Proskauer

Amendments to Federal Rule 702, Now in Effect

Minding Your Business on **December 4, 2023**

Last year, we previewed impending changes to the federal rule that governs the admissibility of expert testimony: Federal Rule of Evidence (FRE) 702. Since our last blog post on this topic, Congress and the U.S. Supreme Court approved those amendments. And as of December 1, the amendments are in effect. Amended FRE 702 now reads:

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 the principles and methods to the facts of the case.

As we noted last year, the revisions to FRE 702 clarify that: (1) a court may not admit expert testimony unless the proponent establishes its admissibility by a preponderance of the evidence, and (2) a court must find that an expert's opinion follows from a reliable application of the methodology to the facts at issue before that opinion is heard by a jury.

In its Note regarding the amendments, the Advisory Committee emphasized that "[n]othing in the amendment imposes any new, specific procedures." The preponderance standard was previously implied in FRE 702, but, according to the Advisory Committee, express language was needed to correct certain courts' failure to correctly apply the rule: "[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." Court decisions that presumed admissibility or confused questions of admissibility as questions of weight are now bad law.

Last year we predicted that these revisions would necessarily shift practitioners' approaches to *Daubert* challenges and the use of experts at trial. Assuming courts will have a more discerning eye when confronted with expert testimony, we suggested that litigation teams take even greater care in selecting, preparing, and defending their experts. That recommendation is worth repeating—especially considering that federal courts, citing to the still-pending amendments, have already began excluding or limiting expert testimony that fails to meet the standard the amendments to FRE 702 are intended to clarify. *See, e.g.*, *Sardis v. Overhead Door Corp*. *See also* *United States v. Briscoe*.

For example, in *Sardis v. Overhead Door Corp.*, the Fourth Circuit found the district court committed reversible error by admitting testimony from two experts without analyzing the relevance and reliability of their testimony. *Id.* at 284. In doing so, the court cited the Advisory Committee's proposal to amend Rule 702, noting the amendments echo the prevailing law on the issue: "Consistent with that existing law––and in accordance with the Committee's pending rule––we confirm once again the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged on relevance and/or reliability grounds." *Id.* Other federal courts have not gone as far as to apply the amended version of Rule 702, but they have acknowledged it in dicta. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation* , 2022 WL 15053250, at *4, n.9 (E.D.N.Y. Oct. 26, 2022) ("…in deciding these [*Daubert*] motions the Court is mindful of the proposed amendments' purpose of 'emphasiz[ing] that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology' and 'explicitly weaving the Rule 104(a) standard into the text of Rule 702'") (quoting Committee on Rules of Practice and Procedure, Agenda Book, Tab 7A, at 891 (June 7, 2022).

Practitioners should not presume, however, that these amendments will make all *Daubert* challenges successful. In *Vanzant v. Hill's Pet Nutrition*, for example, the Northern District of Illinois rejected defendants' argument that the pending amendments to Rule 702 justified the exclusion of plaintiffs' proffered expert testimony. *See* No. 17-C-2535, 2023 WL 6976988, at *6, *11 (N.D. Ill. Oct. 23, 2023) (holding that "even if the language of the pending amendments to Rule 702 is considered," "Plaintiffs have shown that it is more likely than not that [their experts'] opinion[s] reflect[] a reliable application of the principles and methods to the facts of the case."); *id.* at *6 ("As the advisory committee explains, "[n]othing in the amendment imposes any new, specific procedures.") (quoting Fed. R. Evid. 702 advisory committee's notes to 2023 amendments).

Now that the amended rule is in effect, litigants may try to use these amendments to their advantage in *Daubert* motions, challenges, and at trial. Litigants should be mindful to use the amended rule to ensure that only reliable expert opinions are presented to the jury.

View original.

Related Professionals

- **Hannah G. Silverman**
  Associate