

One Step Closer to a Revised Standard for the Admissibility of Expert Testimony Under Rule 702

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The Judicial Conference of the United States' Committee on Rules of Practice and Procedure seems poised to advance proposed amendments to Federal Rule of Evidence 702, after the Advisory Committee on Evidence unanimously voted to approve the proposed amendments and recommended that the Committee on Rules of Practice and Procedure refer the amendments to the Judicial Conference for a full vote.

Rule 702 governs the admissibility of expert testimony and sets the standard that the proponent must meet. The current federal standard is colloquially known as the *Daubert* standard after a 1993 Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The proposed amendments are intended to further clarify Rule 702's admissibility standard and to emphasize a judge's gatekeeping authority to allow or disallow expert testimony under *Daubert*. Specifically, the Rule would be modified as follows (additions in bold and deletions in strikethrough):

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.

The key change would be spelling out the "preponderance of the evidence" standard, which has been inconsistently applied by federal courts.

As part of the amendment process, the proposed amendments to Rule 702 were subject to a period of public comment, which recently closed. The proposed “preponderance of the evidence” language received many comments, particularly from civil litigators. The [Advisory Committee on Evidence’s report](#) noted that approximately 80% of all public comments were against the amendments, with “almost all” of the opposition coming from the plaintiffs’ bar.

The plaintiffs’ bar has opposed the changes fearing that more stringent standards would favor defendants, whereas the defense bar is in favor hoping to end what they view as the current too lenient standard that allows unreliable expert testimony to be admitted. The opponents criticize the proposed rule, contending that it will ultimately lead to the exclusion of an even greater number of proposed experts. Moreover, opponents claim that the proposed amendments will result in a dramatic increase in expensive and timely mini-trials while a judge weighs admissibility. By contrast, [proponents of the rule amendments](#) argue that these amendments are necessary to empower judges, as gatekeepers of evidence, to prevent unreliable expert testimony from being admitted.

As is usual with discussions related to expert witnesses and *Daubert*, the focus is largely on the civil side and the ramifications on the criminal side are usually an afterthought. To be fair, expert issues are far more prevalent in civil matters than in criminal matters. That being said, both the [National Association of Criminal Defense Lawyers](#) (“NACDL”) and the Innocence Project submitted comments in favor of the proposed amendments. The NACDL noted that “the need to exclude unreliable or dubious evidence is particularly acute in the criminal context” because prosecutors have used witnesses with “spurious fields of expertise” and secured wrongful convictions. The Innocence Project, on behalf of itself and other public interest organizations, emphasized “the importance of amending Federal Rule of Evidence 702 to bring scientific integrity to proceedings in which life and liberty are at stake.” They also proposed an amendment to Rule 702(c), suggesting language that would highlight “the limitations and uncertainty of those principles and methods.”

Though less common, expert witnesses also play a crucial role *for the defense’s affirmative case* in a variety of criminal prosecutions. For example, defendants often call upon their own expert witnesses, ranging from forensic scientists to accountants, to counter the government’s theory of the case. But it does not appear that any of the public comments have discussed how changes to Rule 702 may impact the defense’s use of expert witnesses.

Stay tuned to find out if these amendments are enacted. If the Committee on Rules of Practices and Procedures advances the amendments, the full Judicial Conference will review the proposed changes and public comments later this summer. If the Judicial Conference recommends advancing the Rule 702 amendments, then the Supreme Court will approve or deny the proposed rule change (Supreme Court recommendations are generally issued in April). A Supreme Court-approved rule change will go into effect December 2023, unless Congress passes a law preventing the amendments from taking effect.

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National Law Review, Volume XII, Number 165

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