



Federal Rule of Evidence (FRE) 702, which governs expert testimony in federal court, is getting a facelift.

The amended FRE 702 goes into effect later this year. In this Update, we review what has changed, as well as takeaways for litigants looking to introduce expert testimony in federal courts.

### **What Has Changed?**

FRE 702 is used extensively in federal civil litigation, as it controls who can testify as an expert witness in federal court and how these experts are qualified.

While the new edits to the rule might appear minor initially, they clarify standards applicable to expert testimony and will guide courts around the country in evaluating the qualifications of expert witnesses.

Specifically, the proposed FRE 702 reads as follows (new language is underlined and deleted language is 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."

### **When Do the Changes Take Effect?**

The U.S. Supreme Court approved the changes to FRE 702, among other amendments to various federal rules, and transmitted the proposed edits to Congress in April 2023. The new rule amendments take effect on December 1, 2023.

### **Why Is This Important?**

Three aspects of the updated FRE 702 could see changes to the ways in which federal courts interpret this standard:

- First, the change to FRE 702 emphasizes that an expert's qualification is based on the preponderance of the evidence standard—namely, that the Rule 702 criteria are "more likely than not" met. The [committee note](#) discussing the amendments to Rule 702 explained that "many courts" have followed an "incorrect application" of the rule, prompting this Update. The committee stated clearly that "the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology," are threshold questions of admissibility, not the weight of the evidence. As the committee explained, "once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will only go to the weight of the evidence."
- Second, the committee advised that FRE 702 requires an expert's knowledge to "help" the fact-finder understand evidence presented or determine a disputed fact. In its note to the amended FRE 702, the committee identified that some courts had held that an expert's testimony must "appreciably help" the trier of fact, and the committee concluded that "[a]pplying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict."
- Third, the amendment to Rule 702(d) was amended to further emphasize the role of judicial gatekeeping to limit an expert's opinion to the bounds of what can be concluded from a reliable application of the expert's basis and methodology. The committee's note explained that judicial gatekeeping is needed because jurors may lack the specialized knowledge to determine (1) the reliability of scientific methods underlying the expert's opinions and (2) whether an expert's opinions go beyond what the expert's basis and methodology might reliably support. While the amended FRE 702 does not require a court to "nitpick an expert's

opinion to reach a perfect expression" of what might be supportable testimony, it "does not permit the expert to make claims that are unsupported by the expert's basis and methodology."

## Takeaways

Litigators should take note of the amendments to FRE 702 and incorporate them into their decision-making and advising regarding expert testimony. Already, federal courts are taking notice of these changes to FRE 702, and the changes have influenced courts' decision-making. *See e.g., Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021); *In re Anderson*, No. 15-21681, 2023 WL 2229355 (W.D. Tenn., Jan. 19, 2023).

While the rule has not changed extensively, the amendments clarify the standards federal courts should apply to the qualification of expert witnesses. Litigants will also want to pay close attention to prior precedent that may lose much of its persuasive luster following the advisory committee's clarifications and take care when citing such precedent. In addition, counsel preparing expert witnesses may wish to ensure that the expert is prepared to defend the principles and methods used as appropriate and reliably applied to the given case.

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