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Amendments to Federal Rule of Evidence 702

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SHOOK
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Overview

1. **Pre-*Daubert* History**
2. **Rule 702 and *Daubert***
3. **Post-*Daubert* Rule 702**
4. **2023 Amendments**
5. **Kansas Expert Standard**
6. **Practice Tips**

Pre-*Daubert* History

- *Luning v. State*
(Wis. 1849)
- “The general rule that the opinions of witnesses are confined to men of science, art or skill in some particular branch of business, is well settled.”



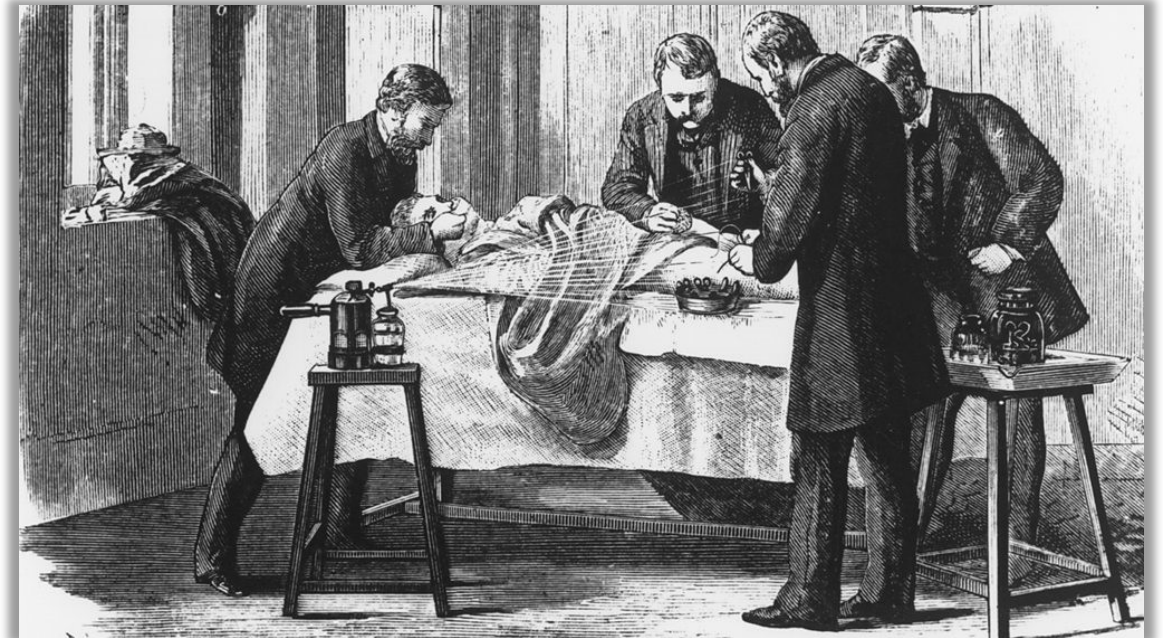
Pre-*Daubert* History

- *State v. Clark* (N.C. 1851)
- “Authorities need not be adduced to show, that it is an established rule in the law of evidence, that, in matters of art and science, the opinions of experts are evidence, touching questions in that particular art or science.”



Pre-*Daubert* History

- *Tefft v. Wilcox* (Kan. 1870)
- “An expert cannot give an opinion on the case where the facts are controverted, but counsel must put to him an hypothetical case, or supposed state of facts, and ask the opinion of the witness upon these facts.”
- “Experts are always confined to opinions within the scope of their professions, and are not allowed to give opinions or make guesses on things of which the jury can as well judge as the witness.”



Pre-*Daubert* History: *Frye*

- *Frye v. United States* (D.C. Ct. App. 1923)
- “Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained ***general acceptance*** in the particular field in which it belongs.”



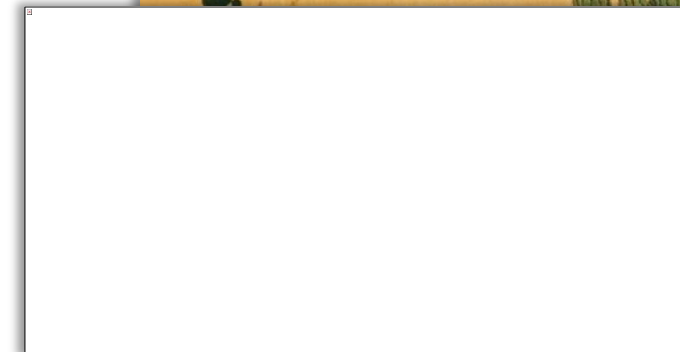


Rule 702 and Daubert

- 1975 adoption of Rule 702
- 1993 *Daubert* decision
- *General Electric* (1997) and *Kumho Tire* (1999)
- 2000 amendments to Rule 702

Rule 702 and *Daubert*

- 1975 adoption of the Federal Rules of Evidence
- Rule 702: “If Scientific, technical, or other 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.”



Rule 702 and *Daubert*

- ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***
- Acknowledged background of pre-702 *Frye* standard.
- “Nothing in the text of this Rule establishes ‘general acceptance’ as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a ‘general acceptance’ standard.”



Rule 702 and *Daubert*

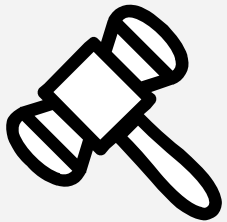
- ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***



- “[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”

Rule 702 and *Daubert*

- ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***
 - “Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to ***Rule 104(a)***, whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is ***scientifically valid*** and of whether that reasoning or methodology properly can be applied to the facts in issue.”




Rule 702 and *Daubert*

- ***General Electric Co. v. Joiner (1997)***: Abuse of discretion standard of review applies to admissibility rulings under Rule 702—regardless of whether the ruling admitted or excluded the proffered expert testimony.
- ***Kumho Tire Co. v. Carmichael (1999)***: The *Daubert* standard applies to all proffered expert testimony, not just “scientific” testimony.



Rule 702 and *Daubert*

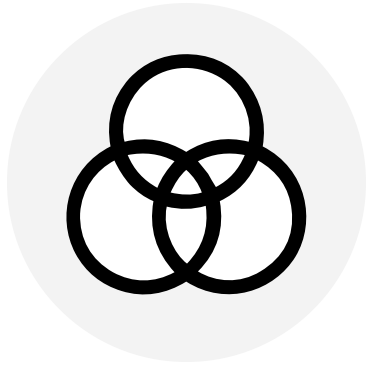
- 2000 amendment to incorporate the *Daubert* trilogy (*Daubert*, *General Electric*, and *Kumho Tire*)
- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
 - (1) the testimony is based upon sufficient facts or data,
 - (2) the testimony is the product of reliable principles and methods, and
 - (3) the witness has applied the principles and methods reliably to the facts of the case.



Rule 702 **Post-*Daubert***

- 2000 amendments to Rule 702
- Implementation in the courts

Post-*Daubert* Rule 702



- Three Requirements
 - Qualification
 - Helpfulness
 - Reliability
 - Reliable/sufficient *facts or data*
 - Reliable *methodology*
 - Reliable *application* of methodology to facts or data

Post-*Daubert* Rule 702



- “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”
 - *Daubert*, 509 U.S. at 595 (quoting article by Judge Jack Weinstein)

Post-*Daubert* Rule 702



- “[W]hile the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the ‘gatekeeper’ role of the trial judge in screening such evidence.”
 - ***General Electric Co.***, 522 U.S. at 142.

Post-*Daubert* Rule 702



- **Qualification**
- “[W]ithin the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called ‘skilled’ witnesses, such as bankers or landowners testifying to land values.”
 - 1972 Advisory Committee Notes
- “Rule 702 does not require a ... medical expert to be of the identical medical specialty as the plaintiff’s expert.”
 - ***Robinson v. GEICO Gen. Ins. Co.***, 447 F.3d 1096, 1100 (8th Cir. 2006)

Post-*Daubert* Rule 702

- **Qualification**
- ***Poosh v. Philip Morris USA, Inc.*** (N.D. Cal. 2012): Public health epidemiologist was not qualified to testify on alternative cigarette designs or their impact on smoking behaviors in product liability case
- ***Gayton v. McCoy*** (7th Cir. 2010): General practitioner MD was qualified to testify of effect of drug on heart failure.



Post-*Daubert* Rule 702



- **Helpfulness**
- “There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.”
 - 1972 Advisory Committee Notes

Post-*Daubert* Rule 702

- **Helpfulness**
- “This condition goes primarily to relevance.”
 - *Daubert*, 509 U.S. at 591
- “Whether an opinion ‘relates to an issue in the case’ or helps a jury answer a ‘specific question’ depends on the claims before the court. Thus, when analyzing the relevancy of expert testimony, a court should consider the elements that a plaintiff must prove.”
 - *Madej v. Maiden*, 951 F.3d 364, 370 (6th Cir. 2020)

2000 Amendments and Implementation

- **Helpfulness**
- ***Linde v. Arab Bank, PLC*** (E.D.N.Y. 2013): Academic's testimony going to the charitable intent of Saudi committee donations to Palestinian organizations excluded as to intent/state of mind testimony, and thus unhelpful.
- ***Virginia State Conference NAACP v. County School Board of Shenandoah County*** (W.D. Va. 2025): Legal academic's testimony that naming schools after Confederate figures should be left to democratic process was not helpful.

Post-*Daubert* Rule 702



- **Reliability**
- *Daubert* factors for reliability of methodology:
 - whether a theory can be or has been tested
 - the extent to which it has been subjected to peer review and publication
 - the extent to which a technique is subject to standards controlling the technique's operation
 - the known or potential rate of error
 - the degree of acceptance within the relevant scientific community
 - (consideration of and ruling out alternative explanations)

Post-*Daubert* Rule 702



- **Reliability:** “the witness has applied the principles and methods reliably to the facts of the case”
- “This has been called the ‘homework requirement’ because ‘the expert must have done her homework before testifying.’”
 - Mark A. Behrens, Andrew J. Trask, *Federal Rule of Evidence 702: A History and Guide to the 2023 Amendments Governing Expert Evidence*, 12 Tex. A&M L. Rev. 43, 49 (2024)

Post-*Daubert* Rule 702

- **Reliability**
- ***U.S. v. Marks***, (S.D. Fla. 2013): Police expert on fortune telling fraud schemes excluded for lack of methodology. He simply assumed that all fortune telling businesses were fraudulent schemes, with no methodology or supporting studies.
- ***In re Volkswagen “Clean Diesel” Litigation*** (N.D. Cal. 2020): Conjoint analysis (surveys of consumers about how much more or less they would pay for products with certain features or defects) was not reliable as it ignored the “supply” portion of supply/demand curve and vaguely defined defect.


Post-*Daubert* Rule 702



- **Reliability**
- “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”
- ***General Electric Co.*, 522 U.S. at 146.**

Post-*Daubert* Rule 702

- **Reliability**
- ***D. H. Pace Co., Inc. v. Aaron Overhead Door Atlanta LLC*** (N.D. Ga. 2021):
 - *Ipse dixit* opinion on generic-ness of trademark by linguistics expert excluded.
 - “[S]omething doesn’t become ‘scientific knowledge’ just because it’s uttered by a scientist; nor can an expert’s self-serving assertion that his conclusions were ‘derived by the scientific method’ be deemed conclusive.”



2023 Amendments to Rule 702

- 2023 Amendments
- Context for Amendments

2023 Amendments to Rule 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 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’s opinion reflects a reliable application of the principles and methods to the facts of the case.

2023 Amendments to Rule 702



- “Many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) ... 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***. ... [These rulings are] contrary to the Supreme Court’s holdings that under ***Rule 104(a)***, admissibility requirements are to be determined by court under the preponderance standard.”
 - Hon. Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rule

2023 Amendments to Rule 702

- “[T]he rule has been amended to clarify and emphasize that 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. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. ... 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).”
 - Advisory Committee Notes to 2023 Amendments.

2023 Amendments to Rule 702



- **Rule 104(a):**
- “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.”

2023 Amendments to Rule 702

- “[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.”
 - Advisory Committee Notes to 2000 Amendments
- “We have traditionally required that [admissibility under Rule 104(a)] be established by a preponderance of proof.”
 - ***Bourjaily v. United States***, 483 U.S. 171, 175 (1987)

2023 Amendments to Rule 702

- “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 it more likely than not 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 it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.”
 - Advisory Committee Notes to 2023 Amendments.

2023 Amendments to Rule 702



- The amendment to subsection (d) was a “slight change” to address the “overstatement” problem, especially by forensic experts in criminal cases (“the expert’s opinion *reflects* a reliable application of the principles and methods to the facts of the case”).



Kansas Expert Standard

- Kansas Revised Statute § 60-456
- Kansas Revised Statute § 60-408
- Kansas Case Law

Kansas Expert Standard

- “If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if:
 - (1) The testimony is based on sufficient facts or data;
 - (2) the testimony is the product of reliable principles and methods; and
 - (3) the witness has reliably applied the principles and methods to the facts of the case.”
- Kan. Rev. Stat. § 60-456(b)

Kansas Expert Standard



- 2014 amendment to § 60-456(b), adopting 2000 version of Federal Rule 702 (“*Daubert* Amendment”)
 - *See Matter of Cone*, 309 Kan. 321, 326-28 (2019)

Kansas Expert Standard

- Kansas courts apply the *Daubert/Kumho* nonexclusive factors:
“(1) whether the theory or technique can be (and has been) tested;
(2) whether it has been subject to peer review and publication;
(3) whether, in respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique’s operation; and
(4) whether the theory or technique has general acceptance within a relevant scientific community.”
 - *State v. Lyman*, 455 P.3d 393, 410 (Kan.2020)

Kansas Expert Standard



- ***State v. Aguirre*** (Kan. 2021)
 - Testimony on age of open grave based on leaf accumulation was not reliable
 - Expert failed to consider alternate explanations
 - Expert did not utilize any controls or experiments



- ***Matter of Cone*** (Kan. 2019)
 - Actuarial tools and tests used to estimate sex offenders' risk of reoffending, for civil commitment hearing, were sufficiently reliable.
 - Tests were generally accepted in the field, tested, peer reviewed, had established rate of error, and had established controls in application.

Kansas Expert Standard

- “When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in this article to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he or she shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the section under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury”
 - Kan. Rev. Stat. § 60-408

Kansas Expert Standard

- Kan. Rev. Stat. § 60-408
 - Preponderance standard applied to admissibility in many contexts
 - Admissibility of confession
 - Inevitable discovery 4th Amendment doctrine
 - Hearsay exceptions
 - Compliance with rules for “posthypnotic testimony”
 - ***State v. Daugherty***, 362 P.3d 1124 (Kan. Ct. App. 2015) (referencing application of preponderance standard to expert testimony admissibility)
 - Because 2023 Rule 702 amendments were clarifying amendments, they should apply equally to admissibility in Kansas courts.



Practice Tips

- Helpfulness
- Qualification
- Reliability

Practice Tips



- **Helpfulness:** Prepare to articulate how expert testimony relates to specific element or defense at issue in the case and defend against anticipated attacks.

Practice Tips



- **Qualification:** Prepare to articulate how expert is qualified to opine on specific issue, or how expertise relates to or overlaps with subject of opinion and defend against anticipated attacks.

Practice Tips



- **Reliability:** Read through *Daubert* factors and prepare to articulate and proffer evidence for many or all factors and defend against anticipated attacks; consider how opposing counsel may attack the application of the methodology or underlying facts and data.

- Behrens & Trask, *Federal Rule of Evidence 702: A History and Guide to the 2023 Amendments Governing Expert Evidence*, 12 Tex. A&M L. Rev. 43 (2024)

Further Reading

FEDERAL RULE OF EVIDENCE 702: A HISTORY AND GUIDE TO THE 2023 AMENDMENTS GOVERNING EXPERT EVIDENCE

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ABSTRACT

Federal Rule of Evidence 702 was amended effective December 1, 2023. The Rule was amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court by a preponderance of the evidence that the proffered testimony meets all of the Rule's admissibility requirements. The amendment was necessitated by decisions by many federal courts incorrectly applying the reliability requirements set forth in Rule 702(b) and (c) and declaring that expert testimony is presumed to be admissible. Rule 702 was also amended to prevent "overstatement" by experts. Rule 702(d) now emphasizes that an expert's opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. The Article discusses the widespread misapplication of Rule 702 since it was last amended in 2000. The Article then discusses the march toward the 2023 amendment with a detailed history of the amended Rule's development. Next, the Article discusses the amended Rule and some early decisions showing how the Rule is to be applied. The Article also suggests some principles for litigants and courts to keep in mind as they apply Rule 702. The Article concludes by calling on judges to embrace their gatekeeping obligation and to faithfully apply the text of Rule 702 over any obsolete case law to the contrary.

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