AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

Spring 2024

COMMITTEE NEWS

Toxic Torts and Environmental Law

When Faced with Emerging, Untested Science, Don't Forget Amended Federal Rule of Evidence 702

Carter F. Thurman
Hollingsworth LLP

***Carter Thurman** is a partner at Hollingsworth LLP in Washington, DC, where he focuses on product liability, toxic tort, environmental, and commercial litigation involving contract disputes.*

Toxic tort litigation involving emerging contaminants presents distinct challenges due to the complex interplay of law and science. Faced with an array of new and still-evolving scientific evidence, trial courts have a particularly important responsibility in serving as gatekeepers against expert testimony based on speculation or hypotheses rather than tested and reliable scientific evidence. Too often in the past, trial courts have abdicated their gatekeeping responsibility and passed these challenges off to juries that are even less equipped to distinguish between scientifically reliable and scientifically unreliable opinions.

On December 1, 2023, Federal Rule of Evidence 702, which governs the admissibility of expert testimony in federal courts, was amended for the express purpose of clarifying and confirming the trial court's gatekeeping responsibility in these situations. The aim of the recent amendments to Rule 702 is to provide clear guidance for federal judges, ensuring a more consistent and rigorous approach to the admission of expert testimony across federal courts. By doing so, the amendments

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seek to ensure expert evidence presented in court is reliable, thereby improving the fairness and integrity of the judicial process. Practitioners challenging unreliable expert testimony should understand both the amendments, and the Committee Notes and deliberative papers, so they can help guide judges to understand the amended rule.

Rule 702 was modified in response to critiques highlighting the failure of many courts to properly hold proponents of expert testimony to their preponderance of the evidence standard to establish the reliability of an expert's factual bases, methodologies and—most importantly—application of those facts and methodologies in reaching their conclusions. Rule 702 was amended as follows (new language underscored; deleted language stricken):

> 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.

Fed. R. Evid. 702 (2023). The revised Rule explicitly demands that all four elements of admissibility be proven by a preponderance of the evidence and stresses that courts must evaluate whether the expert reliably applies their methodology to the facts of the case, not just the reliability of the underlying facts and methodologies used by the expert.

The drafters of the amended Rule provided important guidance as to the meaning of these changes in the Advisory Committee Note and other documents explaining their reasoning and rationales. These materials are generally given great weight in the interpretation of federal rules,[1] and they are particularly important in understanding the Rule 702 amendments given the Advisory Committee's repeated admonition that much of the case law previously applying Rule 702 was wrongly decided. The Advisory Committee Note offers a detailed blueprint for applying the new Rule correctly, spotlighting three pivotal updates. First, the amended Rule "clarify[ies] and emphasize[s]" that the proponent of the evidence must demonstrate by a

preponderance of the evidence that the "proffered testimony meets the admissibility requirements set forth in the rule."[2] No longer should trial courts ignore challenges to the sufficiency of an expert's basis, or to the application of the methodology, and simply let such issues go to the jury as such "rulings are an incorrect application of Rule 702 and 104(a)."[3] Second, the "preponderance [of the evidence] standard applies to the three reliability-based requirements added in 2000 – requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard."[4] Lastly, the amendment clarifies that the validity of facts and methodologies alone does not suffice if their application exceeds their logical extent, ensuring that each expert's conclusion must be directly derived from a sound application of their expertise and methodology—"each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[5]

Additionally, the working papers from the Advisory Committee delve deeply into the amended rule's intended meaning, critiquing the frequent permissive approach toward admitting expert testimony and providing specific instances from cases.[6] These cases often imply a default inclination towards allowing expert testimony or suggest that the adequacy of an expert's methodology is a matter for the jury to decide.[7] The Advisory Committee working papers provide extensive examples of courts not properly applying Rule 702.[8] Critics argue that the recent amendments address and rectify over two decades of Rule 702's misapplication, suggesting that case law established on these misinterpretations should now be disregarded.

Although the amendments have only been in effect for a short period, early court decisions indicate a shift towards stricter scrutiny of expert testimony.

Although the amendments have only been in effect for a short period, early court decisions indicate a shift towards stricter scrutiny of expert testimony. For instance, in *In Re Google Play Store Antitrust Litigation*, after unsuccessfully challenging an expert at the class certification stage, Google moved to exclude plaintiffs' same expert economist at the merits stage.[9] This time, Google was armed with the upcoming amendments to Rule 702. The Court, citing the upcoming amendments, noted the preponderance standard's application to each element of Rule 702 and the revision to subpart (d) that requires an expert's opinion to reflect a reliable application of the principles and methods to the facts of the case.[10] The Court referred to the amendments as "an amplification of the existing FRE 702 standards."[11] Ultimately, the Court determined that the expert's model is "not within accepted economic theory and literature" and was "based on assumptions . . . that are not supported by the evidence" and granted Google's motion to exclude the merits opinion.[12]

More recently, in *In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Products Liability Litigation*, the Sixth Circuit affirmed the district court's exclusion under Rule 702 of plaintiffs' sole expert based on a finding that the expert had not

"reliably applied" his methodology to the "facts of the case."[13] While the Sixth Circuit did not directly rely on the amendments to Rule 702, as the amendments went into effect after the district court's decision, the Sixth Circuit noted that "Rule 702's recent amendments . . . 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.'"[14]

The recent amendments to Rule 702 should have significant implications for upcoming litigations involving novel theories of causation that hinge on largely untested scientific and technical evidence. The amendment's emphasis on the rigorous evaluation of expert testimony's relevance and reliability could impact the admissibility of scientific evidence, especially related to various exposures and its alleged health effects. Practitioners need to understand how Rule 702 was amended and what those amendments are intended to achieve—the requirement of sound science in the courtroom.

Endnotes

1 *See, e.g.*, *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005); *C.B. v. City of Sonora*, 769 F.3d 1005, 1018 (9th Cir. 2014) (ascribing weight to the advisory committee's note) (citing cases); *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009) (giving persuasive weight to advisory committee notes while interpreting the Federal Rules of Civil Procedure).

2 Appendix A: Rules for Final Approval, Proposed Amendment to the Federal Rules of Evidence, in Committee on Rules of Practice and Procedure January Agenda Book 879, 892 (June 7, 2022), available at https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf.

3 *Id.*

4 *Id.* at 893.

5 *Id.* at 894.

6 *See* Administrative Office of the U.S. Courts, *Records of the Rules Committees*, available at https://www.uscourts.gov/rules-policies/records-rules-committees (last visited Mar. 4, 2024).

7 Daniel J. Capra and Liesa L. Richter, Mem. To: Advisory Committee on Evidence Rules Re: Possible Amendment to Rule 702 (Apr. 1, 2022), in Advisory Committee on Evidence Rules May Agenda Book 125, 148 (May 6, 2022), available at https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf.

8 *See, e.g.*, Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020), in Committee on Rules of Practice and Procedure January Agenda Book 441, 445 (Jan. 5, 2021), available at https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf (explaining that "[t]he Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence."); T.D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039 (2020) (analyzing flawed opinions); Capra and Richter, *supra* note 7, at 148 (discussing three pre-2000 cases relied on by plaintiffs to suggest there is a presumption in favor of admitting expert testimony or that whether an expert's methodology has a sufficient basis is a question for the jury).

9 Order re Merits Opinions of Dr. Hal J. Singer, *In re Google Play Store Antitrust Litig.*, No. 3:21-md-02981 (N.D. Cal. Aug. 28, 2023), ECF No. 588.

10 *Id.* at 8-9.

11 *Id.* at 9.

12 *Id.* at 16.

13 No. 22-6078, MDL 2809, 2024 WL 577372, at *5-6 (6th Cir. Feb. 13, 2024).

14 *Id.* at *6 n.7 (citing Fed. R. Evid. 702 advisory committee's note to 2023 amendments). Ultimately, the Sixth Circuit noted that the district court's reasoning was consistent with the updated rule, as the district court placed the burden on the plaintiffs to show that expert testimony was admissible. *Id.* at *3 n.4 (adding that "702(d) was rephrased to emphasize that an expert opinion must 'reflect[ ] a reliable application' of the expert's methodology") (alteration in original).