New rules force judges to expel 'junk science' experts from court, *Legal Newsline*

New rules force judges to expel 'junk science' experts from court
Legal Newsline
Daniel Fisher
December 1, 2023
https://legalnewsline.com/stories/652722601-new-rules-force-judges-to-expel-junk-science-experts-from-court

It's labeled a "clarification," but an amendment to the Federal Rules of Evidence going into effect today is intended to end the widespread practice of judges allowing paid experts to peddle unscientific theories in their courts.

Rule 702 already required judges to be gatekeepers over scientific evidence but many took a more hands-off approach and allowed juries to decide which expert to believe. One result: Multibillion-dollar mass torts based upon unproven theories such as Roundup weedkiller causing cancer and Johnson's Baby Powder containing asbestos.

"Many courts have essentially said 'I'm letting it in and we'll let the jury decide,'" said Alex Dahl, general counsel of Lawyers for Civil Justice, an industry-supported group that pushed for the change.

The actual changes to Rule 702 are slight. The amendment spells out the "preponderance of evidence" standard that many judges already followed, requiring judges to issue a finding that a proposed expert opinion more likely than not reflects scientific methods, not speculation. The amendment also strengthens the requirement that expert opinions reflect "a reliable application of the principles and methods to the facts of the case."

Defense lawyers have complained for years that Rule 702 already contained both requirements but judges widely ignored them. Roundup litigation, for example, was kicked into overdrive by U.S. District Judge Vince Chhabria in 2019 when he allowed plaintiff experts to testify the active ingredient glyphosate causes cancer, even though every major national regulatory agency disagrees and epidemiological studies involving tens of thousands of agricultural workers show no such connection.

In his order, Judge Chhabria said the opinions of plaintiff experts were "shaky but admissible," and "barely inched over the line." Allowed to hear such testimony, juries awarded Roundup plaintiffs who had been exposed to tiny amounts of the substance compared to agricultural workers tens of millions of dollars. In November, a California jury awarded $332 million to a 51-year-old man.

Plaintiff lawyers similarly created a multibillion-dollar headache for Johnson & Johnson by paying experts to testify cosmetic talcum powder contains asbestos in quantities high enough to cause ovarian cancer and mesothelioma, a cancer of the chest lining associated with asbestos exposure. Some of those same experts previously had testified talc couldn't cause cancer, to avoid deflecting blame away from asbestos manufacturers they were testifying against.

But as the supply of postwar industrial workers exposed to asbestos died off, trial lawyers needed a new supply of plaintiffs and many of the same experts switched to talcum powder.

Johnson & Johnson has taken the extraordinary step of suing one of the most prominent talc experts, Dr. Jacqueline Moline, who has testified repeatedly about anonymous mesothelioma victims she said had no known exposure to asbestos other than talc when in fact she had testified for some about their exposures from other products. J&J accuses Dr. Moline of fraud. She declines to comment.

Other experts critical to the plaintiffs' theories include William Longo, who claims he has found asbestos fibers in decades-old talc samples after previously describing the talc/asbestos link as an "urban legend"; Dr. David Egilman, who edited a journal that published some early studies linking talc to cancer, and who has testified on everything from asbestos to supposedly dangerous popcorn fumes; and Ronald Gordon, a researcher who earlier in his career admitted to bank fraud and money laundering.

A New Jersey appeals court threw out a $224 million talc verdict in October, ruling Dr. Moline and two other experts shouldn't have been allowed to testify. But other judges have let the experts in, including in a Missouri trial where plaintiff lawyer Mark Lanier won a $2.1 billion judgment.

A trio of U.S. Supreme Court decisions led by one commonly known as Daubert requires judges to serve as "gatekeepers" for scientific evidence, keeping out expert testimony that isn't based on rigorous methods. Rule 702 was amended in 2000 to cement those requirements into federal law, and many states followed with their own versions.

But judges largely ignored the heightened rules, justifying a liberal approach to experts by saying a jury could decide whether they were telling the truth.

A study by Lawyers for Civil Justice of more than 1,000 federal court opinions from 2020 found that more 65% didn't mention the preponderance of evidence standard, with courts in some districts splitting on the question. Some judges even cited both the preponderance of evidence standard and a presumption toward admissibility, which LCJ said are "inconsistent with each other."

It's a significant change in the rule," said Dahl of LCJ. "Although it clarifies the current law, it's clear the reason the rule is being amended is to change practices."

The amendment now requires judges to make a decision on admissibility before an expert can testify, and judges must monitor that testimony to make sure the expert doesn't stray into inadmissible speculation. The impetus to change the rules started in criminal law, after scandals involving experts in fingerprints, bite marks and ballistics who were allowed to testify but departed from rigorous scientific conclusions when they spoke to the jury. Corporate defendants then joined the effort to amend the rules for civil litigation.