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Changes to Rules Governing Expert Testimony Imminent

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Last month, the Advisory Committee on Evidence of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure voted to unanimously to recommend certain amendments to Federal Rule of Evidence 702, which governs the admissibility of expert witness testimony. This vote signals imminent changes that could significantly affect federal practitioners' requirements to demonstrate their experts' reliability.

Rule 702, which was further explicated by the seminal case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, allows for an witness to testify in the form of an expert opinion if the propounding party demonstrates the following foundation:

"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 advisory committee approved two amendments to the rule that clarify that an expert must meet all four elements of Rule 702 by a preponderance of the evidence, and require that the expert's opinion "reflects a reliable application of the principles and methods." The amended rule would thus read as:

"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**:

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** has reliably applied the principles and methods to the facts of the case."

The amended rule, therefore, more clearly establishes that judges should take a discerning approach to expert witness testimony, ensuring that only reliable evidence is presented to the jury as part of their deliberations. With respect to Rule 702(d), the amendment removes the current, more nebulous "reliably applied" standard with a new guidepost that heightens the judge's role as the gatekeeper of evidence.

The proposed changes to Rule 702 seem to be in response to growing concerns about unreliable expert testimony being admitted. While expert opinions are most often used in civil cases, concerns have also been raised about unreliable expert testimony in criminal proceedings. There has also been confusion between courts as to what standard to apply, with some courts applying the preponderance standard while others appearing to apply no discernable standard at all. Amending the rule as the Advisory Committee on Evidence has recommended could go a long way to ensuring that expert witnesses are subject to rigorous, and consistent, verification before their testimony is heard by the jury.

If these amendments are approved—which is expected later this summer, with final enactment in December 2023 pending Supreme Court approval—trial strategies and approaches could shift markedly. To ensure that expert witnesses can lay enough foundation to meet this new standard, litigation teams will need to take extra care in their selection of experts, such as by selecting witnesses who can sufficiently demonstrate expertise in the field in which they will offer an opinion. Likewise, experts will need to prepare their materials—including merits and rebuttal reports—with an eye towards maximizing their chances of meeting this standard. Finally, counsel will need to be prepared to both defend their experts, as well as challenge opposing experts, to determine the reliability of both the methods and applications of experts' methodologies. Engaging with counsel to secure reliable expert testimony – and ensuring that the reliability of said expert testimony is properly presented to a judge—will be essential to guaranteeing effective trial representation and securing favorable outcomes in court.

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