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Federal Rule of Evidence 702(d) changes clamp down on mismatched expert conclusions

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Overview

On December 1, 2023, amendments to Federal Rule of Evidence 702 ("Rule 702") regarding expert admissibility went into effect. The Advisory Committee on the Rules of Evidence (the "Advisory Committee") has made clear the changes to the Rule 702 are not intended to alter the law. Indeed, "[n]othing in the amendment imposes any new, specific procedures."[1] Rather, the amendments are intended to reassert the correct standard for expert admissibility in light of frequent and consistent misapplications.

Rule 702 will now state the requirement that "the expert's opinion reflects a reliable application of *the principles and methods to the facts of the case."*

Specifically, the amendments:

(1) address the standard of proof — making clear that it is the proponent who has the burden to establish admissibility of the expert by a preponderance of the evidence ("more likely than not"); and

(2) course correct on how courts assess issues that go to weight versus admissibility.

This second change includes a key language change to Rule 702(d).

Rule 702 will now state the requirement that "the *expert's opinion reflects a reliable application of* the principles and methods to the facts of the case." In so requiring, the amendment is consistent with the U.S. Supreme Court's decision in *Joiner*, where the Court held that testimony should not be admitted when there is "too great an analytical gap between the data and the opinion proffered."[2]

Courts must consider both the expert's methodology *and* the expert's conclusion. And the methodology must not only be reliable; it must be reliably applied.

This second change is thus intended to resurrect scrutiny of whether there is a connection between the expert's analysis and the conclusions the expert reached. The Advisory Committee Notes emphasize that this is an important component to the *admissibility* question when it comes to expert testimony — not just the weight of that testimony:

> Judicial gatekeeping [on connection between analysis and conclusions] is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.[3]

How the Rule 702(d) change addresses the connection between an expert's analysis and conclusions

Through the Rule 702(d) change, the Advisory Committee sought "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."

This renewed focus on the analytical connection between an expert's conclusion and methodology has important applications to all types of expert testimony.

This change is especially pertinent to forensic or scientific testing. Prior to the amendment, one thing the Advisory Committee found particularly concerning was "the problem of overstating results (for example, an expert claiming that her opinion has a 'zero error rate,'" where that conclusion is not supportable by the expert's methodology)."[4]

Despite the concern, the Advisory Committee declined to create a separate standard for forensic experts because Rule 702(d) already required such an analysis. Instead, the Committee "unanimously favored a slight change to the existing Rule 702(d) that would emphasize 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."[5]

"It is only in the Notes where the Committee separately addresses the forensic expert question: 'In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results.'"[6]

Thus, although forensic experts were of concern, the Advisory Committee was specific in deciding that the Rule change applies to all experts.

The Advisory Committee therefore opted to revise the language of Rule 702(d) to reanimate the need to evaluate whether the conclusions flow from the methodology. As the Committee unambiguously stated: "The language of the *amendment more clearly empowers* the court to pass judgment on the conclusion that the expert has drawn from the methodology" and is consistent with "*General Electric Co. v. Joiner*, 522 U.S. 136 (1997), in which the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion."[7]

Although the Rule "does not require perfection," it nonetheless "does not permit the expert to make claims that are unsupported by the expert's basis and methodology."

This renewed focus on the analytical connection between an expert's conclusion and methodology has important applications to all types of expert testimony, not just forensic analysis. Indeed, courts have long agreed that an expert's conclusions cannot be the mere *ipse dixit* of the expert. But excluding experts under Rule 702(d) is not limited merely to situations where an expert makes a bald conclusion.

Some examples where courts correctly applied fulsome scrutiny even where there was more to the expert's analysis (prior to the recent Rule 702 amendment) include:

- *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*[8] Court excluded expert that failed "to explain how methodology designed to be used for one purpose (valuation of personal data) reliably can be used for a completely different purpose (estimating the total quantity of sales of one person's personal data)" because it "fail[ed] to comply with the requirement of Rule 702(d) that the proponent of expert opinion testimony has 'reliably *applied the principles and methods to the facts of the case*.'"[9]
- *Zimmer, Inc. v. Stryker Corp.*[10] Court excluded expert where "the record contains many readily apparent facts that pose alternative explanations for [Plaintiff's] drop in sales figures, yet these details went unconsidered by [the Expert]" rendering the conclusion unsupported by the analysis.
- *Sherer-Smith v. C.R. Bard, Inc.*[11] Court excluded expert opinion that the Bard mesh was a substantial factor in causing plaintiff's injuries: "Rule 702(d) requires that [an expert] reliably apply those methods to the facts of the case. A differential etiology need not rule out every conceivable cause. But a differential etiology is deficient if it ignores a significant potential cause, or if the decision to rule in or rule out a potential cause is not based on reliable methods or sufficient data. And an expert's opinion is not admissible if it gives only the expert's bottom line, without explaining how the expert's conclusion is connected to the facts of the case."

This reanimated analysis-conclusion scrutiny is closely related to the 'fit' requirement, but litigants should be careful when using '*Daubert*' as shorthand

The Rule 702(d) changes thus emphasize that it is not enough to just point to a reliable methodology — the methodology must be reliably applied to and relate to the actual case at hand. This goes hand in hand with the fit requirement.

As *Daubert* explained, pre-Amendment: "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.[12] ... The study of the phases of the moon, for example, may provide valid scientific 'knowledge' about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night."[13]

Nonetheless, litigants should be careful when using the term "*Daubert*." The standard for expert admissibility is Rule 702, not *Daubert*. The use of the term *Daubert* as shorthand for expert testimony instead of "Rule 702" has affected litigants' and courts' understanding of what standards apply to expert testimony.

The continued reference to the "*Daubert* standard" has perpetuated reliance on case law that predates the 2000 Amendment to Rule 702 and, in some cases, even predates *Daubert* itself. Thus, it is best to avoid the shorthand "*Daubert*" or "*Daubert* motion" — opt for "Rule 702" or "Rule 702 motion" instead.[14]

Indeed, the Rule change serves as a powerful corrective to using *Daubert* as shorthand for all admissibility standards. The Rule amendments serve as a reminder that the relationship between the expert's methodology and conclusions go to admissibility, not weight.

Rule 702 is therefore extremely clear: an expert must have a reliable methodology. But that methodology must then be reliably applied to the facts of the case.

Conclusion

The Rule 702(d) amendment addresses an essential component of the Rule 702 inquiry, as the expert's conclusion or opinion is the critical piece that will get presented to the jury or court. The conclusion must flow from the analysis. Thus, although the Rule

"does not require perfection," it nonetheless "does not permit the expert to make claims that are unsupported by the expert's basis and methodology."[15]

Going forward, courts and litigants should be mindful of this amendment and use it — courts, in particular, to honor their gatekeeping function against unreliable "expert" testimony, and litigants to help police this important gatekeeping function.

Notes

[1] *See* Final Amendments to the Federal Rules of Evidence (December 1, 2023), available at https://bit.ly/3tnjmXD, at 18-22.

[2] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[3] *See* Final Amendments to the Federal Rules of Evidence (December 1, 2023), available at https://bit.ly/3tnjmXD, at 18-22.

[4] Draft Advisory Committee Notes to 2023 Amendments. https://bit.ly/3NwJO82

[5] *Id.*

[6] *See* Final Amendments to the Federal Rules of Evidence (December 1, 2023), available at https://bit.ly/3tnjmXD.

[7] Draft Advisory Committee Notes to 2023 Amendments. https://bit.ly/3NwJO82

[8] 602 F. Supp. 3d 767, 788–89 (D. Md. 2022).

[9] Fed. R. Evid. 702(d) (emphasis added).

[10] No. 3:14-CV-152 JD, 2018 WL 276324, at *5 (N.D. Ind. Jan. 3, 2018).

[11] No. 19-CV-903-JDP, 2020 WL 1470962, at *4 (W.D. Wis. Mar. 26, 2020).

[12] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

[13] *Id.*

[14] *See* https://bit.ly/478MorE; *see also* Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020* (September 30, 2021), available at https://bit.ly/488RAx9.

[15] *See* Final Amendments to the Federal Rules of Evidence (December 1, 2023), available at https://bit.ly/3tnjmXD.

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