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Implications for Practice: Judicial Discretion and Expert Witnesses Under Newly Amended Federal Rule of Evidence 702

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On December 1, 2023, the most recent amendments to Federal Rule of Evidence 702 took effect. The newly amended Rule 702 affects the standards for admissibility of expert testimony. These changes will have an significant impact on the admissibility of expert testimony commonly used in employment disputes. Part I provides a short overview of Rule 702, its history, and common applications. Part II discusses the amendments to Rule 702, including the justification for the changes as provided by the Advisory Committee on Evidence Rules. Part III highlights the effects the rule changes will likely have on employment litigation, examining current case law and potential practitioner concerns in light of the amendments.

I. <u>The History and Application of Rule 702.</u>

For decades, federal and state courts applied a lenient admissibility standard for expert testimony. The rare instances when a court properly applied the "general acceptance test" from *Frye v. United States*,[1] was for forensic testimony in criminal cases. For all other matters, courts usually required only that an expert witness be "qualified" in her field.

In 1993, to address the growing confusion, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] The *Daubert* Court held that Rule 702's reference to an expert's "knowledge" creates a necessary condition of reliability for an expert's scientific testimony.[3] The *Daubert* Court provided four elements to consider when making Rule 702 determinations:

(1) whether the theory or technique in question can be and has been tested;
(2) whether it has been subjected to peer review and publication;

[1] *Frye v. United States*, 292 F. 1013, 1014 (D.C. Cir. 1923).

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 585 (1993).

[3] *Id.* at 580.

(3) its known or potential error rate and the existence and maintenance of standards controlling its operation; and
(4) whether it has attracted widespread acceptance within a relevant scientific community.[4]

In 1999, the Supreme Court, in *Kumho Tire v. Carmichael*,[5] held that the court's role as gatekeeper applies to all expert testimony, not just scientific experts.[6] In response, the Advisory Committee amended Rule 702 in 2000 to codify "the trial court's role as gatekeeper."[7] The Advisory Committee mandated a "more rigorous and structured approach" to the scrutiny of expert testimony,[8] and added that Rule 702(d) required that an expert reliably apply the principles and methods to the facts of the case.

Despite the Advisory Committee's intent and the Court's stated approval of the Rule 702(d) requirement, some commentators claimed that the courts were not sufficiently rigorous in applying the *Daubert* standard.[9]

As an example, the Ninth Circuit held in 2014 that a district court abused its discretion by excluding an expert chemist in a water pollution case for failing to reliably apply his stated methodology to facts of the case.[10] In reversing the district court, the Ninth Circuit stated that the only "valid basis" for excluding an expert's testimony is a faulty methodology or a faulty theory.[11]

In contrast, the Third Circuit, in a mass tort case, had held that "the trial court must scrutinize…whether those principles and methods have been properly applied to the facts of the case."[12] The amended version of Rule 702 supports the latter approach.

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[4] *Id.* at 593–94.

[5] *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)

[6] *Id.* at 148.

[7] FED. R. EVID. 702 Advisory Committee Note to 2000 amendment.

[8] *Id.*

[9] *See, e.g.*, David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 27 (2015). These authors took credit for the 2023 amendments. *See* Cara Salvatore, "How New Expert-Witness Rules Put Science Front and Center," Law360 (Nov. 29, 2023).

[10] *See* Bernstein & Lasker, note 10, *supra*; *see also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048–48 (9th Cir. 2014).

[11] *City of Pomona*, 750 F.3d at 1048.

[12] *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994).

II. The 2023 Amendments to Rule 702.

The Advisory Committee again amended Rule 702 in 2023. The amendments are as follows (the new language is underlined, and the 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.

These amendments give more authority to the courts as gatekeepers for expert witness testimony in two ways, and reduce the role of the jury. First, the inclusion of the "more likely than not" language emphasizes that the court must determine the admissibility of an expert's qualification by applying the preponderance of the evidence standard to the facts of the case, which removes part of the jury's determination.

Second, the amendment of Rule 702(d) limits an expert's opinion to the "bounds of what can be concluded from a reliable application of the expert's basis and methodology."[13] While the Advisory Committee supported this change by highlighting the lack of technical knowledge jurors may possess, the effect of the rule amendment is to give the courts more authority to determine the facts of the case, which the jury previously decided. This approach is problematic as it is experts in a particular area who provide opinions not within the ken of ordinary jurors, based on the facts of the case, and not the court.

A. Rule 702's elements must be reviewed under the "more likely than not" standard.

The amended language of Rule 702 requires a proponent of expert testimony to demonstrate to the court that it is more likely than not that the proffered testimony meets the reliability factors set forth in Rule 702(b)–(d).[14] The amendment responds directly to the many courts that have declared that the reliability requirements of Rule 702(b) and (d) are questions of weight and not

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[13] FED. R. EVID. 702 Advisory Committee Note to 2023 amendment.

[14] *Id.*

admissibility.[15] While the new language does not require proponents of an expert's testimony to demonstrate to the judge by a preponderance of the evidence that the expert's assessment is correct, the proponent must demonstrate by a preponderance of the evidence that the opinions are reliable, as reliability is defined and considered in Rule 702(b), (c) & (d).[16]

B. Courts Will Now Take a "Hard Look" at an Expert's Basis and Methodology, and Determine Whether Its View of the Facts Supports the Expert Opinions.

The Advisory Committee unanimously favored a significant change to existing Rule 702(d) to emphasize that the court must focus on the expert's opinion, with an emphasis that the *opinion proceeds from a reliable application of the methodology*.[17] As the Advisory Committee elaborated: "A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology."[18]

The Advisory Committee stated that this amendment "is consistent with the decision in *General Electric Co. v. Joiner,* 522 U.S. 136 (1997), where the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied."[19]

The amended Rule 702(d) does not require judges to "nitpick an expert's opinion" to reach a perfect explanation of what the expert's methodology can support.[20] But the language is noticeably permissible, allowing, if not outright encouraging, judges to exercise more discretion to exclude expert testimony before it can go to the jury. The only way the courts can do this additional scrutiny is by scrutinizing and deciding facts that could support an expert's opinion, which before was within the scope of the jury's role.

Prior to the 2023 amendments, some courts were already scrutinizing and taking "a hard look" at an expert's methodology as a threshold matter of reliability. For example, in a medical device tort case, Judge Engelmayer of the U.S. District Court for the Southern District of New York,[21] set forth the following set of principles for a reliability assessment:

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[15] COMM. ON RULES OF PRACTICE & PROCEDURE, THE JUDICIAL CONFERENCE, SUMMARY E-20 (2022) [COMMITTEE REPORT] https://www.uscourts.gov/sites/default/files/sept_2022_jcus_rules_report_final_for_website.pdf.

[16] *Id.*

[17] *Id.*

[18] FED. R. EVID. 702 Advisory Committee Note to 2023 amendment.

[19] Report of the Advisory Committee on Evidence Rules, at 6 (May 15, 2021).

[20] FED. R. EVID. 702 Advisory Committee Note to 2023 amendment.

[21] *In re Mirena (II),* 341 F. Supp. 3d 213 (S.D.N.Y. 2018).

- Whether a critical step in a prospective expert's reasoning is based on a highly dubious analogy;

- Whether the proffered opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached;

- Whether an expert exceeds the limitation of the studies upon which he relied;

- Whether an expert assumes a conclusion and "reverse-engineers" a theory to fit that conclusion; and

- Whether an expert ignores evidence that is highly relevant to his conclusion but contrary to his own stated methodology.[22]

These determinations, to one degree or another, require the court, not the jury, to decide facts.

III. The Amended Rule 702's Implications for Employment Litigation.

From the universe of potential categories of expert witnesses, there are three types of experts who frequently appear in employment discrimination and retaliation cases: mental health experts; economists; and vocational rehabilitation experts. Some cases may also call for other, specialized experts to opine on issues unique to the employee's professional field. This section discusses several problems which are likely to arise under the amended Rule 702 with courts deciding the admissibility of the testimony of three types of expert witnesses.

In general, the amendments to Rule 702 may create a problem in that under Rule 703, experts are allowed to rely on inadmissible evidence in forming an expert opinion:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. **If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted**. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 703, Fed. R. Evid. (emphasis added).

[22] *Id.* at 241–42.

However, if the courts are going to be deciding whether the facts support the expert's opinion, then the courts may have hold mini-trials outside the jury's presence to evaluate any inadmissible facts and determine whether the expert opinion should be allowed to go to the jury. Since Rule 703 was not amended in 2023, there is a potential conflict in the courts usurping the role of the jury in evaluating and deciding facts.

A. Mental Health Expert Witnesses.

If the plaintiff has emotional distress damages that are quite severe or reflect symptoms and disorders that are not within the common knowledge of jurors, then an expert opinion as to the plaintiff's mental health might be necessary. Plaintiffs with less severe (*e.g.*, "garden variety") emotional distress damages will generally not need an expert witness.

The courts have prevented expert witnesses, including mental health professionals, from testifying whether they have an opinion as to whether the plaintiff or any other witness is credible or truthful. Several representative district court opinions have drawn this line in precluding such testimony by expert witnesses:

> However, **neither expert will be permitted to opine as to** whether Clark suffered from the alleged abuse, whether he actually repressed any memories of the experience, or **whether he is a credible witness** or his claimed memory is more credible than it otherwise might appear.

Clark v. Edison, 881 F. Supp. 2d 192, 217 (D. Mass. 2012) (emphasis added).

> **Finally, no expert, including Johnson, will be permitted to opine on the credibility or consistency of others' testimony**. Listening to testimony and deciding whether it is contradictory is the "quintessential jury function of determining credibility of witnesses." An expert may not substitute his judgment for the jury's. "When this occurs, the expert acts outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determinations."

Crowley v. Chait, 322 F. Supp. 2d 530, 553-54 (D.N.J. 2004) (emphasis added) (citations omitted) (partially granting motion *in limine* to exclude expert testimony).

> It is clear to the Court that, based even on her own testimony, **[the expert] should not be permitted to testify that she either believes Mr. Isely or believes that the incidents he alleges occurred**, since she has specifically admitted that she has no empirical way of factually establishing in fact whether the underlying facts occurred. Such testimony would invade the province of the jury by vouching for the credibility of Isely and would,

> in any event, be unhelpful to the jury since everything she knows about the alleged events is hearsay from Mr. Isely (and perhaps from the deposition testimony of Gale Leifeld).

Isely v. Capuchin Province, 877 F. Supp. 1055, 1067 (E.D. Mich. 1995) (emphasis added) (partially granting motion *in limine* to exclude expert testimony).

In the past, one way to address this problem was to acknowledge the employer's argument that the evidence that the psychologist or psychiatrist is relying upon is based solely on information provided by the plaintiff and not from an independent investigation. In that case, the plaintiff should be allowed to elicit testimony from the expert as to why she did not need to do an independent investigation. The theory is that an independent investigation was not required because the plaintiff's description of important facts was consistent with the evidentiary record, the expert viewed the plaintiff as credible, or there was supporting documentation for the plaintiff's description of the facts.

Under the modified Rule 702 standard, to use this workaround, an expert would have to demonstrate that it is more likely than not that her testimony is the product of reliable principles and methods <u>and</u> that it is more likely than not that the opinion reliably applies those principles and methods to the facts of the case. The expert would have to show that relying upon the plaintiff's description, and the record evidence, was sufficient to form an expert opinion, without making credibility determinations. Therefore, the amended Rule 702 will give more authority to the court to determine what facts the expert can consider to issue an expert opinion, which may be contrary to the expert's usual way of applying his or her expertise.

B. <u>Expert Economists.</u>

If a plaintiff is seeking front pay, then an expert economist will likely be needed to explain to the jury the methods for calculating lost future pay.

If the expert economist compares two income streams, *i.e.*, the compensation the plaintiff would have earned had she remained with the defendant (the "but for" damages) versus the compensation that the plaintiff has earned and will now earn, given her dismissal, then the assumptions underlying those calculations will also need to be explained to the jury. *See*, *e.g.*, *Artunduaga v. Univ. of Chicago Medical Center*, No. 12-C-8733, 2016 WL 7384432, at *2, *4-7 (N.D. Ill. Dec. 21, 2016) (allowing expert testimony on comparison of income streams). The expert may also need to explain the need to reduce future earnings to their present value. If the plaintiff receives an award now for future pay covering a number of years, that award needs to be reduced to reflect the fact that the plaintiff can invest the money and earn interest at a statutory or standard interest rate on amounts that she would otherwise not have received until later years

Expert economic testimony may also be needed at the summary judgment stage, if the defendant moves for summary judgment on damages, arguing that the plaintiff has failed to present sufficient evidence to allow her claim for damages to go to the jury, or if actual damages are an element of the plaintiff's claim.

The following discussion by D.C. Court of Appeals of the need for expert testimony to prove lost future earnings is typical of the approach taken by the courts on this issue:

> Since "arriving at a [reasonable] sum representing future loss of earnings often involves a complicated procedure" [*District of Columbia v. Barriteau*, 399 A.2d 563, 568 (D.C. 1979)], "**the trier-of-fact must have evidence pertaining to the age, sex, occupational class, and probable wage increases over the remainder of the working life of the plaintiff**." *Id*. Furthermore, it is well settled that "'**the task of projecting a person's lost earnings lends itself to clarification by expert testimony because it involves the use of statistical techniques and requires a broad knowledge of economics**.'" *Barriteau, supra*, 399 A.2d at 568 (quoting *Hughes v. Pender*, 391 A.2d 259, 262 (D.C. 1978)). Indeed, "where the existence of substantial future economic loss becomes an issue, the use of expert testimony likely would be necessary since seldom will lay witnesses possess the requisite background to testify on a matter such as this – one not likely to be within the common knowledge of the average lay [person]." *Id.* at 569.

Croley v. Republican Nat'l Committee, 759 A.2d 682, 690 (D.C. 2000) (emphasis added).

The amendments to Rule 702 may make it more likely that the court will exclude an expert economist based on the expert's assumptions, instead of allowing the jury to determine whether the assumptions are reasonable. For example, in a wrongful termination case, an expert economist for the employee may make an assumption that an employee would have continued to receive bonuses or annual salary increases if she had remained employed with the defendant. Or, the employee's expert may make an assumption about the future earnings trajectory at her new employer. The employer's expert economist, in contrast, will have quite different assumptions about the employee's future compensation at her new or potential place of employment. The judge will now have to weigh those assumptions and determine whether one or both experts will be allowed to present their opinion to the jury.

As one example from a past discrimination case, *Brienza v. UPI*, No. 90-2925 (D.D.C.), the plaintiff's expert provided an opinion about the plaintiff's lost wages stemming from her termination. The defendant's expert gave an opinion that the plaintiff would make much more in the long run because UPI and other wire services were in bad financial shape. If litigated under the amended Rule 702, the court would decide which set of facts are more believable, which is a fact-finding responsibility of the jury, and may require a mini-trial of its own.

C. **Vocational Rehabilitation Experts.**

Persons who specialize in vocational rehabilitation are sometimes used as experts in disability and age discrimination cases, as well as personal injury cases, to address whether the plaintiff is capable of returning to work in any capacity, or whether the plaintiff made sufficient efforts to search for new employment. However, vocational rehabilitation is not a professional field with doctoral-level training and state licensing requirements, in contrast to medicine and psychology. Those in vocational rehabilitation are more akin to job or career counselors. Since vocational experts generally lack professional credentials, courts may see these experts as insufficiently qualified to opine on the sources of evidence upon which they rely. For example, in one of our firm's retaliation cases, one such "expert" hired by the employer used Wikipedia as a basis for opining on the plaintiff's career trajectory, even though Wikipedia lacks professional validity, since almost any Wikipedia entry can be revised by anyone without peer review.

The 2023 amendments to Rule 702 will make it harder for plaintiffs' counsel to use vocational rehabilitation experts, given the subjective nature of their opinions, and that the "standards" for reaching a conclusion are amorphous or even speculative. It is likely that the courts will be more rigorous in analyzing and rejecting proposed expert testimony by vocational rehabilitation experts, thereby keeping this evidence away from the jury.

Over the past two decades, courts have varied widely in whether they allow this expert testimony because of these experts' lack of formal training or credentials. Now, it is more likely that courts will feel emboldened to exclude this kind of testimony.

The Eighth Circuit, in *Masters*, recently provided a good explanation of what a vocational rehabilitation expert can and cannot testify to. The vocational rehabilitation expert can opine on how the plaintiff's current condition may affect their career prospects:

> "A vocational rehabilitationist assesses the extent of an individual's disability, evaluates how the disability affects the individual's employment opportunities, and assists the individual's re-entry into the labor market." *Elcock v. Kmart Corp.*, 233 F.3d 734, 740 (3d Cir. 2000). Because vocational rehabilitationists generally are not physicians, they are not competent to diagnose a person's medical condition or to opine on their physical or psychological impairments. *See Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). They may, however, rely on medical records, reports, and testimony about a person's medical condition, combined with other materials and their knowledge and experience about the labor market, to opine on the effect the medical condition may have on that person's vocational outlook. *See id.*

Masters v. City of Independence, Missouri, 998 F.3d 827, 838 (8th Cir. 2021).

Under the amended Rule 702, the court will now decide whether the facts (*i.e.*, medical records, reports, and testimony), lay a proper predicate for the vocational expert's testimony. The courts may now determine whether or not their opinion "reflects a reliable application of the principles and methods to the facts of the case."

Finally, there can be a fine line for vocational rehabilitation experts as to whether their expert opinion is an impermissible legal opinion:

> But an expert witness cannot opine as to her legal conclusion, that is, an opinion on an ultimate issue of law. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016–17 (9th Cir. 2004). "In other words, an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997).
>
> Here, Ms. Donelson states that Mr. McKinney will testify "that extending Ms. Donelson's unpaid leave was a reasonable accommodation that was available to the defendants." … This is testimony regarding the ultimate issue of law because it parrots the precise language of the WLAD and ADA's cause of action for discrimination. Furthermore, the use of the word "reasonable" signals that Mr. McKinney will testify to an issue that is within the jury's fact-finding duty; the phrase "reasonable accommodation" will undoubtedly appear on the verdict form that is given to the jury at the conclusion of Defendant's case. Accordingly, the Court excludes testimony by Mr. McKinney that relates to whether unpaid medical leave was a reasonable accommodation.

Donelson v. Providence Health & Services-Washington, 823 F. Supp. 2d 1179, 1193 (E.D. Wash. 2011) (excluding expert testimony in disability discrimination case).

<u>Conclusion</u>

In conclusion, the amended Rule 702 will require practitioners to ensure, up front, that they have all the facts (indeed, overwhelming facts) to support their expert's opinions. Only then will a party be able to convince a judge that the expert has reliably applied their methodology to the facts of the case, since the judge, not the jury, will be making that initial determination.