Expert Witnesses: Be Prepared for Changes to Federal Rules of Evidence

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Anyone serving as an expert witness should be aware that proposed amendments to Federal Rules of Evidence, Rule 702, could affect the admissibility of their expert testimony in the near future. These amendments, detailed below, concern two aspects of Rule 702. First, they would clarify that a proponent of expert testimony must demonstrate by a preponderance of the evidence that the testimony is admissible. Second, they would expressly require a court to find that the expert's opinion reflects a reliable application of the expert's methodology to the facts in the case. While in theory the amendments do not make any substantive changes to the law surrounding expert testimony and merely clarify the existing rule, in practice these changes could affect whether courts will admit expert testimony.

Proposed Amendments to Rule 702

Last year, after four years of research, the federal judiciary's Advisory Committee on Evidence Rules (Committee) unanimously approved two proposed amendments to Rule 702. The proposed changes to Rule 702 are as follows, with the additions in bold italics and the deletions struck through.

> **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 has demonstrated by a preponderance of the evidence that:***
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> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the ~~expert has reliably applied~~ ***expert's opinion reflects a reliable application of*** the principles and methods to the facts of the case.[1]

Preponderance Standard

The Committee unanimously agreed that adding the preponderance standard to Rule 702 would address an existing conflict among the courts in applying the rule. The Committee found that many courts have incorrectly determined that expert testimony is presumed to be admissible and that two of the rule's requirements—that an expert has relied on sufficient facts or data and has reliably applied a reliable methodology—are questions of

1 Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Standing Committee), *PRELIMINARY DRAFT: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence* (August 2021), 308–09, https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_0.pdf.

weight and not admissibility.[2] The Committee Note to the proposed amendments emphasizes that the addition of the preponderance standard to Rule 702 does not create a negative inference that a different standard applies for any of the other federal rules that are silent as to the standard. The Committee Note also explains that not all challenges to an expert's testimony go to admissibility; for example, the fact that an expert has not reviewed every study on the topic would go to the weight the jury decides to give the evidence and not whether the evidence is admissible. The Committee stated that once a court finds sufficient evidence that the admissibility requirements are met, any remaining attacks go to the weight of the evidence. The Committee further instructed that the preponderance standard does not require the exclusion of one side's expert merely because the parties' experts came to different conclusions based on a contested set of facts. Instead, the jury is left to decide which side's expert to credit when deciding disputed facts.

Reliable Application of Methodology

For the second proposed amendment, the Committee unanimously favored making a slight change to existing Rule 702(d) to clarify that a court must find that the expert's opinion actually proceeds from a reliable application of the methodology.[3] The Committee viewed this change as a way to empower courts to pass judgment on both the methodology and the conclusion the expert draws from a reasonable application of the methodology.

According to the Committee Note, the amendment to Rule 702(d) is intended to emphasize the judge's role as a gatekeeper with respect to the expert's ultimate opinion. An expert's opinion is bound by what can reasonably be concluded from a reliable application of the expert's basis and methodology. As gatekeeper, the judge determines whether an expert's conclusions exceed those bounds; a decision the jury may not be equipped to make.

The Committee views the judge's gatekeeping role as especially pertinent to forensic expert testimony, in both civil and criminal cases, admonishing forensic experts to "avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error."[4] The Committee Note instructs that when deciding whether to admit forensic expert testimony, "the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results."[5]

Impact on Admissibility of Expert Testimony

The period for public comment on the proposed amendments closed on February 16, 2022. The proposed amendments are currently with the Advisory Committee to determine what changes, if any, it will make before presenting the amendments to the Standing Committee. If the Standing Committee and then the Judicial Conference approve the proposed amendments in 2022, they will be sent to the Supreme Court for review. If the amendments are ultimately approved by the Supreme Court, they will go into effect on December 1, 2023.

Proponents of the amendments argue that there are no substantive changes to the evidence rules, and they merely clarify the standards Rule 702 always imposed. Proponents often cite to a study conducted by the Lawyers for Civil Justice,[6] which showed that in 2020 only 35 percent of cases referenced the preponderance standard, 65 percent of cases did not reference the proponent's burden of proof or the preponderance standard, and 13 percent of cases used language indicating a presumption of admissibility. The study also found that 61 percent of federal judicial districts were split internally as to what standard should be applied. Proponents of the amendments argue that these changes will help to settle a circuit split and provide more clarity and certainty to litigants about what is necessary for expert testimony to be admissible. Both the AICPA and the CalCPA submitted comments supporting the proposed amendments because they believe that the modifications would improve the quality of the judicial process involving expert opinions.[7]

2 Ibid., 297.
3 Ibid.
4 Ibid., 311.
5 Ibid.
6 Kateland R. Jackson and Andrew J. Trask, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, 2 (Arlington, VA: Lawyers for Civil Justice, Sept. 30, 2021), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008.
7 Peter W. Brown, CalCPA, FSS Chair, Re: Proposed Amendments to Rule 702 of the Federal Rules of Evidence (Feb. 2, 2022), available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0043; Bethany Hearn, Chair, AICPA Forensic and Valuation Services Executive Committee, Judicial Conference Advisory Committee on Evidence Rules (Jan. 24, 2022), available at https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0039.

Opponents of the proposed amendments argue that they are unnecessary and will likely cause judges to scrutinize the weight of the evidence, which is a task that belongs to the jury, and make it more likely that experts will be excluded. They also point out that while most states' rules of evidence mirror the federal rules (and some automatically change by statute when the federal rules are amended), not all states simultaneously adopt the notes along with the rules. As a result, important details included only in the Committee Note, like the rule against negative inferences discussed above, could lead to issues in state court. Opponents also argue that if Rule 702 is amended, it should use the phrase "preponderance of information presented," instead of "preponderance of the evidence," because, as the Committee Note clarifies, the judge can rely on all information presented, not just admissible evidence, when making an admissibility determination under Rule 702.

Throughout its recommendation and the Committee Note, the Committee emphasizes that the amendments are meant only to clarify the existing Rule and not to create substantive changes or impose new procedures. The Committee Note goes as far as to state that the rule does not require perfection or for the court to nitpick an expert's opinion. However, the intent behind the amendments is for courts to play a more active gatekeeping function when determining admissibility of expert testimony before allowing the jury to weigh the evidence. This renewed focus on the court's responsibility does not necessarily imply that more expert testimony will be deemed inadmissible. Nonetheless, if adopted, these proposed amendments would shift the focus to the judge's determination of both the strength of experts' principles and methods, and the reliability of their application of that methodology to the facts of the case when reaching their conclusions.

Both attorneys and expert witnesses should keep in mind the four elements of Rule 702 that will have to be shown by a preponderance of the evidence for the testimony to be deemed admissible. Forensic experts, in particular, should be prepared to discuss whether there is a known or potential error rate to show how often their methods produce accurate results. Some changes may need to be made to expert reports and expert testimony to adequately address the items these amendments seek to clarify, but experienced experts and attorneys should be able to navigate these changes. Out of an abundance of caution, experts who are retained now and who anticipate that their testimony may be called for after December 1, 2023, should assume that their testimony will be subject to the proposed amendments and prepare accordingly. VE

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