LCJ Analysis Reveals Federal Courts Are Applying Incorrect Standards In Decisions On Admission of Expert Testimony

Findings Submitted to Advisory Committee on Evidence Rules as Part of Rule 702 Reform Effort

Arlington, VA – Lawyers for Civil Justice (LCJ) – September 30, 2021-- A new analysis of over 1,000 recent opinions conducted by Lawyers for Civil Justice (LCJ) found a widespread pattern of incorrect application of the expert admissibility standards set forth in Federal Rule of Evidence 702. LCJ submitted its findings to the Advisory Committee on Evidence Rules as part of the public comment period on a proposed Rule 702 amendment that would clarify the standards for expert evidence admissibility.

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:

- Failed to cite the preponderance of evidence standard (686)
- Mistakenly stated Rule 702 has a 'liberal thrust favoring admissibility' (135)
- Inconsistently cited the preponderance **and** "liberal thrust" standard (61)

Additionally, LCJ's analysis found that there was widespread discrepancy about citing or failing to cite the preponderance standard in 57 judicial districts--more than half of all districts. LCJ's study demonstrates that the standards for expert admissibility are not applied the same way throughout the country, or even within the same federal district court or circuit, providing further supportive evidence that the pending amendment to Rule 702 should be adopted.

"Our analysis confirms the widespread misunderstanding about Rule 702 and the inconsistent application of its standards that are plaguing our federal courts," said Alex Dahl, LCJ's General Counsel. "The results of our study support adoption of the pending amendment, which will improve practice by providing greater consistency and fairness to our civil justice system."

The full analysis and comment by LCJ can be found here and the accompanying infographic here.

Methodology

The researchers conducted a comprehensive search for case decisions issued during 2020 that include the trial judge's decision to admit, deny, or partially admit expert testimony using an analysis under Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or both. First, the researchers eliminated any search results that yielded cases in which the court did not make a decision on expert admission (for instance, cases only briefly mentioning Rule 702 or *Daubert*, setting a "*Daubert* hearing" but not actually deciding admissibility, etc.). The researchers then reviewed every remaining opinion for specific factors such as inconsistent applications of Rule 702.

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