States Should Follow Federal Lead On Expert Evidence Rules

By **Michael Harrington** (April 12, 2024)

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The recently amended Federal Rule of Evidence 702 assigns federal judges the role of gatekeepers to ensure that expert testimony is the product of sufficient data and reliable methods properly applied to a given case.

The amendment, which took effect Dec. 1, 2023, reflects widespread understanding that too often, judges have applied an incorrect standard, including the false assumption that there is a liberal preference to admit expert opinions.

The amended Rule 702 is much clearer, and will help prevent junk science from entering federal courtrooms. State courts should adopt similar changes to help ensure reasonable standards for expert testimony at the state level.

It is particularly important for state courts to amend their rules on expert testimony because they are home to the overwhelming majority — 98.5% — of all litigation in the U.S., according to research conducted by the Court Statistics Project.[1] Ensuring credibility and consistency across state courts will help prevent forum shopping, and ensure that litigants experience harmonious rules throughout the country in both state and federal courts.

It is already well established that plaintiffs prefer to be in state courts — and defendants in federal — because the former are known to have more liberal rules on the admissibility of evidence. If states fail to modernize their rules on expert testimony in keeping with the amended federal update, forum shopping will likely increase.

This would exacerbate the issue of litigation tourism in venues like Pennsylvania and Georgia, which allow out-of-state plaintiffs to take advantage of courts in their jurisdictions, consuming judicial resources and adding to concerns of being unfriendly to business.[2]

Gatekeeping standards are especially important at a time when there is more disinformation than ever before, and agenda-driven parties and "experts" are able to self-publish or pay to publish material of dubious veracity without peer review. Additionally, fewer than four in 10 Americans possess "high science knowledge," according to a study conducted by the Pew Research Center.[3]

In too many cases, lay jurors are left to evaluate scientific or technical evidence without the court first determining whether it is the product of sufficient data and reliable methods. This problem is hardly unique to federal juries, and states will benefit from ensuring that their judges also appropriately act as gatekeepers to prevent junk science from unfairly exploiting the courtroom.

The problems associated with common misinterpretations of Rule 702, and its state analogs, are not merely academic. They have real-world consequences that can result in erroneous high-dollar verdicts.

The data show that, prior to the recent amendment of the federal rule, courts frequently misapplied Rule 702, often misapplying the U.S. Supreme Court's 1993 holdings in Daubert

v. Merrell Dow Pharmaceuticals, which was supplanted by the rule.

In many trials, millions of dollars are on the line, providing a clear incentive for plaintiffs lawyers to seek out scientists who validate their view — even if that view is not based on sufficient facts or reliable methods. Such instances illustrate the importance of rules that support the judge's role as a gatekeeper for the admissibility of expert testimony in both federal and state courts.

Confusion about the rules governing expert evidence admissibility has resulted in court decisions holding that questions relating to the methods or reliability of an expert's opinion affect the weight given to that testimony by juries — not its admissibility. However, the amended Rule 702 clarifies that judges are required to determine admissibility based on whether the factual basis of expert testimony is sufficient, and the expert's opinion is a product of reliable principles and methods properly applied.

These same problems exist in state courts, where differing interpretations of the rules open courts to idiosyncrasies that often result in the admission of evidence that is not based on reliable science. States are already starting to make needed improvements consistent with the new federal amendment.

Arizona leads the nation in state efforts to reform evidentiary rules. On Jan. 1, an updated rule consistent with the amended federal rule went into effect as a result of an order by the Arizona Supreme Court.

Several other states have also initiated the process of updating their rules. Judiciaries in Kentucky, Ohio and Michigan have proposed amendments to their rules of evidence, and some of these states are likely to see amended rules go into effect in the coming months.

The stakes are high. Indeed, innovation in every sector of the economy is constrained when companies are forced to contemplate that legal decisions may not be based on provable facts or scientific methods.

Lawyers should advocate for their states to follow the lead of the federal judiciary in modernizing the standards for reliable science in the courtroom. Without such efforts, low and disparate standards for expert testimony will continue to impair the credibility of court verdicts and the fair administration of justice.

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[1] Court Statistics Project, https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads.

[2] Judicial Hellholes 2023/24, American Tort Reform Assocation (Feb. 14, 2024), https://www.judicialhellholes.org/wp-content/uploads/2023/12/ATRA_JH23_FINAL.pdf.

[3] Brian Kennedy, Meg Hefferon, What Americans Know About Science, Pew Research Center (March 28, 2019), https://www.pewresearch.org/science/2019/03/28/what-americans-know-about-science.