Proposed Amendments to Federal Rule of Evidence 702 Provide Clarification for Courts and Litigants

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Published in Joint Business Litigation Committee / Cannabis Law & Policy Committee Newsletter in Spring 2023.

The journey to amend Federal Rule of Evidence 702–the rule that governs the admission of expert testimony—is in its last stage. The process to amend the rule began in 2017, and now only a final stamp of approval by the Supreme Court of the United States is needed for the rule amendments to move forward.[1] If the Supreme Court approves, amendments to Rule 702 will "go into effect" starting December 1, 2023.[2] The phrase, "go into effect," however, is a misnomer. Truly, the new language included in the proposed amendments simply clarifies, and does not substantively change, Rule 702's standards and how courts should apply the rule in making admissibility determinations for expert testimony.

The Current & New Rule 702 Language

The proposed amendments to Rule 702 read as follows, with the new language underlined and bolded and the omitted language lined through:

(Proposed) 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.

This new language clarifies two main points; (1) the standard for admissible expert testimony is a preponderance of the evidence standard for all four elements of the rule, and (2) the expert's opinion must demonstrate a reliable

application of principles or methodology to the facts of the case. In an overarching sense, these changes clarify and emphasize the active role the courts must take as the gatekeeper of expert testimony and halt the courts that take a passive and overly liberal role in admitting expert testimony.

Historical Variability Amongst Courts

First, the proposed amendments clarify that the burden a party must carry when seeking to admit expert testimony under Rule 702 is the "preponderance of the evidence" standard. Although this standard has always been what Rule 702 required, review of district court decisions applying Rule 702 over the years demonstrates confusion and misunderstanding amongst the courts as to how proposed expert testimony should be evaluated. Orders discussing admissibility of expert testimony show that federal judges have used a variety of standards when ruling on Rule 702 motions to exclude proposed expert testimony. For example, in *Armour Capital Management v. SS&C Technologies*, a court in the District of Connecticut partially admitted an expert's testimony without ever mentioning the preponderance of the evidence standard, or any standard at all.[3] Rather, the court only stated that the expert "appears to be a qualified expert whose testimony may be helpful to the jury" without explicitly individually weighing Rule 702's elements and applying the standard to each.[4] The lack of citing the preponderance standard by which the court determined admissibility of expert testimony can be found across the country.[5] Yet, even within the same district court, another standard is applied. In *Greco v. Broan-NuTone*, the court excluded proposed expert testimony by applying the proper standard: "The party seeking to admit the witness bears the burden of demonstrating, by a preponderance of the evidence, that his or her testimony is admissible."[6] This variability regarding the burden standard amongst courts is seen throughout the United States.[7]

More troubling still than the courts that have not identified the standard by which the court determined the admissibility of expert testimony are the decisions based upon the entirely wrong standard. One such wrong standard is the liberal-leaning standard (*i.e.*, "liberal thrust") for admission of expert testimony. For example, in *Moultrie v. Coloplast Corp.*, a court in the Western District of Pennsylvania partially admitted expert testimony by allowing a "liberal thrust of the Federal Rules of Evidence."[8] Even more concerning and contradictory is courts have stated both the preponderance of evidence *and* liberal-thrust standard within the same opinion.[9]

Second, the new amendment language for Rule 702 leaves no ambiguity that the court is indeed the gatekeeper between the jury and unreliable expert witnesses by compelling the court to take an active role in analyzing the methods and principles on which the expert witness relied on. Previously, federal courts across the United States took on vastly different roles when it came to their role in Rule 702 motions. For example, in *Gustafson v. BI-State Development Agency*, the Eastern District Missouri court partially admitted expert testimony, noting that "expert testimony must show . . . that the methodology underlying his conclusions is scientifically valid."[10] Yet, later in the same opinion writes, "[r]ule 702's requirements notwithstanding, courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility."[11] This seemingly contradictory language is seen in many other district courts throughout the United States.[12] Additionally, the confusion about the court's role regarding expert testimony admissibility is seen amongst courts throughout the United States.[13]

The *Daubert* Misnomer

Since the 1993 case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, a case in which the Supreme

Court of the United States examined Rule 702, attorneys across the country have erroneously referred to motions to exclude expert testimony as "*Daubert* Motions." *Daubert* is, without a doubt, a pivotal Supreme Court decision. The *Daubert* opinion only confirmed that Rule 702 replaced the *Fyre* standard in federal courts and provided a non-exhaustive list of factors that courts should use in their Rule 702 analysis. Yet, despite the intended limited application of the *Daubert* decision, the *Daubert* decision slowly began to supplant Rule 702's standards. A strong presumption of admissibility for expert testimony interweaved itself within the *Daubert* standard. However, such a presumption directly contradicts Rule 702's standard.

Simply put, the *Daubert* decision and associated case law were never meant to replace Rule 702, but, over time, the *Daubert* decision did exactly that and, eventually, the practical application of the decision even contradicted Rule 702's standards.

Advisory Committee Commentaries

In May 2022, the advisory committee on evidence rules universally approved the change in language to Rule 702.[14] The advisory committee's memorandum declares that the change in the language of Rule 702 does not change anything, but clarifies how the rule should have always been applied.[15] Further, the committee alludes to the misnomer of the term "*Daubert* Motion" by writing, "[a]nd while *Daubert* mentions the standard, *Daubert* does so only in a footnote in the midst of much discussion about the liberal standards of the Federal Rules of Evidence."[16]

Key Takeaways

Although the amended Rule 702 has not officially gone into effect, counsel can and should begin utilizing this clarifying language immediately. Since the new language does not substantively change the rule, but rather only clarifies how the rule should have always been applied, it is reasonable for counsel to utilize the clarifying language before the official enactment date. It is also likely to begin to see more courts applying Rule 702's proper standard before the official effective date.

Moreover, counsel should put particular focus on the foundation in which its expert witnesses use to support their testimony and ensure such foundation is reliable. This focus includes preparing expert witnesses to be equipped to defend why such methodology and principles which the expert witnesses used to reach their conclusions are appropriate and applicable to the given case. Doing such will put counsel's experts in the best position to get passed the court's gatekeeping role and get the expert's testimony in front of the jury.

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[1] The U.S. Supreme Court will need to approve the new language by May 1, 2023, for it to go into effect by December 1, 2023. This timing allows for the required 7-month statutory period in which Congress can enact legislation to reject, modify, or defer the changes to the rule. 28 U.S.C. §§ 2074, 2075. For more information on the federal rulemaking process, *see* United States Courts, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts*, available at

https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public.

[2] *See* United States Courts, *Pending Rules and Forms Amendments*, available at https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments.

[3] *Armour Cap. Mgmt. LP v. SS&C Tech., Inc.*, 2020 WL 64297, at *7-9 (D. Conn. Jan. 5, 2020).

[4] *Id.* at *9.

[5] *See, e.g., Spegele v. USAA Life Ins. Co*., 336 FRD 537, at *544-45 (W.D. Tex. Sept. 23, 2020) (admits expert testimony; no description of a preponderance standard); *Bluetooth SIG, Inc. v. FCA US LLC*, 463 F. Supp. 3d 1169, 1181-82 (W.D. Wash. May 29, 2020) (admits expert testimony; acknowledging the acceptance of "[s]haky but admissible evidence").

[6] *Greco v. Broan-NuTone LLC*, 2020 WL 1044002, at *5 (D. Conn. Mar. 4, 2020).

[7] For more examples of such variability, *see* Kateland R Jackson & Andrew J. Trask, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020,* September 30, 2021, available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_study_of_rule_702_decisions_from_2020_–_sept_30_2021.pdf.

[8] *Moultrie v. Coloplast Corp.*, 2020 WL 1248913, at *2-3 (W.D. Pa. Mar. 16, 2020); *see also*, *Mountain v. United States*, 2020 WL 8571674, at *6 (D. Wyo. Sept. 11, 2020) (partially admits expert testimony; recognizing "the liberal thrust of the Federal Rules of Evidence, [and] the flexible nature of the Daubert inquiry").

[9] *See, e.g., Dries v. Sprinklr, Inc*., 2020 WL 7425602, at *3 (W.D. Wash. Dec. 18, 2020) (admits expert testimony; "The proponent of expert testimony has the burden of establishing that the admissibility requirements are met by a preponderance of the evidence" but "Rule 702 should be applied with a liberal thrust favoring admission").

[10] *Gustafson v. BI-State Dev. Agency*, 2020 WL 409011, at *1-2 (E.D. Mo. Jan. 24, 2020).

[11] *Id.*

[12] *See*, *supra*, n. 7.

[13] *Id.*

[14] *See* United States Courts, *Advisory Committee on Evidence Rules – May 2022* at pp. 6-7, *available at*, https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-evidence-rules-may-2022.

[15] *Id.*

[16] *Id.* at p. 6.

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