

# The Impact of New FRE 702 Amendments on Mass Tort Litigation

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Experts often provide the most impactful and influential testimony a jury hears at trial. Unfortunately, even though many experts possess advanced college degrees and other impressive credentials, and testify with an air of confidence, that doesn't mean their opinions are grounded in reliable scientific principles and methodologies. Toxic tort cases routinely come down to a battle of the experts, and if experts can give "junk science" opinions, that makes for unfair advantage at trial, and can unjustly result in multi-million-dollar verdicts.

With the stakes so high, it should come as no surprise that parties often seek to suppress the number of experts and the content of their testimony. In doing so, attorneys and judges rely on Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert testimony in federal courts, to make their expert testimony suppression arguments. Prior to FRE 702's amendment, many federal judges erred on the side of admitting testimony even if it had questionable scientific rigor. Under that approach, only the most seriously flawed testimony ends up being barred, and it may be beyond the jury's ability to discern what science is legitimate and what is not.

In December of 2023, FRE Rule 702 was amended to clarify the standard the courts must apply as gatekeepers when ruling on admissibility issues. To either defend their own or suppress opposing parties' expert opinions, parties to litigation and their counsel must understand the nuances of this amendment and how it affects their cases within complex litigation.

## The Amendment

As amended, the new rule reads as follows (additions are in bold; deletions are crossed out):

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.

The Advisory Committee on Civil Rules has made it clear that this amendment was not intended to alter the law, but rather to emphasize the court's gatekeeping role over expert testimony and the burden of proof required for admission. Thus, the Amendment aims to correct the frequent misapplication by the courts of this standard in two important ways:

First, the Amendment demands that the judge perform a Rule 702 analysis before admitting an expert opinion over objection. A court may not simply invoke the language of the Rule and then admit a proposed expert's testimony without finding **by a preponderance of the evidence** that the testimony meets each of the four requirements of the Rule.

Second, the amended language requires a **stricter connection between experts' conclusions and the methodology** used to come to those conclusions. This language's intent is to allow courts more flexibility to scrutinize experts who exaggerate their opinions. The Amendment emphasizes a court's duty to determine whether an expert's opinion is more likely than not supported by their methodology used.

Of course, it will likely take years to know the true impact of this amendment. But federal courts are beginning to take note. For example, one Federal Court last month ordered a "full refiling of *Daubert* motions" in a talc case against Johnson & Johnson because the court was "persuaded that the recent changes to Federal Rule of Evidence 702, the emergence of new relevant science, and the language of [the prior judge's previous] *Daubert* opinion" made this necessary. This has the potential to be a major victory for Johnson & Johnson and other defendants who repeatedly assert that the opinions proffered by plaintiffs lack grounding in reliable scientific principles and methods.

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