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With the Federal Rule of Evidence 702 Amendment in Place, Federal Courts Issue Rulings in Conformity with the Changes, and Attention Shifts to the States

JUNE 28, 2024

It has now been over six months since the amendment to Federal Rule of Evidence 702 regarding the admissibility of expert testimony went into effect on Dec. 1, 2023.

That amendment clarifies that: (1) the proponent of the expert has the burden to establish the admissibility of the expert testimony by a preponderance of the evidence standard; and (2) the expert's opinion must reflect a reliable application of the principles and methods to the facts of the case.



The changes have been championed as a correction to the misapplication of the Rule by courts, including courts that had repeatedly abdicated their gatekeeping function by admitting expert testimony without engaging in the required Rule 702 analysis. The Advisory Committee emphasized the importance of the gatekeeping function when it amended Rule 702 in 2000[1] and again reaffirmed its importance upon this amendment in 2023:

> "Judicial gatekeeping is essential because" jurors may "lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support."[2]

Following the recent Rule 702 amendment, federal courts and states are responding with renewed focus on the gatekeeping function of courts. This article takes a quick look at the federal court decisions that have cited the Rule 702 amendment since its enactment, as well as some of the state reform efforts in light of the federal Rule 702 amendment.

Court Decisions Citing the Rule 702 Amendment

Even before the Rule 702 amendment went into effect, the U.S. Court of Appeals for the Fourth Circuit cited the amendment favorably, noting that the amendment "echoes the existing law on the issue" and confirms "the indispensable nature of district courts' Rule 702 gatekeeping function" in cases challenging expert testimony. *See Sardis v. Overhead Door Corp.*, 10 F.4th 268, 284 (4th Cir. 2021).

Since the passing of the amendment, several federal courts have issued favorable decisions citing the Rule 702 amendment and excluding plaintiffs' unreliable expert testimony.[3] For example:

- **In re Paraquat Products Liability Litigation, 2024 WL 1659687 (S.D. Ill. Apr. 17, 2024) (appeal filed):** In Paraquat, the Southern District of Illinois excluded plaintiffs' general causation expert. Id. at 42. The expert conducted a meta-analysis of seven epidemiological studies to measure the potential association between paraquat and Parkinson's disease. Id. at 2. Relying on the new Rule 702 amendment, the court excluded the expert and found the expert's meta-analysis "not sufficiently reliable under Rule 702" based on the expert's "failure to reliably apply his chosen methodology." Id. at 33. Examples of how the expert failed to reliably apply his methodology included his "failure to clearly predefine his eligibility criteria, his subsequent redefinition of eligibility criteria, his varying definitions of quality criteria, and his inconsistent application of quality criteria." Id.
- **In re Onglyza (Saxagliptin) and Kombiglyze (Saxaglipton and Metformin) Prod. Liab. Litig., 93 F.4th 339 (6th Cir. Feb. 13, 2024):** In Onglyza, the Sixth Circuit affirmed the exclusion of plaintiffs' general causation expert-a cardiology professor testifying about the cause of heart failure-due to unreliability. Id. at 344, 348. The court cited three reasons for excluding the cardiology expert: "(1) improper reliance on SAVOR to the exclusion of all other human studies, (2) unqualified analysis of animal studies, and (3) cherry-picking and inconsistent consideration of the Bradford Hill factors." Id. at 345. In excluding the expert, the court cited the Rule 702 amendment, emphasizing the importance of the court's gatekeeping function and the burden of proof on the party proffering the expert. Id. at 345.
- **United States v. Diaz, 2024 WL 758395 (D.N.M. Feb. 23, 2024):** In Diaz, the District of New Mexico excluded testimony from experts in drug trafficking and firearms because the government did not show by a preponderance of the evidence that the experts' testimonies would be helpful to the jury. Id. at *9-10. In so doing, the court cited the Rule 702 amendment and the advisory committee notes, emphasizing the burden of proof of the party proffering the expert and the gatekeeping function of the court. Id. at *4-5.
- **In re Acetaminophen ASD-ADHD Products Liability Litigation, 2023 WL 8711617 (S.D.N.Y. Dec. 18, 2023) (appeal filed):** In Acetaminophen, the Southern District of New York excluded plaintiffs' general causation experts' opinions regarding Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, and biological plausibility. Id. at 49. The court cited Rule 702 amendment's emphasis on judicial gatekeeping in coming to its conclusion. Id. at *16, n.27. The court concluded the plaintiffs did not carry their burden of showing that Dr. Baccarelli's opinions (an epidemiologist proffered by plaintiffs) "reflect[] a reliable application of the principles and methods to the facts of the case." Id. at 30-35. The court excluded several other experts proffered by plaintiffs for similar reasons.

Six months after the amendment, federal courts are already upholding the gatekeeping function that was reaffirmed in the Rule 702 amendment. Litigants should be mindful of the amendment and consider how to leverage these cases in disputes to exclude opposing parties' unreliable experts.

State Action

Organizations and attorneys have started calling for the states to follow the lead of the Federal Rules in amending their Rule 702 equivalents. And several states have in fact re-examined their rules. This article details a few examples of state action.

Ohio

The Supreme Court of Ohio Commission on the Rules of Practice filed a proposed amendment to Rule 702 with the General Assembly for final consideration. Absent adoption of a concurrent resolution of disapproval by the General Assembly the amendment will go into effect July 1, 2024.

As shown below, the proposed amendment to Ohio Rule of Evidence 702 tracks the changes made to Federal Rule of Evidence 702:



Arizona

Following a petition and period of comments, the Arizona Supreme Court ordered the amendment of Arizona Rule of Evidence 702 to bring it into conformity with the recently amended Federal Rule of Evidence 702. The Arizona amendment, posted below, went into effect Jan. 1, 2024.



In the months following its passage, Arizona courts citing the Arizona Rule 702 amendment have come to different results regarding the exclusion of expert testimony. For example:

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  - **McAlister v. Loeb, 2024 Ariz. App. Unpub. LEXIS 94 (2024):** In McAlister, the Court of Appeals of Arizona, Division One affirmed the lower court's exclusion of plaintiffs' loss profits damages expert as unreliable and speculative. Id. at *16, *29. The court found there to be "too great an analytical gap between the data and the opinion proffered" because the expert speculated about critical facts, ignored expenses, and used an algorithm that assumed profitability based on speculative revenue alone, without adequate explanation. Id. at *16. In excluding the expert, the court reiterated the proponent's burden of proof and the gatekeeping function, citing Arizona's Rule 702 amendment. Id. at *14, n.5.
  - **State v. Kelly, 545 P.3d 478 (Ct. App. Ariz. 2024):** In Kelly, the Court of Appeals of Arizona, Division One found that the lower court did not err by admitting the expert officer's opinion regarding the cause of the collision and Kelly's speed. Id. at 486. The court found the officer's methods were reliable and reliably applied in the case because he explained in detail how he came to his conclusions and addressed alternative explanations, which was sufficient given the facts of this case and the method applied. Id. In upholding the lower court's ruling, the court cited to the amended Arizona Rule 702 and emphasized the court's gatekeeper function. Id. at 485.

Michigan

The Michigan Supreme Court ordered the amendment of Michigan Rule of Evidence 702 on March 27, 2024, following a period of comments. The amendment went into effect on May 1, 2024. Like the amendments in other states, the Michigan amendment tracks the recent changes to Federal Rule of Evidence 702:



Kentucky

The Kentucky Evidence Rules Review Commission recommended adoption of an amendment to Kentucky Rule 702 that reflects the changes made to the federal rule:



The Chief Justice reported the proposed changes to the General Assembly, and the period for written comments closed on April 15, 2024. The General Assembly did not disapprove of the amendment to the Rules of Evidence by resolution during the 2024 Regular Session, and so the Chief Justice ordered KRE 702 amended as of June 24, 2024, effective July 1, 2024.

Conclusion

The Federal Rule of Evidence 702 changes reinforce the gatekeeping function of the court and protect fact finders from expert testimony relying on junk science, or otherwise reliable methods that are unreliably applied to the facts of a case. States have begun turning to their state equivalents of Rule 702 and amending them to reflect the changes made to the federal rule. In the months that follow, other states may similarly amend their Rule 702 equivalents to reaffirm the gatekeeping function of the court and establish consistency among jurisdictions. Practitioners should look to these amendments and the cases applying them when challenging experts so as to understand what it takes for the proponent to meet their burden and how courts are applying their gatekeeping function.

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[1] Fed. R. Evid. 702, Advisory Committee Note to 2000 Amendment ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'").

[2] Fed. R. Evid. 702, Advisory Committee Note to 2023 Amendment.

[3] While some federal courts have issued adverse decisions citing the Rule 702 amendment, this article focuses on several favorable decisions that have excluded unreliable expert testimony. For a more robust compilation of cases, *see* Lee Mickus, *The First 100 Days of Amended FRE 702: The Good, the Bad, the Ugly, and the Next Steps* (Wash. Legal Found., Working Paper No. 229, 2024), available here.