



## EXPERT EVIDENCE STANDARDS UNDER REVIEW: COMMITTEE CONSIDERS POSSIBLE AMENDMENTS TO RULE FRE 702

by Alex Dahl

The Advisory Committee on Evidence Rules is considering whether to amend Federal Rule of Evidence 702 to address “overstatement” by expert witnesses, which occurs when an expert expresses a degree of confidence that cannot be supported by the expert’s principles and methods.

Expert testimony is required when cases involve “scientific, technical or specialized knowledge” that falls outside the common experience of the trier of fact. Rule 702 establishes standards for admission of expert testimony in order to ensure the reliability of such information. Rule 702 was last amended in 2000 in response to the U.S. Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Currently, Rule 702 allows opinion testimony by a witness who is qualified as an expert by knowledge, skill, experience, training, or education if:

- (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 the principles and methods to the facts of the case.

The Committee is considering a possible amendment that would add the following requirement to the list of Rule 702’s admissibility factors: “(e) the expert does not claim a degree of confidence that is unsupported by a reliable application of the principles and methods.”

The Committee’s interest in amending Rule 702 stems from a September 2016 report by the President’s Council of Advisors on Science and Technology (PCAST) titled “Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods.” The Committee held a symposium about the PCAST report in 2017, and much of the discussion concerned the problem of forensic experts overstating their conclusions.

After considering many options, the Committee determined that writing a rule expressly for forensic science would be ill-advised and decided to focus instead on the possibility of addressing overstatement by amending Rule 702, which governs expert testimony in both criminal and civil cases.

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At the same time, the Committee has also been considering an amendment to Rule 702 that would clarify that the questions of sufficiency of basis (subdivision (b)) and reliability of application (subdivision (d)) are issues of admissibility, not weight, and are governed by the preponderance of evidence standard under Rule 104(a). Courts frequently confuse this standard. It now appears unlikely that the Committee will amend the text of the rule for that purpose, but it may address the problem in the Committee Note if it proceeds with an amendment addressing overstatement. The decision whether to proceed with an amendment is likely to be made at the Committee's Spring 2020 meeting.

In the meantime, the Committee is studying how courts decide on the admissibility of expert testimony in practice. At its upcoming October 25 meeting, the Committee will host a "miniconference" about "best practices" in handling *Daubert* issues and conducting *Daubert* hearings. Participants in the miniconference will include: Judge Vince Chhabria (N.D. Cal.); Judge Keith P. Ellison (S.D. Tex.); Judge John Z. Lee (N.D. Ill.); Judge William H. Orrick III (N.D. Cal.); Judge Edmund A. Sargus, Jr. (S.D. Ohio); Judge Sarah S. Vance (E.D. La.); and Professor Ed Cheng of Vanderbilt Law School. The transcript will be sent to all federal judges and published in the Fordham Law Review.