



## **Leaders of 61 Companies Urge Adoption of Amendments to Rules Governing Expert Evidence**

*Proposed Amendment Aims to Clarify Often Misapplied Rule 702 Standard*

**Arlington, VA – Lawyers for Civil Justice (LCJ)** – December 16, 2021 – 61 senior legal officers representing a diverse group of industries – aerospace, automotive, defense, food and beverage, insurance, manufacturing, pharmaceutical, medical products, and technology – today sent a joint letter to the Committee on Rules of Practice and Procedure in support of the Advisory Committee on Evidence Rules’ proposed amendment to Rule 702 of the Federal Rules of Evidence (FRE), which governs the admissibility of expert evidence. These changes aim to fix the widespread errors made by courts in executing their expert gatekeeping responsibilities.

“Too often, we see courts allowing juries to consider expert testimony without first determining whether that testimony is ‘based on sufficient facts or data,’ is the ‘product of reliable principles and methods,’ and reflects a reliable application of those principles and methods to the facts of the case,” the letter states. “The misunderstanding about [Rule 702’s] requirements frequently result in the admission of factually unsupported or otherwise unreliable opinion testimony that misleads juries, undermines civil justice, and erodes public confidence in the courts.”

The prevalence of this problem is supported by a September 2021 analysis of over 1,000 recent opinions conducted by Lawyers for Civil Justice (LCJ), a national coalition of corporations, defense bar organizations and defense counsel. This research found a repeat pattern of incorrect application of the expert admissibility standards set forth in Rule 702. Out of the 1,059 Rule 702 opinions issued during 2020 in which the trial judge decided to admit, deny, or partially admit expert evidence, LCJ found 882 instances in which the court either:

- Failed to cite the preponderance of evidence standard
- Mistakenly stated Rule 702 has a ‘liberal thrust favoring admissibility’
- Inconsistently cited both the preponderance **and** “liberal thrust” standard

The full analysis can be viewed in the accompanying infographic [here](#).

The senior legal officers, many of whose companies are members of LCJ, expressed concern that without action by the Advisory Committee on Evidence Rules, judicial practices under the existing Rule 702 will continue to diverge from the intent of Rule 702, which is the legal standard federal courts are required to apply when deciding the admissibility of expert testimony.

To address these problems, the senior legal officers urge the committee to adopt the proposed amendment to Rule 702 to clarify that:

- The proponent of the expert’s testimony is responsible for proving its admissibility;

- The proponent’s responsibility requires demonstrating the sufficiency of the basis and reliability of the expert’s methodology and its application; and
- An expert shall not declare confidence in an opinion that is not derived from sufficient facts and reliable methods.

“For too long, courts have had a widespread pattern of misunderstanding the expert admissibility standards set forth in rule 702,” said Alex Dahl, LCJ’s General Counsel. “The proposed amendment to the Rule would help clarify courts’ ‘gatekeeping’ obligation and ensure expert testimony meets its standard. The proposed amendment will improve our civil justice system for all parties by providing greater consistency and fairness.”

Under Rule 702, a court must decide the preliminary questions of whether an expert witness is qualified and the expert’s testimony is admissible before allowing a jury to hear it. The corporate legal officers believe that courts not only frequently pass on this gatekeeping responsibility to juries, but many courts also assume that there is a “presumption of admissibility” to evidence brought under Rule 702, which inverts the proponent’s burden to establish admissibility.

Expert testimony is required when cases involve “scientific, technical or specialized knowledge” that falls outside the common experience of the jury.

The public comment period for the Advisory Committee on Evidence Rules’ proposed amendment closes on February 16, 2022.

To read the full comment letter, click [here](#).

The following senior legal officers signed the public comment letter:

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