NEW AMENDMENTS TO EXPERT RULES TAKE EFFECT

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On December 1, 2000 Federal Rule of Evidence 702 was Amended to read as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

According to the Advisory Committee Notes, the rule was amended in response to Daubert and Kumho Tire. The purpose of the amendment affirms "the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."

The Notes confirm that the rule, as amended, provides that all types of expert testimony present questions of admissibility for the trial court in determining whether the proposed evidence is reliable and helpful, thereby adopting Kumho Tire. In addition, the admissibility of all expert testimony is governed by the principles of Rule 104(a) and the proponent of the evidence has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.

Significantly, the Advisory Committee acknowledges that Daubert set forth a nonexclusive checklist and no attempt was made by the amended rule to codify the specific factors set forth in Daubert. The Advisory Committee Notes list five factors that courts both before and after Daubert have found relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact:

1. Were the opinions developed expressly for purposes of testifying in the case or did they develop naturally from research independent of the litigation;

2. Has the expert unjustifiably extrapolated from the accepted premise to an unfounded conclusion;

3. Has the expert adequately accounted for obvious alternative explanations;

4. Is the expert being as careful as he would in his regular professional work outside of paid trial consultations; and

5. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion he would give.

The Advisory Committee also points out that since Daubert the rejection of expert testimony should be "the exception rather than the rule." It reaffirms that the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. Vigorous cross examination, presentation of contrary evidence, and careful instruction of the burden of proof, as identified in Daubert, are still the primary weapons to attack shaky but admissible evidence.

The Advisory Committee Notes quote the Third Circuit that the "evidentiary requirement of liability is lower than the merit standard of correctness." In re Paoli RR Yard PCB Litigation, 35 F. 3rd 717, 744 (3rd Cir. 1994). The Notes also recognize that while the focus is on methodology the trial court must still scrutinize not only the principles and methods used by the expert but also whether those principles and methods have been properly applied to the facts of the case.

It is also interesting that the Advisory Committee states that nothing in the amendment was intended to suggest that experience alone, or experience in conjunction with other knowledge, skill, training or education, may not provide a sufficient foundation for expert testimony. The text of the rule as amended expressly contemplates that concept and an expert may be qualified solely on the basis of experience. The specific examples referenced are cases

involving a handwriting examiner and a design engineer. Of course, the expert relying on experience must be able to explain how that experience enabled him to draw the conclusion reached, what the basis for the opinion is, and how the experience is reliably applied to the facts.

Finally, the Advisory Committee observes that the amendment did not make any attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. The courts were given wide latitude and flexibility in considering challenges to expert testimony under Daubert and that has not changed under the amended rule.

As a practical matter, there is much in the Advisory Committee Notes for both plaintiff and defense attorneys to use as ammunition in either proposing or attacking certain expert testimony. On the whole, both the amended rule and the notes should prove helpful in persuading judges that well qualified or experienced origin and cause experts and other technical experts used in fire cases should be allowed to testify so long as their methodology is sound, even in cases where much of the testimony is based upon circumstantial evidence. Fanatical adherence to N.P.F.A. 921 should not be a prerequisite to admitting fire origin and cause testimony.

The battle must be fought and won at the trial level because the trial judges have been given wide latitude and their decisions will only be overturned on appeal only for abuse of discretion, a very difficult standard to overcome.

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