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# FRE 702 Amendments and Experts in Plaintiffs' Employment Cases

Hon. Paul W. Grimm (Ret).

Phil Andonian, Caleb Andonian, PLLC

Lynne Bernabei, Bernabei & Kabat, PLLC

## *Daubert* criteria for expert witnesses under Rule 702

- ▶ Whether the theory or technique in question can be and has been tested;
- ▶ Whether it has been subjected to peer review and publication;
- ▶ Its known or potential error rate and the existence and maintenance of standards controlling its operation; and
- ▶ whether it has attracted widespread acceptance within a relevant scientific community

# 2023 Amendments to Rule 702

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

*New language underlined and highlighted; deleted language struck.*

# Role of the Court under Rule 702

- ▶ Proponent of expert testimony must demonstrate to the court that it is more likely than not that the proffered testimony meets the reliability factors in 702(b), (c) and (d).
- ▶ Do not have to show that the expert's assessment is correct, but must show, by a preponderance of the evidence ("more likely than not"), that the opinions are *reliable*.
- ▶ Previously, the jury would weigh the facts and assumptions in evaluating the expert's opinion.

# Role of the Court under Rule 702

- ▶ Under amended Rule 702, the courts will have to scrutinize and decide facts to determine whether the expert's opinion is based upon a reliable methodology.
- ▶ Advisory Committee:
  - “A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology.”

# Experts and Inadmissible Evidence

- ▶ Rule 703 allows experts to consider otherwise inadmissible evidence in forming an expert opinion, “if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”
- ▶ Rule 703 was *not* amended in 2023, creating a potential conflict with the amended Rule 702.
- ▶ Since Rule 703 was not amended, what is the universe of facts that the court can examine in evaluating the expert opinion? A mini-trial?

# Rule 702 and Mental Health Experts

- ▶ Mental health experts for emotional distress damages (for severe emotional distress, not “garden variety” distress).
- ▶ Experts cannot opine on the credibility or consistency of a party’s or witness’ testimony.
- ▶ Expert can rely on information provided by the plaintiff, without doing an independent investigation.
  - Was the plaintiff’s description of key facts consistent with the evidentiary record and supporting documentation?

# Rule 702 and Expert Economists

- ▶ Methods for calculating front pay
- ▶ Assumptions made by expert witness:
  - Plaintiff's future earnings trajectory at former place of employment but for termination;
  - Plaintiff's future earnings trajectory at a potential or subsequent employer.
- ▶ Courts will have to weigh the assumptions and decide whether the experts will be allowed to present their opinion to the jury.



# Rule 702 and Vocational Rehabilitation Experts

- ▶ Vocational Rehabilitation experts – disability, age, and personal injury cases –
  - Can the plaintiff return to work, and in what capacity?
  - Did the plaintiff properly mitigate damages in searching for new employment?
- ▶ Vocational rehab experts generally not licensed, and not same level of professional expertise as for economists, psychiatrists, and psychologists.
- ▶ The courts will now decide if the facts – medical records, reports, and testimony – lay a proper predicate for the vocational expert’s testimony.