Unpacking Rule Changes on EXPERT TESTIMONY

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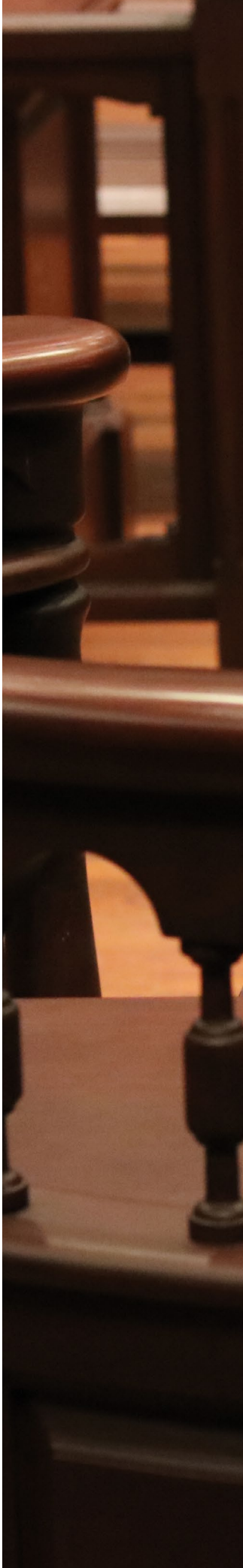

Federal Rule of Evidence 702 sets forth the standard for admissibility of expert testimony. In December 2023, an amendment to Rule 702 took effect, following fervent debate over whether the amendment was appropriate—or even necessary.

Those who supported it argued that the amendment was necessary to correct more than 20 years of "judicial confusion and recalcitrance" among federal courts.[1] Those who opposed it chastised the amendment's champions for creating a license for federal courts to usurp the jury's fact-finding role.[2]

A change in evidence rules has attorneys abuzz about federal courts encroaching on the jury's fact-finding role. But rest assured: The sky isn't falling, despite what our opponents claim.

Eighteen months later, the landscape remains murky, and practitioners, courts, and commentators disagree as to whether the rule substantially changed at all. Amended Rule 702 reads:

> 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.[3]

Not much of the rule's text has changed. The U.S. Judicial Conference's Advisory Committee on Evidence's note for the 2023 amendment states that the primary purpose of the first addition was to "clarify and emphasize" that the admissibility of expert testimony requires its proponent to satisfy the "preponderance of the evidence standard" of Rule 104(a).

In other words, an expert witness can give their opinion in court if the attorney presenting the expert proves that their knowledge, skill, experience, training, or education "more likely than not" qualifies the testimony as reliable.[4]

The committee's note explains that the change to subsection (d) is intended to emphasize that courts must ensure that expert witness testimony "stays within the bounds" of a reliable application of the expert's basis and methodology behind their opinion.[5]

Misrepresentations

Although the committee note explicitly states that "nothing in the amendment imposes any new, specific procedures," those who supported the amendment—most on the defense side—have opportunistically contended that the amended rule was needed to correct what they characterize as rogue courts abandoning or neglecting their role as the gatekeepers of unreliable expert testimony.[6] To be sure, the committee notes confirm that the primary motivation behind the amendment was to correct courts' misapplication of the rule's reliability requirement.[7]

The committee also underscored that the amendment serves as a reminder of how to apply the standard. In other words, amended Rule 702 should not be construed as giving courts any more power or responsibility than they already had.[8] Assertions that the amendment vacated 30 years of *Daubert* jurisprudence are therefore patently incorrect.

Significant Decisions

Recent decisions confirm that although the Rule 702 amendment emphasizes courts' gatekeeping duties, the rule's substance remains the same. Significantly, several courts across the country have analyzed and applied the rule in the same manner as before the 2023 amendment.[9]

For example, a Colorado court explained that the Rule 702 standard remains unchanged:

> Although recently amended, application of Rule 702 is still guided by two core ideas articulated in *Kumho Tire*. First, "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." As I observed previously, admission of expert testimony is construed liberally. . . . Second, "experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from . . . specialized experience.'"[10]

Advice for Practitioners

While nothing is substantively different, counsel should be prepared to defend against a more restrictive approach in their application of the amended rule. Some courts have explicitly acknowledged that they are exercising a higher level of caution in Rule 702 analyses in response to the 2023 amendment.

For instance, in *United States ex rel. LaCorte v. Wyeth Pharmaceuticals, Inc.*, the U.S. District Court in Massachusetts stated that it took care to conduct its Rule 702 analysis in conformity with the 2023 amendment's revision to subsection (d):

> [The 2023] amendment is designed generally to emphasize that judicial gatekeeping is essential. . . . Although this is not a jury proceeding, I have applied this approach to assure that my own consideration has begun with an effort to ensure that any expert opinion has "stay[ed] within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[11]

As we continue the battle to protect our clients and our experts, consider these tips.

Use the correct standard. The advisory committee criticized federal courts for applying what many of the amendment's proponents have called a "liberal thrust" approach.[12]

Indeed, this was also the committee's primary criticism.[13] Counsel can expect opponents of admissibility to misrepresent the amendment's purpose as entirely forbidding courts from adopting a lenient or flexible approach in any aspect of the Rule 702 analysis, and judges may be hesitant to do so themselves.

Proponents, therefore, should center their argument around dispelling these myths and demonstrating to the court that, in admitting an expert's testimony, it is faithfully adhering to Rule 702's actual requirements. More pointedly, counsel should refrain from premising arguments on the idea that a flexible or lenient standard applies to Rule 702's admissibility test in its totality.

This is not to say that case law referring to a lenient or flexible standard—or that a "presumption of admissibility"—is no longer good law. Rather, plaintiff counsel should contextualize those standards around the *Daubert* factors—but not Rule 702 as a whole.

Proponents should specifically note that the "preponderance of the evidence standard" applies to each individual element of Rule 702,[14] while, at the same time, making it clear that the individual *Daubert* factors are analyzed under a permissive standard.[15] They should conclude by demonstrating that each of the *Daubert* factors, as applied to the expert, satisfies the "more likely than not" standard with respect to each element and is therefore admissible under Rule 702.

Emphasize the differences between questions of weight and questions of admissibility. Avoid making the mistake of interpreting the amendment as reducing the jury's role or delegating more power or responsibility to the court.

It remains the case that once the court has determined that expert testimony is reliable, any efforts to attack the testimony become questions of weight for the jury to decide.[16] Indeed, "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."[17]

If the court finds that an expert has a sufficient basis to support their opinion, then the fact that the expert has not read "every single study," for example, becomes a jury question of weight.[18] This is also the case for testimony that relies on disputed facts. In those cases, "the jury can decide which side's experts to credit."[19]

Perhaps most important, the question of whether expert testimony is reliable is different from the question of whether the testimony is correct.[20] The former is a question for the court, but the latter is for the jury to decide. And as the advisory committee makes clear, "the evidentiary requirement of reliability is lower than the merits standard of correctness."[21]

Avoid making the mistake of interpreting the amendment as reducing the jury's role or delegating more power or responsibility to the court.

Ensure expert testimony is in the scope of the qualifications and reliable methodology. The aim of the modification to subsection (d) was to "emphasize" that experts "must stay within the bounds" of their qualifications and reliable methodology as applied to the case.[22] This has always been required by Rule 702—and it remains unchanged.

The 2023 committee note refers to the 2000 note, which states that "proponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.'"[23]

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In sum, don't buy into the hype. Identify, cultivate, and prepare your expert carefully, but remember that the court is a gatekeeper, not a juror. Be prepared to counter opposing counsel's false narrative regarding Rule 702 when defending your experts and fighting for your clients.

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Notes

1. Eric Lasker & Lawrence Ebner, *Time for Courts, Attorneys to Use Amended Evidence Rule*, Law360 (July 20, 2023), law360.com/articles/1700336/time-for-courts-attorneys-to-use-amended-evidence-rule.
2. Memorandum from Daniel J. Capra & Liesa L. Richter on Possible Amendment to Rule 702 to the Advisory Comm. on Evidence Rules (Apr. 1, 2022), *in* Advisory Comm. on Evidence Rules May 6, 2022, Agenda Book 125, www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf.
3. The added language is underlined, while the deleted language is stricken through.
4. The "more likely than not" articulation of Rule 104(a) was adopted by the U.S. Supreme Court in *Bourjaily v. United States*, 107 S. Ct. 2775, 2779 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.") and in *Huddleston v. United States*, 485 U.S. 681, 686 n.5 (1988) ("[P]reliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard.").
5. Fed. R. Evid. 702 Advisory Committee's note to the 2023 amendment. *See also United States ex rel. Griffis v. EOD Tech. Inc.*, No. 3:10-CV-204, 2024 WL 4921599, at *9 (E.D. Tenn. 2024).
6. *See, e.g.*, Mark A. Behrens, *A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence*, The Federalist Society (Jan. 30, 2024), fedsoc.org/commentary/fedsoc-blog/a-brief-guide-to-the-2023-amendments-to-the-federal-rules-of-evidence-1 ("Rule 702 was amended effective December 1, 2023, to fix widespread misapplication of the Rule by courts."); *Chiles v. Salazar*, 116 F.4th 1178, 1238 n.5 (10th Cir. 2024) (Hartz, J., dissenting) ("[T]oo many courts have maintained a laissez faire attitude [toward judicial oversight of expert testimony], so Rule 702 was strengthened in the recent 2023 amendments.").
7. *See* Fed. R. Evid. 702 Advisory Committee's note to the 2023 amendment ("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.").
8. Notably, the adopted changes are less extreme than other options presented in the amendment process. *See, e.g.*, David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57:1 Wm. & Mary L. Rev. 1, 44 (Oct. 29, 2015), https://scholarship.law.wm.edu/wmlr/vol57/iss1/2.
9. *See Polk v. Gen. Motors LLC*, No. 3:20-CV-549-MMH-LLL, 2024 WL 326624, at *4 n.6 (M.D. Fla. 2024) (explaining that there is no substantive change to Rule 702); *Freeman v. Progressive Direct Ins. Co.*, 733 F. Supp. 3d 463, 490 (D.S.C. 2024) (affirming same and denying defendants' motions to exclude four out of five plaintiff experts); *Roake v. Brumley*, No. 24-517-JWD-SDJ, 2024 WL 4751509, at *5–7 (M.D. La. 2024) (immediately after citing the 2023 amendment, stating, "Notwithstanding *Daubert*, the Court remains cognizant that 'the rejection of expert testimony is the exception and not the rule.'") (quoting *Johnson v. Samsung Elecs. Am., Inc.*, 277 F.R.D. 161, 165 (E.D. La. 2011)).
10. *BlueRadios, Inc. v. Kopin Corp, Inc.*, No. 16-CV-02052-JLK, 2023 WL 9104818, at *3 (D. Colo. 2023) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999)).
11. *LaCorte*, 706 F. Supp. 3d 206, 233 (quoting Fed. R. Civ. P. 702 Advisory Committee's note to the 2023 amendment).
12. Kateland R. Jackson & Andrew J. Trask, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, Laws. for Civ. Just. (Sept. 30, 2021), www.lfcj.com/document-directory/federal-rule-of-evidence-702a-one-year-review-and-study-of-decisions-in-2020.
13. *See* Fed. R. Evid. 702 Advisory Committee's note to the 2023 amendment ("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.").
14. The chair of the Advisory Committee's Rule 702 subcommittee acknowledges this himself. *See* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95:5 Notre Dame L. Rev. 2039, 2060 (June 19, 2020), scholarship.law.nd.edu/ndlr/vol95/iss5/7/ ("[T]he elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility") (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988)).
15. *See id.* ("[T]he flexibility accorded trial judges relates to which *Daubert* factors, in the totality of circumstances, the court chooses to examine in applying Rule 702's required elements.").
16. *See* Fed. R. Evid. 702 Advisory Committee's note to the 2023 amendment ("[O]nce 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.").
17. *Id.*
18. *Id.* ("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.").
19. *Id.*
20. *Id.*
21. *Id.* (quoting the advisory committee's note to the 2000 amendment).
22. *Id.*
23. "'[T]he evidentiary requirement of reliability is lower than the merits standard of correctness.'" Fed R. Evid. 702 Advisory Committee Note to the 2000 Amendment, quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).