



## Working with Experts after Proposed 702 Rule Changes

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On June 7, 2022, the Judicial Conference Committee on Rules of Practice and Procedure approved amendments to several of the Federal Rules of Evidence—including Rule 702, which governs the admissibility of expert witness testimony. If approved by the US Supreme Court and Congress, the Rule 702 amendment will take effect on December 1, 2023.

The amendment is intended to clarify Rule 702. US District Judge Patrick Schiltz of Minnesota, chair of the Advisory Committee on Evidence Rules and supporter of the amendment, claims many federal judges had wrongly interpreted the existing rule to mean evidence could be admitted if a jury could find it reliable, rather than the judge making that determination. Judge Schiltz said, “This does not change the law at all. It simply makes it clearer.” Based on comments taken by the advisory committee, the plaintiffs bar seems to be against the amendment as favoring the defense, and the defense bar appears to be in support of it.

Below is Rule 702, as amended. The new language is in italics; the old language is struck-through.<sup>1</sup>

### Rule 702: Testimony by Expert Witnesses

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.

## How the Rule 702 Amendment Will Affect Admissibility of Expert Testimony

The rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is "more likely than not" that the proffered testimony meets the admissibility requirements set forth in the rule. The "more likely than not" standard is "substantively identical to 'preponderance of the evidence,'" according to the advisory committee. The preponderance of the evidence standard applies to most of the admissibility requirements set forth in the evidence rules. Currently, Rule 702 does not explicitly include a preponderance standard. Some courts apply a preponderance standard, while others apply a more lenient standard, favoring admissibility.



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In practice, there has been a widespread misapplication of Rule 702. The rule in its present form has led some federal judges to improperly interpret its language to mean that jurors may determine the admissibility of expert testimony. The advisory committee makes clear that admissibility requirements are to be determined by the court under the preponderance standard.<sup>2</sup>

The second part of the Rule 702 amendment emphasizes that an expert's testimony must not only be the product of reliable principles and methods, but it must also reflect a reliable application of these principles and methods to the facts of the case. The amendment is designed to clarify federal judges' obligation to act as the gatekeeper to determine the admissibility of expert witness testimony and to promote uniform decision making among federal courts as to the admissibility of expert testimony.

The Rule 702 amendment will supplant the Daubert standard, which is currently used by trial judges to assess whether an expert witness' testimony is based on scientifically valid reasoning that can be properly applied to the facts at issue. This standard was pursuant to the US Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*<sup>3</sup>

## Best Practices for Hiring an Expert Under the New Rule

With the more stringent standard of the pending Rule 702 amendment, below are five considerations to keep in mind that will improve your relationship with your expert while increasing the likelihood of admissibility and, ultimately, winning your case.

### 1. Assess the Expert's Communication Skills

Because an expert may receive closer scrutiny under the amended Rule 702, advocates may need to develop innovative techniques to assess an expert's communication skills prior to hiring. While there is an art to finding and selecting the most technically astute person as an expert, credibility and influence are the characteristics that mark the best experts.

Prepare your thoughts before you interview a potential expert as to what you are looking for, not only taking into account the facts of the case and the technical issues but also what characteristics you are looking for in an expert. Consider making your own checklist of soft skills that you expect your witness to embody—e.g., wellspoken, confident, precise, friendly, enthusiastic, persuasive, authoritative, etc. You can even give each skill a value, which may take some of the guesswork out of evaluating their nontechnical skills.



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### 2. Look for an Expert Who Is a Good Teacher

An expert witness must be able to relate complex information in an understandable manner to both the judge and the jurors. The more complicated the topic, the more the expert should be an adept storyteller, providing examples and analogies to help educate. Jurors look to the expert to step into the role of professor and explain the technical concepts in a way they can understand.

Keep in mind that an expert should be capable of partnering with your visual design team to transform complex legal concepts into compelling, informative visuals that teach and persuade decision makers.

### 3. Remember That Expert Witness Preparation Is Key

An expert should be well-versed in the requirements of Rule 702 and understand what is expected over and above technical knowledge. Consider working with your expert as to how they must convey the basis for their opinions to satisfy the court.

The most impactful expert witnesses engage the judge and jurors and earn their trust by delivering testimony with clarity, confidence, and credibility. Some experts tend to use jargon and rely heavily on specialized knowledge to explain concepts to a jury. It is important to remember that every person that they are trying to influence—whether by report, deposition, or testimony—is a layman.

It takes some practice for an expert to avoid talking over the jurors' heads or sounding like they are being condescending to their audience. Prepare your witness thoroughly to maintain this critical balance.

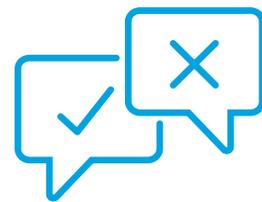
#### **4. Hire the Expert Early**

Hiring an expert early in the process ensures a better outcome. If an expert is hands-on with the data and analysis, they command more believability. Sometimes, an expert loses credibility because they fail to assess the data or research themselves. They may have relied on research associates to run an analysis or write a report. This can arise from a lack of sufficient lead time to prepare.

Anticipate that an expert has a potentially busy schedule with their primary workload and allow them enough prep time to take ownership of the analysis and report with authority when they are on the stand.

#### **5. Ensure Your Expert Is Prepared to Support the Basis of Their Opinion**

The new more-likely-than-not standard is essentially a de facto preponderance standard, which will become the universal norm under Rule 702 when the amendment is enacted. Because the decision of admissibility is at the judge's discretion, the proponent of the expert testimony must show admissibility by a preponderance of the evidence, and the expert's opinion must be reliable in light of the facts and applicable principles or methodology. The onus is shared between the attorney and the expert in preparing to make this argument to the court. It is essential that the attorney understands the concepts underlying the expert's opinion well enough to argue these points.



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## In Summary

Expert testimony will be subject to a higher admissibility standard and closer inspection under Rule 702—as amended—than some federal judges are used to imposing. An expert will need to be able to present their opinion and demonstrate that they have met the admissibility standards to the court, as well as be clear and persuasive to the jury.

*A version of this article was originally published by [Law360](#).*

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## References

<sup>1</sup> See Appendix A: Rules for Final Approval Committee on Rules of Practice and Procedure | June 7, 2022 | page 891. [https://www.uscourts.gov/sites/default/files/2022-06\\_standing\\_committee\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf).

<sup>2</sup> See Report to the Standing Committee Advisory Committee on Evidence Rules | May 15, 2022 | page 6. [https://www.uscourts.gov/sites/default/files/evidence\\_rules\\_report\\_-\\_may\\_2022\\_0.pdf](https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf).

<sup>3</sup> Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

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