

## Expert Witness Testimony Rule Changes Would Serve Justice

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Federal Rule of Evidence 702, which sets forth the admissibility standard for expert witness testimony, can be one of the most useful weapons in a trial attorney's arsenal. Because the purpose of Rule 702 is to ensure judges exclude unreliable science from a jury's consideration, uniform application of the rule is critical.

This is especially true in products liability mass tort and toxic tort cases, which uniquely rely upon expert-driven science and medicine as proof of causation. Even the slightest variation in the application of Rule 702 can profoundly impact the fairness and reliability of jury verdicts, with important ramifications outside the courtroom, such as multimillion-dollar verdicts predicated on unreliable or inadmissible expert testimony.

Unfortunately, over the course of several decades, the inconsistent understanding and application of Rule 702 by federal courts nationwide have weakened the decision-making process for the admission of expert testimony. Currently, there is a lack of uniformity in the way federal courts evaluate the admissibility of expert testimony.

A recent example of this lack of uniformity is the RoundUp cases, where a [petition for certiorari](#) is pending before the U.S. Supreme Court. The defendant is seeking the court's guidance on, among other things, whether the "Ninth Circuit's standard for admitting expert testimony—which departs from other circuits' standards—is inconsistent with this Court's precedent and Federal Rule of Evidence 702."

Specifically, the Ninth Circuit's standard is biased towards admissibility as compared with other circuits. This bias is inconsistent with the burden of proof under Federal Rule of Evidence 104(a), which requires proof by a "preponderance of the evidence" as to admissibility of proposed expert testimony prior to being presented to the jury.

## Recommendations of Judicial Conference Advisory Committee

To address these concerns, the Judicial Conference Advisory Committee on Evidence Rules spent four years studying the inconsistent application of Rule 702 and debating possible amendments. Its goal is to ensure that juries are not deciding cases based on factually unsupported or otherwise unreliable opinion testimony, resulting in verdicts predicated on inadmissible evidence. As a result, the committee recently proposed amendments to help clarify the rule's requirements and encourage uniformity in application.

The proposed amendments are intended to:

- 1. clarify the admissibility standard within the rule's language; and
- 2. emphasize the judicial gatekeeping authority established in [Daubert v. Merrell Dow Pharmaceuticals Inc.](#)

Specifically, the [amendments](#) would change Rule 702 as follows: (1) clarifying that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence; and (2) emphasizing that as gatekeeper, the court must require that an expert's conclusions be supported by the specific basis and methodology relied upon by the expert.

Confirming the need for these amendments, the Lawyers for Civil Justice (LCJ) recently published a [comprehensive research study](#) examining all federal cases decided in 2020 that addressed the admissibility of expert testimony under Rule 702. Interestingly, the LCJ study reached the same conclusion as the judicial advisory committee's regarding the lack of uniformity and predictability in the admissibility standard.

In particular, the LCJ study found that federal courts are split over whether to apply the preponderance standard—which is mandated by Rule 104—when assessing the admissibility of expert testimony under Rule 702.

In fact, in almost two-thirds of the cases studied, the trial judge did not even mention the preponderance standard when deciding to admit or exclude expert testimony. And in 13% of the cases, the judge described Rule 702 as having a “liberal thrust,” “favor[ed] admission,” of expert testimony, or stated that “exclusion is the exception rather than the rule.”

Additionally, the 2020 cases underlying the LCJ study (described in the appendices to the LCJ study) highlighted the second problem with the application of Rule 702: Some courts also made admissibility determinations based solely on the reliability of an expert's methodology, yet failed to consider

whether the conclusion reached by the expert was a reliable application of that methodology.

## **Amendments Would Help Courts Adhere to Admissibility Standards**

The proposed amendments are a much-needed clarification that should assist courts in understanding and adhering to the rule's standards, particularly in jurisdictions such as the Ninth Circuit, where courts apply a "presumption of admissibility." A virtual public hearing is scheduled for Jan. 21, 2022, with any public comments due to the committee no later than Feb. 16, 2022.

If the judicial advisory committee approves these amendments, the larger Committee on Rules of Practice and Procedure will conduct an independent review and analysis. The proposed amendments would then have to be recommended to a third committee, the Judicial Conference of the U.S.

The judicial conference would then recommend the amendments to the U.S. Supreme Court. If the court approves the amendments by May 1, 2022, the amendments would become effective on Dec. 1, 2022 (unless Congress enacts contrary legislation).

The adoption of these amendments would help ensure that only reliable and relevant expert testimony is admitted, thereby improving the judicial system and jury outcomes. And they may help reduce forum shopping by eliminating jurisdictions where the admission of expert testimony is "easier."

Given the great weight jurors often give expert testimony, it is critical to ensure that expert testimony and opinions are reliable. While the proposed amendments may ultimately increase the length and cost of litigation due to more expert challenges and the need to bullet-proof expert opinions, any costs are outweighed by the benefit to the justice system in excluding unreliable expert testimony.

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