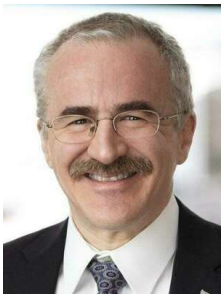
Time For Courts, Attorneys To Use Amended Evidence Rule

By **Eric Lasker and Lawrence Ebner** (July 20, 2023)



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After eight years of deliberation,[1] the U.S. Judicial Conference's Advisory Committee on Evidence Rules has prepared amendments to Federal Rule of Evidence 702.

The amendments, which have been approved by the Judicial Conference's Standing Committee and the U.S. Supreme Court, correct two widespread judicial errors that have caused many district court judges to abdicate their Rule 702 gatekeeping responsibility to protect jurors from exposure to unreliable expert testimony.

As amended, Rule 702 is amended as follows, with the new language underscored, and deleted language stricken:

> 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 has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Although not formally effective until Dec. 1, these amendments are intended to clarify the requirements imposed by the current Rule 702 and, as such, have already been relied upon by a number of courts.[2]

As those courts have recognized, the 2023 amendments may be cited now as persuasive authority because they are "'intended to clarify' how Rule 702 should have been applied all along," as the U.S. Bankruptcy Court for the Western District of Tennessee articulated in its In re: Anderson ruling in January.[3]

The amendments not only will be important going forward, but they also are equally important when looking back through existing Rule 702 case law.

Why? Because the amendments effectively overrule a significant body of case law that has misconstrued and misapplied Rule 702 for more than 20 years.[4]

Practitioners accordingly must take care in Rule 702 challenges to both educate courts on the new amendments and alert courts to the fact that many existing cases upon which they

may have routinely relied in their Rule 702 opinions were wrongly decided.

Practitioners should point courts to the committee note to the amended rule, which expressly states that many courts have been incorrectly applying Rule 702.

Practitioners also should review the advisory committee deliberations, available on the U.S. Courts website, which include memoranda and agenda books dating back to 2016 specifically identifying cases that have misapplied Rule 702 and, accordingly, should no longer be cited.[5]

Let's consider the new Rule 702 language.

The first amendment to Rule 702 was added, as the committee note states, "to clarify and emphasize" that proponents of expert testimony must demonstrate to the court that the proffered testimony satisfies each of the listed requirements in Rule 702 by a preponderance of the evidence.[6]

This preponderance of the evidence standard was already implicit in Rule 702 — indeed, it was specifically incorporated into a court's gatekeeping responsibility by the U.S. Supreme Court's 1993 Daubert v. Merrell Dow Pharmaceuticals Inc. decision.

But the advisory committee determined that an express amendment was needed because many courts had been avoiding their responsibility, holding that questions going to the bases and application of the expert's methodology went solely to the weight — and not to the admissibility — of the proffered testimony.[7]

"These rulings," the advisory committee explained, "are an incorrect application of Rules 702 and 104(a)."[8]

As noted by U.S. District Judge Thomas Schroeder, chair of the advisory committee's Subcommittee on Rule 702, this error arose from judicial confusion over Daubert regarding the use of cross-examination and contrary proof to challenge "'shaky but admissible evidence.'"[9]

Many courts had interpreted this language as liberalizing the admissibility standard and calling for use of the more lenient Rule 104(b) standard for admissibility, which is in fact in direct contravention of Daubert.[10]

All of this case law — whether citing expressly to Rule 104(b), or implicitly through the improper reliance on cross-examination and contrary proof as a safeguard against unreliable expert testimony — is incorrect and should be recognized as such.[11]

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.

The second amendment to Rule 702 requires proponents of expert testimony to establish an expert's "reliable application" of his or her methodology to the facts of the case. [12]

Judicial confusion regarding this requirement of Rule 702 can also be tied back to a misunderstanding of Daubert.

In Daubert, the Supreme Court noted that a court's gatekeeping analysis under the then-existing Rule 702 should focus solely on principles and methodology, not on the conclusions they generate.

But in General Electric Co. v. Joiner, the Supreme Court in 1997 clarified that "conclusions and methodology are not entirely distinct," and in 2000, Rule 702 was amended, in part, to expressly require courts to determine whether an expert had "unjustifiably extrapolated from an accepted premise to an unfounded conclusion."[13]

As the advisory committee again recognized in connection with the 2023 amendment to Rule 702(d), jurors who lack the specialized knowledge needed to meaningfully evaluate the reliability of an expert's scientific methodology and bases are likewise unable to determine whether an expert's conclusions go beyond what those methodologies and bases would reliably support.[14]

As amended, Rule 702(d) seeks to resolve any lingering confusion on this issue by clearly empowering the court to pass judgment on the reliability of the conclusions that the expert has drawn from his or her methodology.[15]

Prior opinions that disavowed this gatekeeping responsibility to protect jurors from improperly drawn expert conclusions were wrong when they were decided, and they should be discarded.

Again, this weeding out process will rely upon the diligence of practitioners to identify and expose cases that improperly ignored the Rule 702(d) requirement and the dedicated focus of judges to expressly hold that such cases are no longer — and indeed, never were — good law.

One final note: Courts that have failed to properly apply Rule 702 in the past have often relied on a mistaken understanding of the role of the judge and the role of the jury on issues of expert admissibility.

Although comfortable in considering factual issues in addressing other admissibility rules, like hearsay, these courts have shied away from considering factual issues related to the reliability of expert testimony, falling back on the mistaken mantra that all factual issues are to be decided by the jury.

The amendments to Rule 702 addressed this issue head on — specifically adding language making clear that it is the court that must decide that each of the elements of Rule 702 is satisfied.

As the advisory committee explained, "when it comes to making preliminary determinations about admissibility, the judge is and always has been a factfinder."[16]

The amendments to Rule 702 were a direct consequence of judicial confusion and recalcitrance, which has led many courts to fail in their gatekeeping responsibility to protect jurors from unreliable and misleading expert testimony.

To avoid such failures going forward, courts must not only hew to the new language of Rule 702, they must also recognize and reject legal precedents that are now clearly shown to have been in error.

And with the new amendments to Rule 702 soon to be in place, practitioners who blindly direct courts to prior case law for standards of expert admissibility are failing in their own responsibility to properly serve their clients' interests and fulfill their responsibilities as officers of the court.

Unless practitioners take the next step, and base their Rule 702 arguments on the language of the rule and on only those cases that apply the rule correctly, the vital protections set forth in the rule against unreliable expert testimony will be eroded, and the societal interest in securing legal decisions based on sound scientific evidence will be undermined.

The advisory committee has spoken.

It is time for attorneys — and courts — to use amended Rule 702.

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Disclosure: Lasker participated in a 2018 advisory committee roundtable meeting on the amendments at the committee's invitation, and he commented and testified in support of the amendments throughout the advisory committee process.

[1] The Committee deliberations were triggered by the law review article, D. Bernstein & E. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1 (2015).

[2] See, Sardis v. Overhead Door Corp., 10 F.4th 268, 283–84 (4th Cir. 2021) (relying on forthcoming Rule 702 amendments, which "echo[] the existing law"); Bishop v. Triumph Motorcycles (America) Ltd., Civil Action No.: 3:18-CV-186, 2021 WL 4316810, (N.D.W. Va. Sept. 22, 2021), aff'd No. 21–2113, 2022 WL 17103710 (4th Cir. Nov. 22, 2022); In re Anderson, Case. No.: 15-21681, 2023 WL 2229355 (Bankr. W.D. Tenn. June 20, 2023).

[3] In re Anderson, Case., 2023 WL 2229355, at *3.

[4] A discussion of this now-rejected prior judicial authority is beyond the scope of this column but can be found at D. Bernstein & E. Lasker, supra at 1; T.D. Schroeder, Toward a More Apparent Approach to Considering the Admission of Expert Testimony, 95 Notre Dame L. Rev. 2039 (2020); LCJ, Don't Say Daubert, https://www.dontsaydaubert.com/.

[5] See https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-

books?committee=44&year%5Bvalue%5D%5Byear%5D= ; see also supra n. 4.

[6] Jud. Conf., Comm. on Rules of Practice and Procedure, Comm. Note to Rule 702 at 228 (Oct. 19, 2022) ("2023 Committee Note") (citing Fed. R. Evid. 104(a)), https://tinyurl.com/2x38778a.

[7] 2023 Comm. Note at 228.

[8] Id.; see also id. ("The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard"); Advisory Committee on Evidence Rules, Minutes of the Meeting of November 13, 2020, at 4 ("[F]ederal cases . . . revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight."), https://tinyurl.com/37xjnu7r.

[9] Schroeder, supra at 4.

[10] Id. at 2042–43 (referring to Daubert v. Merrell Dow Pharm. Inc., 5098 U.S. 579 (1993).

[11] See Report of the Advisory Committee on Evidence Rules 5 (Dec. 1, 2020) (it is in the area of expert testimony that many courts are ignoring that standard."), https://tinyurl.com/yh3ybthn.

[12] 2023 Comm. Note at 230.

[13] Committee Note to 2000 Amendment to Rule 702.

[14] 2023 Comm. Note at 230.

[15] Report to the Standing Committee, Advisory Committee on Evidence Rules, at 6 (May 15, 2022), https://tinyurl.com/yu6f299b.

[16] Id. at 7. Courts also are factfinders in applying the Rule 702 requirements to expert testimony in connection with class certification. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011).