

November 14, 2023

## **FEDERAL RULES OF EVIDENCE (FRE) 702 UPDATE: CLARIFYING EXPERT TESTIMONY ADMISSIBILITY**

On December 1, 2023, changes to the Federal Rules of Evidence (FRE) 702 take effect clarifying a trial court's role in determining expert testimony admissibility. These revisions, announced by the U.S. Supreme Court and sent to Congress on April 24, 2023, are the culmination of work by the Advisory Committee on Evidence Rules that began in 2017.[1]

The Supreme Court last substantively amended Rule 702 23 years ago, following the Court's opinions beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and proceeding through *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The *Daubert* line of cases, and the 2000 amendment to Rule 702, established trial judges as gatekeepers to exclude unreliable expert testimony.[2] Over time, the Advisory Committee found that some trial courts were not fulfilling the gatekeeper role, and it sought to clarify application of Rule 702 to "empower the court to pass judgment" on an expert's conclusions and reject the view that expert testimony is presumed to be admissible.[3]

After a public notice and comment period that drew over 500 comments, the Advisory Committee unanimously adopted the proposed changes to Rule 702 set forth below (with new language underlined and deleted language struck through):

***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.***

## What Changed?

Despite the significance of a rare amendment to the FRE, the Advisory Committee clearly states that the changes are only intended to resolve conflicts in the Rule's application.[4] Specifically, the Rules of Evidence require that all admissibility requirements, such as the Rule 702 elements, are to be determined by a court under a preponderance standard (more likely than not). For example, a court must find that an expert's testimony, more likely than not, is based on sufficient facts or data. The Advisory Committee found that some trial courts applied the preponderance standard inconsistently or did not apply it at all. By explicitly adding the burden of proof to Rule 702, the Advisory Committee sought to address this important conflict.[5]

## Experts Must Stay In Their Lane

Similarly, the amendment to Rule 702(d) clarifies and emphasizes the court's power to pass judgment on an expert's conclusion – an expert's opinion must actually proceed from a reliable application of a reliable methodology.[6] This gatekeeper function is consistent with the Supreme Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and is especially important where jurors may be unable to meaningfully evaluate the reliability or boundaries of an expert's basis and methodology.[7]

## Effective Date

The revised Rule 702 applies to all federal proceedings commenced after December 1, 2023. However, **litigators** should take note that the Supreme Court's Order opens the door for the Rule's application to *all* proceedings pending on December 1, 2023, "insofar as just and practicable." [8]

## Does This Apply To North Carolina State Court Matters?

In 2011, eleven years after the post-*Daubert* changes to Federal Rules of Evidence 702, the North Carolina General Assembly added language to North Carolina's Rule 702(a) that was nearly identical to the federal rule. In 2016, the N.C. Supreme Court held for the first time in *State v. McGrady* that North Carolina's Rule 702(a) "incorporates the standard from the *Daubert* line of cases" and that "North Carolina is now a *Daubert* state." [9]

Once again, North Carolina is lagging behind federal changes to Rule 702. However, the Advisory Committee's Note clearly states that the federal changes are meant to clarify how Rule 702 should have been applied all along. Therefore, even if North Carolina is slow to codify similar changes to Rule 702, the Advisory Committee's Note and Report is instructive to state courts' application of a preponderance standard to each reliability element of N.C. Rules of Evidence 702. [10] **Litigators** should keep this in mind for motions to exclude opposing experts filed after December 1, 2023.

[1] United States Courts, *Report of the Judicial Conference Committee on Rules of Practice and Procedure* – September 22 at Rules Appendix E-19, available at, [https://www.uscourts.gov/sites/default/files/sept\\_2022\\_jcus\\_rules\\_report\\_final\\_for\\_website.pdf](https://www.uscourts.gov/sites/default/files/sept_2022_jcus_rules_report_final_for_website.pdf). (hereafter “Report”)

[2] FED. R. EVID. 702 advisory committee’s notes on 2000 amendments.

[3] Report at p. 23.

[4] Report at Rules Appendix E-20.

[5] *Id.*

[6] Report at Rules Appendix E-19. (citing *General Electric Co., v. Joiner*, 522 U.S. 136 (1997)).

[7] Report at Rules Appendix E-13, E-20.

[8] Supreme Court Order frev23\_5468 (April 24, 2023), available at, [https://www.supremecourt.gov/orders/courtorders/frev23\\_5468.pdf](https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf)

[9] *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016).

[10] See *id.* at 892-93, 787 S.E.2d at 10-11.

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