the expert's opinion "was not based on sufficient facts or data, as required by Rule 702(b)." *Id.* at 1345. The district court failed to analyze whether the expert actually had factual support for the opinions expressed, and so the decision to allow the expert's testimony failed "to fulfill its responsibility as gatekeeper." *Id.* at 1346. This error resulted in reversal of a jury verdict for more than $20 million. *Id.* at 1337, 1347.

U.S. Court of Appeals for the Eighth Circuit

Before the 2023 amendment, the Eighth Circuit considered judicial gatekeeping to be a limited function. Eighth Circuit authorities "call[ed] for the liberal admission of expert testimony." *In re Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.*, 9 F.4th 768, 777 (8th Cir. 2021). In the Eighth Circuit's conception, "[o]nly if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011). With respect to the scope of gatekeeping considerations, the Eighth Circuit "stated numerous times that, '[a]s a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.'" *In re Bair Hugger*, 9 F.4th at 778 (citing *United States v. Coutentos*, 651 F.3d 809, 820 (8th Cir. 2011)). Courts in the Eighth Circuit repeated this statement for decades following its original appearance in *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988).

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This long-standing misconception of the admissibility standard shifted with the Eighth Circuit's decision in *Sprafka v. Medical Device Bus. Svcs.*, 139 F.4th 656 (8th Cir. 2025). In that case, the Eighth Circuit took notice that the 2023 amendment had been deemed "necessary because many courts had incorrectly 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.'" *Id.* at 660 & n.3 (citing Fed. R. Evid. 702 advisory committee's note to 2023 amendment). Of course, making this acknowledgement undercuts the validity of the *Loudermill* "general rule" that the expert's factual basis is not a proper gatekeeping consideration. But the court in *Sprafka* went beyond simply recognizing the Advisory Committee's purpose—it declared that expert opinions "lack reliability" and should be excluded if the court finds that they lack an adequate factual basis. *Id.* at 660. Although the court did not explicitly overrule the conception of gatekeeping described in *Bair Hugger* and its predecessors, finding that insufficient factual basis provides proper justification for excluding expert opinions represents a new direction, one that is entirely incompatible with the approach taken by the Eighth Circuit in its decisions prior to the 2023 amendment.

U.S. Court of Appeals for the Fifth Circuit

The Fifth Circuit's response to the 2023 amendment has been even more pronounced than the Eighth Circuit's turnaround. The Fifth Circuit had long restricted the scope of judicial gatekeeping, regularly reiterating a "general rule" that "[q]uestions relating to the bases and sources of an expert's opinions affecting the weight to be assigned that opinion rather than its admissibility" and so should be left for the jury's assessment. *E.g.*, *Smith v. Starr Indem. & Liab. Co.*, 807 F. App'x 299, 302 (5th Cir. 2020) (citing *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)); *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019).

The Rule 702 amendment changed the Fifth Circuit's understanding of the gatekeeping standard. Now, "[t]here is no question that Federal Rule of Evidence 702 governs the admissibility of expert testimony," and under that rule "expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Nairne v. Landry*, ___ F.4th ___, 2025 WL 2355524, at *16 & n.20 (5th Cir. Aug. 14, 2025). Like other circuit courts, the Fifth Circuit embraced the Advisory Committee on Evidence Rules' guidance that prior decisions holding "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" were "an incorrect application of Rules 702 and 104(a)." *Id.* at *16 (Fed. R. Evid. 702 advisory committee's note to 2023 amendment).

Breaking with the *Viterbo* line, the Fifth Circuit has now declared in multiple decisions that opinion testimony must "be based on sufficient facts or data." *Id.*; *Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024). An expert's opinions are properly excluded under Rule 702(b) where they are not based on sufficient facts or data. *Nairne*, 2025 WL 2355524, at *17; *Williams v. BP Exploration & Production, Inc.*, 143 F.4th 593, 601 (5th Cir. 2025). The trial court "abdicate[s] its role as gatekeeper" if it allows an expert "to testify without a proper foundation" under Rule 702(b). *Harris*, 92 F.4th at 303-04. The trial court must also ensure that the opinions "reflect a reliable application of principles and methods to the facts of the case," *Nairne*, 2025 WL 2355524, at *16, and the testimony is properly excluded when it "cannot meet Rule 702(d)'s requirement for expert witnesses." *Williams*, 143 F.4th at 600.

The Fifth Circuit's alignment with Rule 702's admissibility standard has begun to impact district courts. For instance, in *Banks v. Lakeland Nursing and Rehab. Ctr., LLC*, 2025 WL 420539, at *3 (S.D. Miss. Feb. 6, 2025), the court took guidance from *Harris* and limited the proffered opinion testimony because Rule 702(b) demands that "experts must base opinions on sufficient

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facts or data" but this expert "fail[ed] that test." And in *McKee v. Chubb Lloyds Ins. Co. of Texas*, 2024 WL 1055122, at *6 (W.D. Tex. Mar. 11, 2024), the district court also followed *Harris* and excluded an expert whose opinions did not meet the requirements of either Rule 702(b) or 702(d). District courts in the Fifth Circuit would not have reached these results under the pre-amendment admissibility standard.

U.S. Court of Appeals for the Ninth Circuit

Perhaps the most dramatic post-amendment change in how courts approach gatekeeping has occurred in the Ninth Circuit. In *Engilis v. Monsanto Co.*, ___ F.4th ___, 2025 WL 2315898 (9th Cir. Aug. 12, 2025), the court examined its prior descriptions of how judges should address expert admissibility challenges and provided extensive clarifications. Prior to the 2023 amendment, the Ninth Circuit had repeatedly instructed that "Rule 702 should be applied with a 'liberal thrust' favoring admission." *See, e.g., Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017); *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1996 (9th Cir. 2014). But the *Engilis* court cautioned that such statements should "not be understood to suggest a presumption of admission." 2025 WL 2315898 at *5. To the contrary, the court declared "[t]here is no such presumption, as a proponent of expert testimony must always establish the admissibility requirements of Rule 702 by a preponderance of the evidence." *Id.* "'[S]haky' expert testimony, like any expert testimony, must still be 'admissible,' and this requires a determination by the trial court that it satisfies the threshold requirements established by Rule 702." *Id.* at *6.

The district court "cannot abdicate its role as gatekeeper," nor "delegat[e] that role to the jury." *Id.* at *6. Instead, Rule 702 "expressly require[s] a proponent of expert testimony to demonstrate[ ] to the court that it is more likely than not that the four admissibility requirements are satisfied.'" *Id.* at *5. When applying the standard, "challenges to an expert's opinion go to the weight of the evidence *only* if a court first finds it more likely than not that an expert has a sufficient basis to support an opinion." *Id.* (emphasis added). If, on the other hand, the proponent "fail[s] to establish by a preponderance of the evidence that [the expert's] conclusion was based on sufficient facts or data," the opinions are properly excluded under Rule 702(b). *Id.* at *10.

The Ninth Circuit quickly followed *Engilis* with another application of Rule 702, *Bulone v. Monsanto Co.*, 2025 WL 2730843 (9th Cir. Sept. 25, 2025). In that decision, the court emphasized that Rule 702 contemplates not only that district courts may exclude opinion testimony where the expert employed unreliable methods, but also when the expert's "*application* of those methods" is unreliable. *Id.* at *2 (emphasis original).

The Ninth Circuit's new focus on the proponent's burden of proof and the admissibility prerequisites enumerated in the text of Rule 702 has caught the attention of district courts. In just a few weeks, several rulings quoted the *Engilis* court's direction that "there is no presumption in favor of admission." *Oatway v. Experian Info. Sols., Inc.*, 2025 WL 2689029, at *7 (W.D. Wash. Sept. 19, 2025); *Gorney v. Safeway Inc.*, 2025 WL 2586133, at *2 (D. Ariz. Sept. 8, 2025). District courts have also acknowledged the instruction that expert opinions may be admitted only if the proponent established that all of the requirements enumerated in the rule are fulfilled. *See Gorney*, 2025 WL 2586133, at *2 ("As Rule 702 indicates, whether an expert's testimony meets these requirements and is admissible is determined by a court, not by a jury."); *Church of the Gardens v. Quality Loan Svcs. Corp.*, 2025 WL 2524463, at *8 (W.D.Wash. Sept. 2, 2025) (citing *Engilis* in excluding opinion testimony because "Plaintiffs here have not established that [the expert's] opinion reflects a reliable application of the principles and methods to the facts of the case by a preponderance of evidence.").

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U.S. Court of Appeals for the Sixth Circuit

The Sixth Circuit moved swiftly to align its gatekeeping analysis with the 2023 amendment. Within three months after the Rule 702 changes became effective, the Sixth Circuit recognized that the changes to the rule "were drafted to correct some court decisions incorrectly holding '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.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. Feb. 13, 2024) (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendments). District courts "ha[ve] an independent duty to ensure that all experts" meet these admissibility prerequisites. *Id.* at 347. The failure to establish that an expert has met the requirement of sufficient factual basis or reliable application, for instance by using "cherry-picked data to bolster his case," warrants exclusion. *Id.*

Subsequent decisions from the Sixth Circuit have continued to focus on the text of the rule. To be admitted under amended Rule 702, "expert testimony must be based on: (1) 'specialized knowledge' that is helpful to the trier of fact, (2) 'sufficient facts or data,' (3) 'reliable principles and methods,' and (4) 'a reliable application of the principles and methods to the facts of the case.'" *Hill v. Medical Device Bus. Svcs.*, No. 24-5797, 2025 WL 1950300, at *4 (6th Cir. July 16, 2025). Rule 702 "only allows an expert to testify when" the proponent establishes all of these elements. *Baker v. Blackhawk Mining, LLC*, 141 F.4th 760, 766 (6th Cir. 2025). Thus, causation opinions that "lacked reliable factual bases" or that failed to "reasonably apply [the] principles or methodologies to the underlying facts" are properly excluded. *Davis v. Sig Sauer, Inc.*, 126 F.4th 1213, 1224-25 (6th Cir. 2025). Analytical deficiencies such as "reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, and, significantly, a lack of testing" raise red flags about the reliability of the expert's methods and application under Rule 702. *Baker*, 141 F.4th at 771.

Other Circuits

Other circuit courts have touched on the elements of amended Rule 702, but without emphasizing the analytical changes that motivated its enactment. For example, the Tenth Circuit in *Herman v. Sig Sauer Inc.*, 2025 WL 1672350, at *5 - *6 (10th Cir. June 13, 2025), identified that experts who lack "sufficient facts or data on which to base their opinions" are properly excluded pursuant to Rule 702(b). This conclusion is a positive shift away from prior holdings which had stated that "doubts concerning the sufficiency of the factual basis to support [the expert's] opinion go to its weight, and not to its admissibility." *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991). But the understated finding in *Herman* does not give district courts clear guidance that amended Rule 702 has rendered decisions such as *Werth* anachronistic.

The Third Circuit in *Slatowski v. Sig Sauer, Inc.*, 148 F.4th 132, 138 (3d Cir. 2025), affirmed the exclusion of two experts' causation as not being "the product of reliable principles and methods" as required by Rule 702(c). Although the decision properly highlighted the experts' failure to conduct testing, noting that in the absence of test data the experts' causation opinions lacked "factual context," the court missed the opportunity to point out that the failure to test also made the experts' methodological application to the facts of the case unreliable. Taking this step would have provided district courts with needed direction that Rule 702(d) presents an independent prerequisite to admission that judges must consider.

As noted above, in *Davis* the Sixth Circuit properly recognized that expert opinions that fail to meet the requirements of Rule 702(b) and (d) must be excluded. *Davis*, 126 F.4th at 1224-25. But in getting to this point the court unhelpfully declared that "rejection of expert testimony is the exception, rather than the rule." *Id.* at 1224. Although this statement comes from the Rule 702

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Advisory Committee's Note to the 2000 amendment, it is easily misunderstood to suggest that courts should prefer admission of opinion testimony of its exclusion—and that conception is irreconcilable with the proponent's burden of proof stated the text of Rule 702.

Most problematically, the Fourth Circuit in *Sommerville v. Union Carbide Corp.*, 149 F.4th 408, 423-24 (4th Cir. 2025) entirely overlooked the purpose of the 2023 changes to the rule and followed a misguided pre-amendment decision to overturn the district court's Rule 702(b)-based exclusion. Over a strong dissent by the circuit's Chief Judge, the *Sommerville* majority held that the district court had abused its discretion because "'questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, not its admissibility.'" *Id.* at 423, 424 (quoting *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017)). The dissent properly observed that, in light of the text of Rule 702(b), the majority opinion "can't possibly mean that district courts may not decide that an expert's opinion lacks sufficient support in the record." *Id.* at 431 (Diaz, C.J., dissenting). Further, the *Sommerville* majority's perspective that judicial gatekeeping does not involve assessing whether the expert has a sufficient factual basis for the opinions expressed flies in the face of the Fourth Circuit's recent decision in *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (2021). There, the court took notice of the then-forthcoming Rule 702 amendment and quoted a statement from the Advisory Committee on Evidence Rules' Agenda Book describing a principal reason the amendment was deemed necessary:

> [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.

Id. at 284.[2] According to the *Sardis* court, the Advisory Committee's position "clearly echoes the existing law on the issue." *Id.* A petition for rehearing *en banc* of the *Sommerville* ruling is presently awaiting decision. But while the Fourth Circuit considers how it will reconcile its inconsistent directions about gatekeeping and align practice with the text of Rule 702, the *Sommerville* majority opinion has influenced some district courts to disregard the sufficiency of experts' factual basis as an admissibility consideration for the court to decide. *See, e.g.*, *Michael's Fabrics, LLC v. Donegal Mut. Ins. Co.*, 2025 WL 2624280, at *4 (D. Md. Sept. 11, 2025) (citing *Sommerville* and rejecting challenge to expert's factual basis as affecting "the weight and credibility of the witness' assessment, not its admissibility."); *Mincey v. Se. Farm Equip., Co.*, 2025 WL 2450913, at *10 (D.S.C. Aug. 26, 2025) (denying motion to exclude based on *Sommerville*, and finding that the objections raised "go to the weight, not the admissibility" of the expert's conclusions).

Conclusion

Decisions from circuit courts applying Rule 702 in the aftermath of the 2023 amendments have largely tracked the purposes of the rule change: (1) eliminate any presumptions of admissibility in favor of a burden of proof that the proponent must carry, and (2) use judicial gatekeeping to ensure all of the elements set forth in Rule 702 are established before the opinion testimony is admitted. Decisions that take notice of the 2023 amendments are more likely to describe the gatekeeping responsibility in ways that track Rule 702. Although post-amendment circuit court applications of Rule 702 have not been entirely uniform, the consensus finds that district courts must approach gatekeeping in the manner laid out by the Advisory Committee.

[2] With minor modification, this Agenda Book statement was included within the final Advisory Committee's Note to the 2023 amendments.

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