How Amended Rule 702 Affects Testimony In Patent Litigation

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Table

In 2023, Federal Rule of Evidence 702, which governs the admissibility of expert testimony, had its most significant amendment in 25 years. The 2023 amendments updated the 2000 amendments in two ways to address the apparent failure of some courts to serve as proper gatekeepers in preventing unreliable expert evidence from reaching a jury:

Rule 702. Testimony by Expert Witnesses

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.

On the surface, the amendments may not appear significant. They clarify that: (1) the reliability requirement extends to an expert's application of a methodology to the facts of the case, and (2) the burden of proof for every admissibility requirement (a-d) of Rule 702 is on the proponent of expert testimony under a preponderance of the evidence standard.

The advisory committee notes, however, explain that the amendments were necessary because many courts had been applying a more permissive standard toward expert evidence and failed to shield juries from unreliable expert evidence.

With the new rule in effect since Dec. 1, 2023, we examined its impact in patent litigation. Despite hopes that the 2023 amendments would lead to more uniform applications of Rule 702, early cases suggest that the amendments have had fairly limited effect thus far.

Some courts have not even acknowledged the rule change. Those that have recognized the change are mostly conducting business as usual, continuing to err on the side of viewing expert disputes as issues of weight rather than admissibility, and letting juries evaluate an expert's testimony under cross-examination.

In this article, we examined all Daubert decisions in patent litigation cases issued in 2022 and 2024 — one year before and one year after the 2023 amendments to Rule 702 — to see

how federal courts have applied the rule change in the four most popular districts for patent litigation: the U.S. District Courts for the Eastern District of Texas, the Western District of Texas, the District of Delaware and the Northern District of California.

Percentage of decisions that:	2022	2024
Exclude expert testimony	22% (12)	3% (1)
Admit expert testimony	45% (25)	42% (13)
Mixed results, excluding some and admitting some expert testimony	33% (18)	56% (17)
Mention the proponent of evidence has the burden to demonstrate admissibility by a preponderance of the evidence	16% (9)	23% (7)
Do not mention the proponent's burden or the preponderance standard	84% (46)	75% (24)
Appear to place the burden of proof on the challenger of expert evidence rather than the proponent of expert evidence	56% (31)	31% (22)
Uses language indicating a presumption of admissibility (e.g., Rule 702 has a "liberal thrust" favoring admission)	35% (19)	13% (4)
Require a showing of admissibility by a preponderance of the evidence but state a presumption favoring admissibility ("liberal thrust" standard)	2% (1)	10% (3)

In reviewing these overall trends, we also provide some best practices for challenging and defending Rule 702 motions.

Why Rule 702 Was Amended

When Rule 702 was last amended in 2000, the goal was to provide more uniformity in handling expert testimony. The 2000 amendments codified the Supreme Court's 1993 decision in Daubert v. Merrell Dow Pharmaceuticals Inc., and directed courts to scrutinize not only an expert's methodology, but also the application of that methodology to the facts at hand.[1]

The Daubert decision itself, however, provided ambiguous guidance on the role of courts. On one hand, Daubert stated that admissibility should be flexibly guided by the "'liberal thrust' of the Federal Rules of Evidence."[2]

On the other hand, Daubert defined a gatekeeping role for trial court judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[3]

It is thus no surprise that, according to the Advisory Committee on Rules of Evidence,
Some courts seem to approach Daubert as a rigorous exercise requiring the trial court to scrutinize, in detail, the expert's basis, methods, and application. Other courts seem to think that all Daubert requires is that the trial court assure itself that the expert's opinion is something more than mere unfounded speculation — all other possible defects go to the jury.[4]

The advisory committee notes thus state that the 2023 amendments were necessary because "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)."[5]

While the rule "does not require perfection," it also "does not permit the expert to make claims that are unsupported by the expert's basis and methodology."[6]

The advisory committee further noted that
Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert 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 reliably support.[7]

The advisory committee also identified three pre-2000 cases that are still relied upon by courts and litigants to erroneously suggest a presumption in favor of admitting expert testimony: (1) Loudermill v. Dow Chemical Co., decided by the U.S. Court of Appeals for the Eighth Circuit in 1988; (2) Viterbo v. Dow Chemical Co., decided by the U.S. Court of Appeals for the Fifth CIrcuit in 1987; and (3) Smith v. Ford Motor Co., decided by the U.S. Court of Appeals for the Seventh Circuit in 2000.[8]

According to the advisory committee, it is incorrect to rely on these decisions to suggest that "the "Federal Rules of Evidence establish a liberal thrust in favor of expert testimony," or that "[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury not the court."[9]

That these statements are no longer good law is "absolutely apparent from the inclusion of the preponderance standard in the text,"[10] which establishes the threshold that a proponent must meet.

Under the preponderance standard, evidence is not admitted if there is a tie. In contrast, a presumption favoring admissibility under a liberal-thrust approach does not hold the proponent of evidence to a minimum threshold, sometimes allowing shaky but admissible evidence to go to a jury.

A tie in these situations often results in admitting evidence, which is inconsistent with the required preponderance standard.

How the 2023 Amendments Have Fared in Court

In 2022, there were 55 total written court decisions addressing expert testimony in patent litigation in the four districts: 11 in the Eastern District of Texas, four in the Western District of Texas, three in the Northern District of California and 37 in the District of Delaware.

In 2024, there were 31 written court decisions addressing expert testimony in the four districts: 14 in the Eastern District of Texas, two in the Western District of Texas, two in the Northern District of California, and 13 in the District of Delaware.[11] Several observations can be made.

First, out of the 31 post-amendment decisions in 2024, 48% (15) — 14 decisions in the Eastern District of Texas, and one decision in the Northern District of California — still refer explicitly to the 2000 amendments and do not acknowledge that Rule 702 was ever amended.

Second, the percentage of cases where expert evidence is admitted remains about the same (45% in 2022 and 42% in 2024). Fewer decisions have outright excluded evidence (22% in 2022 compared to 3% in 2024), but the number of decisions where there are mixed results, admitting some while excluding other evidence, has increased (33% in 2022 and 56% in 2024).

Overall, the percentage of cases admitting versus excluding evidence has remained about the same, suggesting that the amendments have had minimal impact on Daubert rulings.

Third, the percentage of decisions that expressly state that the burden of proof is on the proponent of evidence by a preponderance of the evidence slightly increased after the 2023 amendments (16% in 2022 to 23% in 2024).

Despite acknowledging this burden, the percentage of decisions that appear to place the burden on the challenger of expert evidence rather than the proponent is still quite high — 56% in 2022 and 31% in 2024 — even as the percentage of such decisions has decreased after the 2023 amendments.

Finally, the percentage of courts that cite case law suggesting that there should be a presumption of admissibility has decreased from 2022 (35%) to 2024 (13%). But in 10% of post-amendment decisions, courts recited the preponderance standard but also described an incompatible presumption favoring admissibility under the liberal-thrust approach. e.g., stating that exclusion is the exception rather than the rule.

These results suggest that courts and litigants are still divided about how to apply the

burden of proof and preponderance of the evidence standard in patent cases, suggesting that the amendments to Rule 702 have had limited impact thus far in patent litigation.

Practice Tips

1. Point out that Rule 702 was amended.

Some courts are still referencing the 2000 amendments to Rule 702. Only 55% of decisions explicitly refer to and acknowledge the 2023 amendments. Litigants should note that Rule 702 was amended in 2023 and cite to the correct rule.

2. Emphasize the burden.

In 75% of post-amendment cases, the court makes no mention that the proponent has the burden of proof and no mention of the preponderance standard.

Challengers of expert testimony would do well to emphasize that the 2023 amendments require the proponent to prove every admissibility requirement of Rule 72 by a more-likely-than-not standard.

Proponents of evidence should attempt to argue that the burden of proof and reliability requirements have merely been clarified and do not require a departure from how courts have historically been handling Daubert motions.

3. Dispute the relevance of pre-2000 cases that advocate for a liberal-thrust approach.

Challengers of expert testimony would do well to emphasize the advisory committee notes pointing out that language suggesting a presumption of admissibility — from Loudermill, Viterbo, Ford Motor and their progeny — is inconsistent with the preponderance of the evidence standard. Proponents of expert testimony might attempt to argue that these pre-2000 cases are still relied upon and remain good law.

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[1] See MAY 1, 1999 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 5-7, http://www.uscourts.gov/RulesAndPolicies/rules/reports/EV05-1999.pdf.

[2] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 588-89 (1993).

[3] Id. at 589, 591-92.

[4] See Memo. from Dan Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules (Feb. 16, 1998) at 47-48, https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-rules-evidence-april-1998.

[5] Rule 702, Advisory Comm. Notes.

[6] Id.

[7] Id.

[8] Daniel J. Capra and Liesa L. Richter, Mem. To: Advisory Committee on Evidence Rules Re: Possible Amendment to Rule 702, at 24 (Apr. 1, 2022) in ADVISORY COMMITTEE ON EVIDENCE RULES MAY AGENDA BOOK at 148 (May 6, 2022), available at https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf.

[9] Id.

[10] Id.

[11] The difference in the number of Daubert decisions between 2022 or 2024 is likely due more to the general decrease in patent litigation from 2022 to 2024, rather than any impact of the 2023 amendments. See, e.g., Marcum LLP, U.S. District Courts See Decline in Patent Litigation Despite Rise in Patents Granted (Apr. 26, 2024), available at https://www.marcumllp.com/press-releases/us-district-courts-see-decline-in-patent-litigation-despite-rise-in-patents-granted#:~:text=APRIL%2026%2C%202024%20(New%20York,over%20the%20last%20fifteen%20years.