

Amended Federal Rule of Evidence 702



Impact:

- Clarifies preponderance of evidence standard as to expert testimony.
- Confirms the court's function as a gatekeeper to exclude unreliable or unsupported opinion testimony or "junk science".
- Helps promote uniform application of Rule 702 in federal courts and prevent forum shopping.
- May be adopted by some state courts by statute or rule.
- May allow for the courts to dispose of multiple cases at once.

Quick Facts:

- Rule 702's amendments clarify the proponent of the evidence has the burden to establish admissibility of expert evidence by a preponderance of the evidence ("more likely than not").
- An expert's opinion must reflect a reliable application of the principles and methods to the facts of the case.
- Amended Rule 702 can be used to encourage courts to honor their gatekeeping function and keep "junk science" out of the courtroom.

What is Rule 702?

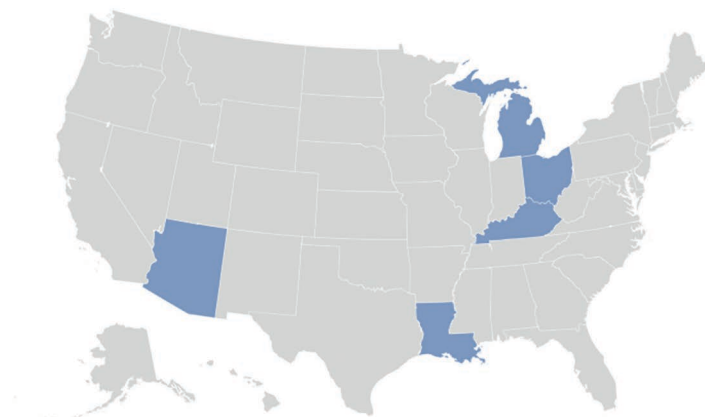
Federal Rule of Evidence 702 requires that an expert's knowledge assist the judge or jury to understand the evidence. The Advisory Committee on Evidence Rules examined Rule 702 and identified issues with how federal courts across the country were applying the rule. The Advisory Committee found many courts viewed the factual basis and reliability of an expert's methodology as going to the weight of the evidence rather than its admissibility. The Advisory Committee determined that, at times, this interpretation would allow juries to decide cases on what may be unreliable expert testimony. Amended Rule 702, effective December 1, 2023, does not impose any new requirements but rather clarifies the requirements for the admissibility of expert witness testimony.

One of the byproducts of various federal courts employing different applications of Rule 702 was that "junk science" often was presented to juries. Junk science is a term that reflects the expert's lack of methodology or reliance upon unfounded or irrelevant information. This allows expert's to testify without a predetermination that an opinion was soundly based on accurate information and reasoning.

State of the States

Rule 702 is a federal rule of evidence. Efforts are being made for states to adopt Rule 702 in lieu of state standards such as *Daubert*¹ or *Frye*².

States adopting Rule 702: AZ, KY, LA, MI, OH



The amendments to Rule 702 are indicated below:

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 accompanying Committee Note indicates the proposed amendments have two primary purposes: (i) to clarify and emphasize that the admissibility requirements of subsections (a) through (d) must be established by a preponderance of the evidence and (ii) the addition to subsection (d) emphasizes the court's gatekeeping function.

Solutions

Amended Rule 702 clarifies the standard when it comes to admissibility of expert witness testimony. Courts can be encouraged to properly apply Rule 702 and hold fast to their gatekeeping function to keep “junk” science out of the courtroom. Rule 702 is a federal rule and applied in federal courts. Individual state standards governing the admissibility of expert evidence differ. State adoption of Rule 702 may provide consistency and predictability with respect to the admissibility of expert evidence and may help prevent forum shopping.

Zurich North America Initiatives

- Proactively supports efforts to enforce the requirements of Amended Rule 702.
- Encourages state adoption of Amended Rule 702.
- Leads the development and collaboration of industry partners on all lawsuit abuse reform efforts.
- Advocates for all lawsuit abuse reform issues impacting Zurich and its customers through its Government & Regulatory Relations (GRR) team.
- Created the first Claims Judicial & Legislative Affairs (CJLA) unit within Zurich North America Claims as a social inflation task force comprised of a dedicated team of experts to provide education and advocacy support.
- Launched and participates in the annual Lawsuit Abuse Reform Symposium with industry coalition members.
- Hosts Zurich Defense Attorney Summit twice a year through CJLA.
- Publishes Quarterly Digest to keep industry advocates informed through CJLA.

What can you do?

- Challenge expert testimony and causation evidence that does not pass muster.
- Encourage the court to adhere to its gatekeeping function and exclude “junk science” that does not meet the standard set forth in Amended Rule 702.
- Support civil justice organizations seeking state adoption of Rule 702.

To learn how you can get involved, contact Zurich North America's Claims Judicial & Legislative Affairs team at usz_cjla@zurichna.com.



¹ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

² *Frye v. United States*, 293 F. 1013 (1923).

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