

NEW FRE 702

Rule 702 was amended in 2000 so that it reflected the holdings of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), and its progeny (e.g., *General Electric v. Joiner*, 522 U.S. 136 (1997), *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)). The amended Rule 702 says, in essence, a qualified expert may provide opinion testimony if a checklist of conditions is met. But since the 2000 amendment, some courts have ignored Rule 702's requirements and read into the rule a presumption of admissibility. This has resulted in too many juries hearing opinions that amount to little more than, "I'm an expert, therefore I'm right."

In December 2023, two further amendments to FRE 702 will take effect.

FRE 702 in its present form:

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:

- 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 the principles and methods to the facts of the case.*

The pending, amended FRE 702 with changes highlighted:

*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.***

According to the Rules Committee and Commentors, the purpose of the amendments is to obtain uniformity in the application of the rule across the federal circuits.

Pursuant to the amendments, expert testimony and opinions are no longer presumed admissible. Judges, as gatekeepers, must determine admissibility of expert testimony as a preliminary question based on the sufficient facts or data.

FRE 702: In Plain English

Rule 702 currently states that expert testimony must: (a) help the trier of fact understand the evidence or determine a fact at issue; (b) be based on sufficient facts or data; (c) be based on reliable principles and methods; and (d) be based on principles and methods reliably applied to facts of the case.

The new proposed rule states that 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.

The amendments, according to the Rules Committee, are intended to:

- 1) Clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not (i.e. by a preponderance of evidence) that the proffered testimony meets the admissibility requirements set forth in rule FRE 104(a) (i.e. the court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible....); and
- 2) Emphasize that the judge is the gatekeeper to assure that the evidence, which may constitute preliminary factual findings under Rule 104(a), is subject to the preponderance-of-the-evidence standard.

The new FRE 702 clarifies that expert testimony should not be presumed admissible on its face. Rather, an attorney seeking to have their expert's testimony admitted must prove, according to a preponderance of evidence standard, that the expert's methodology and principles are reliable, and that the expert reliably applied their methodology and principles to the case at issue.

Nothing in the amendment imposes any new, specific procedures. The amendments are intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Best Practices for Hiring an Expert Under the New Rule

With the more stringent standard of the pending Rule 702 amendment, below are five considerations to keep in mind that will improve your relationship with your expert while increasing the likelihood of admissibility.

1. Assess the Expert's Communication Skills

Because an expert may receive closer scrutiny under the amended Rule 702, advocates may need to develop innovative techniques to assess an expert's communication skills prior to hiring. While there is an art to finding and selecting the most technically astute person as an expert, credibility and influence are the characteristics that mark the best experts.

2. Look for an Expert Who Is a Good Teacher

An expert witness must be able to relate complex information in an understandable manner to both the judge and the jurors. The more complicated the topic, the more the expert should be an adept storyteller, providing examples and analogies to help educate. Jurors look to the expert to step into the role of professor and explain the technical concepts in a way they can understand.

3. Remember That Expert Witness Preparation Is Key

An expert should be well-versed in the requirements of Rule 702 and understand what is expected over and above technical knowledge. Consider working with your expert as to how they must convey the basis for their opinions to satisfy the court.

4. Hire the Expert Early

Hiring an expert early in the process ensures a better outcome. If an expert is hands-on with the data and analysis, they command more believability. Sometimes, an expert loses credibility because they fail to assess the data or research themselves. They may have relied on research associates to run an analysis or write a report. This can arise from a lack of sufficient lead time to prepare.

5. Ensure Your Expert Is Prepared to Support the Basis of Their Opinion

The new more-likely-than-not standard is essentially a de facto preponderance standard, which will become the universal norm under Rule 702 when the amendment is enacted. Because the decision of admissibility is at the judge's discretion, the proponent of the expert testimony must show admissibility by a preponderance of the evidence, and the expert's opinion must be reliable in light of the facts and applicable principles or methodology.

In Summary

Expert testimony will be subject to a higher admissibility standard and closer inspection under Rule 702—as amended—than some federal judges are used to imposing. An expert will need to be able to present their opinion and demonstrate that they have met the admissibility standards to the court, as well as be clear and persuasive to the jury.

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