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AMENDMENTS TO FEDERAL RULE OF EVIDENCE 702 TAKE EFFECT

by Elizabeth C. Tirrill

On December 1, 2023, subtle but significant amendments to Federal Rule of Evidence 702 went into effect. Rule 702 provides the framework for the admissibility of expert opinion testimony in federal courts. As amended, Rule 702 now reads:

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 the expert's~~ opinion reflects a reliable application of the principles and methods to the facts of the case.

As the Advisory Comments note, the amendments to Rule 702 seek 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. These amendments are intended to address the holdings by some courts that the question of the sufficiency or reliability of the basis of an expert's opinion is a question of weight, not admissibility, for the jury to decide. The amendments to Rule 702 make clear that such a conclusion is an incorrect application of Rules 702 and 104(a). Rather, assessing the reliability of the basis of an expert's opinion is part of the court's role as gatekeeper in determining admissibility of an expert's opinion.[1]

To be sure, many challenges to expert testimony will still raise issues that go to the weight, not admissibility, of the expert's testimony - for example, competing expert testimony. The amendments to Rule 702, however, attempt to clarify that, regarding the reliability of the expert's opinion (that is, the basis for his/her opinion) the court must determine, more likely than not, that the expert has a sufficient basis to support an opinion. Once such a determination has been made, any attack on the expert's testimony by opponent will go only to the weight of the testimony.



[1] Advisory Committee Notes to Fed. R. Evid. 702: 2023 Amendments