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Expert Evidence Rule Will Be Tool to Improve Scientific Testimony



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Hollingsworth's Eric Lasker, Elyse Shimada, and Shannon Proctor say Federal Rule of Evidence 702 amendments create an opportunity for courts to correct past errors and strengthen scientific evidence in litigation.

Widespread recalcitrance by many federal courts to correctly exercise their gatekeeping responsibility against unreliable expert evidence will finally be addressed when amendments to Federal Rule of Evidence 702 go into effect Dec. 1.

The amendments—the first in 23 years—have been approved by the Judicial Conference's Standing Committee, Congress, and the US Supreme Court. They correct two widespread judicial errors that have led many courts to fail in protecting jurors from unreliable and misleading expert testimony.

Evidence and Application

The first amendment to Rule 702 was added to clarify and emphasize that proponents of expert testimony must demonstrate to courts that proffered testimony satisfies each of the listed requirements in Rule 702 “by a preponderance of the evidence.”

The second amendment to Rule 702 requires proponents of expert testimony to establish an expert's “reliable application” of their methodology to the facts of the case.

Although the preponderance of evidence standard was already implicit in Rule 702—it was specifically incorporated into a court's gatekeeping responsibility by the Supreme Court's 1993 *Daubert v. Merrell Dow Pharmaceuticals Inc.* decision—the Advisory Committee determined that an express amendment was needed because many courts had been avoiding their responsibility.

Courts had been holding that questions going to the bases and application of the expert's methodology went solely to the weight and not to the admissibility of the proffered testimony.

The Advisory Committee also took aim at experts who offer opinions that may start with reliable facts and dependable methodologies, but then stretch beyond what those facts and methodologies would reasonably support.

This is often the most challenging step in a court's gatekeeping function because it requires courts to closely scrutinize the analyses and reasoning behind an expert opinion.

Incorrect Case Law

The new language will provide a strong foundation for more stringent application of Rule 702 than has been followed by many courts in the past. In addition to reviewing the rule's

amended language for guidance, practitioners should look to the Advisory Committee note explaining the amendments, and to eight years of committee deliberations.

Committee notes and deliberations are accorded great weight in rule interpretation, and provide important further instruction as to the types of mistakes courts have made in the past in admitting improper expert testimony into the courtroom.

The Advisory Committee explicitly calls out courts that had “incorrectly determined” the requirements imposed by the rule are “covered by the more permissive Rule 104(b) standard” and had “failed to apply correctly the reliability requirement” of the rule in its note to the 2023 Rule 702 amendment.

The Advisory Committee’s working papers and statements are likewise replete with criticisms of courts that have been too liberal in their admission of expert testimony.

The Rule 702 Committee Note language is hugely important. Beyond simply providing guidance on interpretation of the amended rule, the Note makes clear that a large body of case law regularly used by parties seeking to admit expert testimony is incorrect, and should no longer carry any weight. This rule change creates a bright line for courts and hopefully sets them on the correct path going forward.

Fight Scientific Skepticism

The amended rule and corresponding committee note and drafting history provide tools to fight back against scientific skepticism. It puts the courts in a place where they should be—screening out science that’s speculative or not reliable.

As the amended language makes clear, judges are obliged to weigh expert evidence and only admit it if it is reliable. That’s not unique to Rule 702. However, judges faced with scientific or complex opinion testimony have perhaps been less confident in their abilities to serve in that role, and more willing to shift that burden to a jury.

As the Advisory Committee explains in its note, however, the complexity of this evidence makes judicial gatekeeping particularly “essential.”

The question of what testimony jurors should be shielded from is a key part of the discussion around the rule change. Courts that wave along unreliable expert evidence to juries play a role encouraging distrust of science.

The Rule 702 amendment provides a tool to fight back against scientific skepticism by giving courts clear guidance on how to screen out unreliable science, protecting jurors from speculative and unfounded scientific-sounding hypotheses.

Counsel’s Role to Educate

With the Rule 702 amendments in place, counsel must educate courts on the new rule language and Advisory Committee guidance. They should also alert courts that many existing cases they may have routinely relied on in their Rule 702 opinions were wrongly decided.

Practitioners should review the advisory committee deliberations, available on the US Courts [website](#) and in published [articles](#) by Advisory Committee members, to identify cases that have misapplied Rule 702. They can ensure this outdated and now overruled case law doesn't continue to distort expert admissibility jurisprudence.

The amended Rule 702 takes a strong step forward in protecting jurors from unreliable expert testimony in the courtroom.

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