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A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence



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Amendments to Federal Rules of Evidence 702, 106, and 615 took effect on December 1, 2023. These rules address testimony by expert witnesses, the “rule of completeness,” and excluding witnesses from the courtroom and preventing those witnesses from accessing trial testimony. The amendment to Rule 702 has received the most attention because it is intended to correct more than two decades of missteps by many federal courts.

Rule 702

The modern iteration of Rule 702 developed from the “Daubert trilogy”—a series of United States Supreme Court cases in the 1990s that articulated the standards for admitting scientific and other expert testimony in federal court: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *Kumho Tire Co., Ltd. v. Carmichael*, and *General Electric Co. v. Joiner*. In 2000, Rule 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony, including the addition of the three reliability-based requirements that are found in subdivisions (b), (c), and (d) of the Rule. As the commentary accompanying the 2000 amendments explained:

In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.

The commentary further explained that “the admissibility of all expert testimony is governed by the principles of Rule 104(a),” under which “the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.”

Despite this guidance, many federal courts incorrectly applied Rule 702. According to Professor David Bernstein (co-author of *The New Wigmore: Expert Evidence* treatise), many courts resisted the judiciary’s gatekeeping role and “continued to apply significantly more lenient standards for expert testimony than Rule 702 permits.” Bernstein added, “[T]hese judges ignore the text of Rule 702” and, instead, rely on “precedents that predate (and conflict

with) not only the text of amended Rule 702, but also with some or all of the Daubert trilogy.” Inconsistent applications of Rule 702 led to “roulette wheel randomness” in court decisions.

In a landmark 2015 article, Professor Bernstein and co-author Eric Lasker demonstrated that many federal courts were not applying Rule 702 as intended, or even as written. Additional reviews of case opinions back up their observation. These include an article by Judge Thomas D. Schroeder, the chair of the federal Advisory Committee on Evidence Rules subcommittee on Rule 702, a Washington Legal Foundation report by practitioner Lee Mickus, and other reviews.

The organization Lawyers for Civil Justice reviewed all federal trial court opinions on Rule 702 motions in 2020 to quantify just how chaotic Rule 702 jurisprudence had become. Of the 1,059 trial court opinions studied, 65% did not cite the preponderance of the evidence standard. More disturbing was the extreme inconsistency within judicial districts. In 57 federal judicial districts, “courts split over whether to apply the preponderance standard when assessing admissibility.” In 6% of cases, courts cited “both the preponderance standard and a presumption favoring admissibility (a ‘liberal thrust’ approach)” — “a remarkable finding given that these standards are inconsistent with each other.”

The Advisory Committee on Evidence Rules independently studied the issue and confirmed that many courts had failed to correctly apply Rule 702. A June 2022 memorandum from the then-chair of the Advisory Committee on Evidence Rules, Chief United States District Court Judge Patrick Schiltz of the District of Minnesota, to the Committee on Rules of Practice and Procedure (Standing Committee) explained:

[M]any courts have declared that the reliability requirements set forth in Rule 702(b) and (d)—that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology—are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence. The Committee concluded 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—essentially treating these questions as ones of weight rather than admissibility, which is contrary to the Supreme Court’s holdings that under Rule 104(a), admissibility requirements are to be determined by court under the preponderance standard.

Chair Schiltz’s memorandum suggested that some courts may have erroneously applied the 2000 version of Rule 702 because “it takes some effort to determine the applicable standard of proof—Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while Daubert mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence.”

Rule 702 was amended effective December 1, 2023, to fix widespread misapplication of the Rule by courts. The amendment provides that the proponent of expert testimony must demonstrate “to the court that it is more likely than not” that the rule’s three admissibility requirements (Rule 702(b)-(d)) are met. As the commentary explains,

[T]he rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. See Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.

The Advisory Committee's work to study and ultimately address erroneous rulings by courts on Rules 702 and 104(a) provided a springboard for the Advisory Committee to consider other amendments to Rule 702. In particular, two leading scientific advisory groups—the National Academy of Science in 2009 and the President's Council of Advisors on Science and Technology (PCAST) in 2016—had critiqued certain forensic evidence techniques and concluded that Rule 702 had failed to ensure the reliability of such testimony. The PCAST report paid particular attention “to the problem of experts overstating their results,” according to Professor Daniel Capra, the Advisory Committee's reporter on Rule 702.

The Advisory Committee considered various approaches to address unreliable forensic testimony and ultimately chose to amend Rule 702(d) to “emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology.” The commentary states that in both civil and criminal cases “[f]orensic experts should 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.”

As amended in 2023, Rule 702 states:

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's opinion reflects a reliable application of the principles and methods to the facts of the case.

It is now clear that courts must perform a Rule 702 analysis before admitting an expert opinion over objection. A court cannot simply invoke the language of the Rule and then admit a proposed expert's testimony without finding by a preponderance of the evidence that the testimony meets all the Rule's requirements. Furthermore, the judge's gatekeeping duty is a continuing one. Rule 702(d) states that the expert's opinion must reflect "a reliable application" of her principles and methods. Thus, if an expert overstates an opinion at trial, the court must strike the testimony.

An early example of a court correctly applying the 2023 version of Rule 702 is the Fourth Circuit Court of Appeals' decision in *Sardis v. Overhead Door Corporation*, a wrongful death action where the court factored the Advisory Committee's findings and the amendment into its decision. The Fourth Circuit

reversed a verdict for the plaintiff, finding that the trial court had “improperly abdicated its critical gatekeeping role to the jury and admitted [the testimony of plaintiffs’ experts] without engaging in the required Rule 702 analysis.” The court criticized the trial court’s failure “to perform any Daubert analysis” and its ruling “that the issues of relevance and reliability impacted only the weight of the experts’ testimony, not their admissibility.” The court held that when “the admissibility of expert testimony is specifically questioned, Rule 702 and Daubert require that the district court make explicit findings, whether by written opinion or orally on the record, as to the challenged preconditions to admissibility.” Requiring written Rule 702 findings was a step forward in ensuring that trial courts enforce Rule 702.

Following the Fourth Circuit’s lead, there are other actions that courts and litigants can take to ensure Rule 702 is applied correctly.

Briefs and opinions should stress the preponderance (“more likely than not”) standard in Rules 702 and 104(a). As explained, Rule 702 was misapplied by many courts after the 2000 amendment because courts were erroneously applying Rule 104(b)’s more permissive standard. Lawyers must remind courts not only that the preponderance standard is to be applied, but also that a “liberal thrust” admission policy (or its cousin, the “presumption of admissibility”) is incompatible with the text of Rule 702. As the chair of the federal Advisory Committee’s Rule 702 subcommittee has written, the “elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility.”

Briefs and opinions also should avoid reliance on pre-2000 case law that is contrary to the text of the Rule. As commentators Eric Lasker and Lawrence Ebner have said, “the amendments effectively overrule a significant body of case law that has misconstrued and misapplied Rule 702 for more than 20 years.” Cases that misapplied Rule 702 “should no longer be cited.” Lasker and Ebner have further cautioned:

Importantly, this incorrect case law will not be flagged as such through Westlaw or Lexis, which generally only identify where cases have been expressly overruled or vacated by subsequent case law or statute.

Practitioners accordingly will need to review the reasoning presented in support of these opinions, and identify for the court where and how such opinions fail to apply the proper Rule 104(a) standard of review.

Judges, in turn, should expressly identify and reject these cases in their Rule 702 opinions to help weed out this flawed jurisprudence.

Rule 106

Federal Rule of Evidence 106 was amended to cover all statements, including unrecorded oral statements, and to provide that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. The commentary accompanying the Rule explains that courts had reached different conclusions as to whether completing evidence properly required for completion under the Rule could be admitted over a hearsay objection. As amended in 2023, Rule 106 states:

Rule 106. Remainder of or Related Statements

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Rule 615

Federal Rule of Evidence 615 was amended to clarify that, when entering an order to exclude a witness from trial to prevent that person from hearing the testimony of other witnesses, the court may also prohibit the excluded witness from learning about, obtaining, or being provided with trial testimony. In addition, the amendment clarifies that the exception from exclusion for entity representatives is limited to one designated representative per entity. Courts have flexibility to allow an entity party to swap one representative for another during trial “so long as only one witness-representative is exempt at any one time,” according to the commentary. As amended in 2023, Rule 615 states:

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney;

(3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

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