

## STATES SHOULD CLARIFY STANDARDS FOR EXPERT TESTIMONY

### How is Federal of Evidence Rule 702 changing?

The proposed amendment to Rule 702 of the Federal Rules of Evidence<sup>1</sup> sets the process and standard for admission of expert witness testimony. It clarifies the existing rule that: (1) the proponent of expert testimony must establish its admissibility to the court by a preponderance of the evidence before it can be presented to a jury, and (2) an expert shall not assert a degree of confidence in an opinion that is not derived from sufficient facts and reliable methods.

The change to the Federal Rules of Evidence is set to become effective on December 1, 2023. Federal rules committees have unanimously adopted the amendment and the U.S. Supreme Court has adopted the rule. The rule is now before Congress for a mandated review period.

### Should my state adopt a clarification to the expert witness rule?

Like federal courts, many state courts do not exercise a “gatekeeping” function to ensure that expert testimony is the product of sufficient data and reliable methods. This means that unsupported “expert” opinions find their way to juries, which are not prepared to evaluate the sufficiency and reliability of the testimony and are left struggling to consider the value of the testimony.

Admission of unreliable opinion testimony can mislead juries, undermine civil justice, and erode stakeholders’ confidence in the courts. Lack of uniformity in the treatment of opinion testimony leaves litigants guessing about how courts will address evidence critical to the viability of claims and defenses.

A change is needed. That’s why the amendment to the Federal Rules of Evidence is set to become final and why similar changes should be adopted for state rules of evidence.

### What expert testimony standard should my state adopt?

If your state does not have a rule making it clear that it is the court’s role to be the gatekeeper for expert testimony, LCJ recommends a rule which establishes: (1) the proponent of the expert’s testimony bears the burden of establishing its admissibility to the judge; (2) the proponent’s burden requires demonstrating the sufficiency of the basis and reliability of the expert’s methodology and its application; and (3) an expert shall not assert a degree of confidence in an opinion that is not itself derived from sufficient facts and reliable methods.

For additional resources on Federal Rule of Evidence 702 or in support of state adoption of similar rules, visit [www.dontsaydaubert.com](http://www.dontsaydaubert.com).

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<sup>1</sup> **Amended Federal Rule of Evidence 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.