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PERSPECTIVE

What Have We Learned from the First Six Months Under the New Federal Rule of Evidence 702?

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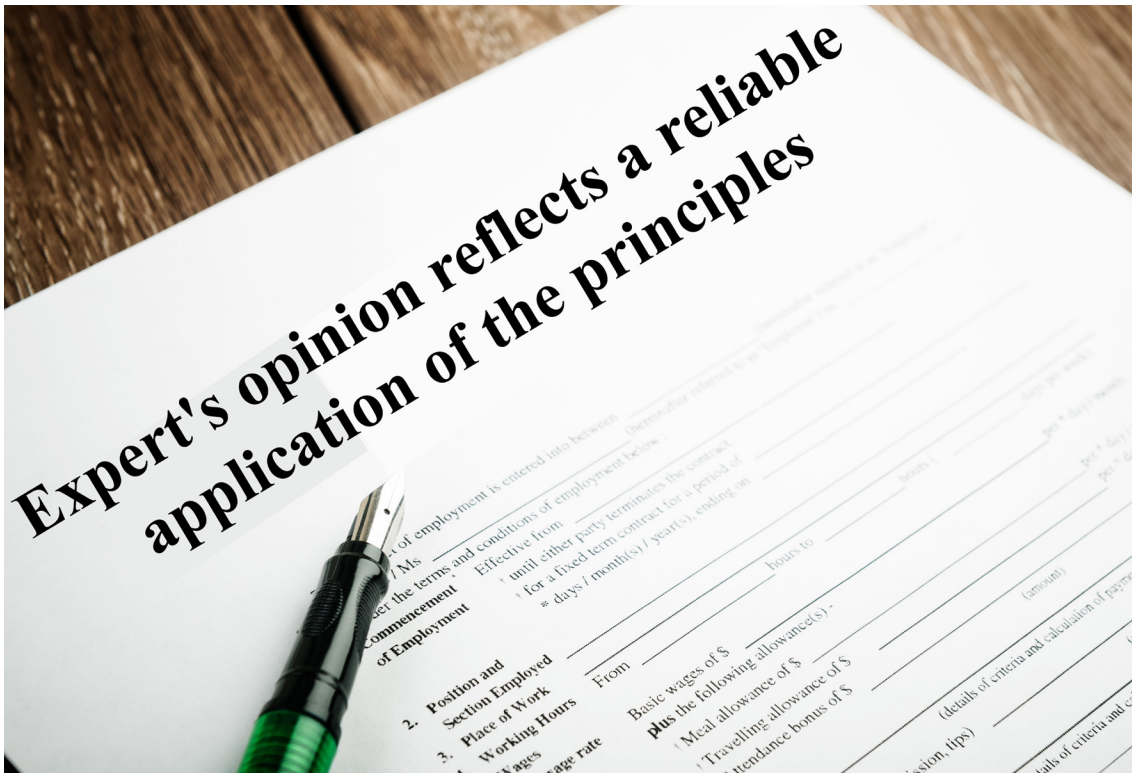

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As patent practitioners know, *Daubert* motions can be some of the most hotly contested and pivotal motions in the life of a patent case. These motions are used to exclude testimony from an opponent's expert witness, usually on the grounds that the expert's opinion is unreliable or methodologically defective. A successful (or even partially successful) *Daubert* motion can drive settlement and significantly affect the course of trial.

In late 2023, the evidentiary rule governing expert testimony—Federal Rule of Evidence 702—was revised for the first time in nearly 25 years. The new Rule 702 has now been in effect for just over six months. We reviewed how courts have been applying the new Rule 702 in this six-month period, particularly in busy patent-litigation venues including the District of Delaware, the Eastern District of Texas, and the Western District of Texas. Let's take a look at what we've learned in these first six months and what practical takeaways there are for patent litigators.

The New Rule 702

The changes to Rule 702—which took effect on December 1, 2023—are shown below, with additions underlined and deletions indicated as strike-thru text:

Rule 702. Testimony by Expert Witness

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.

The change to the Rule's preamble was intended "to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Adv. Comm. Notes—2023 Amendment. In other words, the proponent of expert testimony bears the burden of establishing its admissibility to the court. This change was made because "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight

and not admissibility," which is "an incorrect application of Rules 702 and 104(a)." *Id.*

The change to subsection (d) was intended "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." *Id.*

In Patent Cases, Which Types of *Daubert* Motions Should Be Affected by the Rule Change?

For patent cases, not all types of expert testimony should be equally affected by the 2023 amendments to Rule 702. Many technical experts (*e.g.*, those opining on patent infringement/noninfringement or validity/invalidity) base their opinions on their technical understanding of the relevant field and the evidence that was adduced during fact discovery, guided by the legal framework for comparing patent claims with evidence. *Daubert* challenges to these experts often seek to exclude the expert for insufficient or inapt credentials, and the amendments to Rule 702 seem less likely to affect these types of *Daubert* challenges.

However, some technical experts base their opinions on specialized testing, measurement, or simulation. For these types of technical experts, the amendments to Rule 702 are more likely to affect the outcome of a *Daubert* challenge because the Rule's new language places the burden of demonstrating the reliability of the expert's specialized testing, measurement, or simulation on the proponent of the evidence.

The amendments are also more likely to affect *Daubert* challenges to patent damages experts. These experts may offer surveys to opine on the value of an accused feature and/or economic analyses to opine on a reasonable royalty rate, both of which may be criticized as methodologically unreliable or unsupported by sufficient facts and data. The amendments to Rule 702 confirm that the proponent of the damages expert bears the burden of justifying the damages' expert's methodology in order to survive a *Daubert* motion. In a case where the judge decides that it could go either way, the expert should be excluded under the revised rule.

What Have We Learned in the First Six Months of the New Rule 702?

To assess whether the new Rule 702 has affected the *Daubert* landscape in patent cases, we reviewed *Daubert* rulings under the new rule in the busiest districts for patent litigation: D. Del., E.D. Tex., and W.D. Tex—the three districts where roughly half of all patent cases are venued. The new rule has not caused a seismic shift in expert admissibility in these districts, and judges in these districts continue to deny *Daubert* motions at a high rate.

For example in D. Del., Judge Andrews has commented that the amendment "affect[ed] the substance of the rule," but he has not explained his view on how the new Rule 702 affects the *Daubert* analysis. *See IPA Techs. Inc. v. Microsoft Corp.*, No. CV 18-1-RGA, 2024 WL 1797394, at *4 n.2 (D. Del. Apr. 25, 2024). In fact, in the very same order, Judge Andrews denied a *Daubert* challenge to a damages expert's willingness-to-pay opinion based on survey evidence, reasoning that "[m]ere technical unreliability goes to the weight accorded a survey, not its admissibility." *Id.* at *21.

In E.D. Tex. and W.D. Tex., we have not seen significant commentary on the new Rule 702 from the two judges with the highest patent caseloads in the country, Judges Gilstrap and Albright. In W.D. Tex., judges other than Judge Albright are seeing higher patent caseloads after the court's July 2022 order assigning patent cases filed in the Waco division on a district-wide basis. One such judge (Magistrate Judge Lane, ruling on a motion referred by Judge Pitman) discussed the new Rule 702 in excluding a patentee's damages expert for use of an inappropriate royalty base, although it is not clear that the Rule's new language affected the outcome of the motion. *See Exafer Ltd. v. Microsoft Corp.*, No. 1:20-CV-131-RP, 2024 WL 1087374, at *4 (W.D. Tex. Mar. 7, 2024) (excluding opinion of damages expert that included non-accused products in royalty base).

Outside of these busiest districts for patent litigation, some judges have given more attention to the rule change, but we are still not seeing a major shift in how courts conduct their *Daubert* analyses. For example in *Utherverse Gaming, LLC v. Epic Games, Inc.*, Magistrate Judge Fricke called for the parties to submit supplemental briefing on whether the new language of Rule 702 affected the then-pending *Daubert* motions. No. 2:21-CV-799-RSM-TLF, 2023 WL 9231397 & 2023 WL 9231334 at *1 n.1 (W.D. Wash. Dec. 26, 2023). Yet the court denied the *Daubert* motions, except as to several paragraphs in which the expert relied on online, crowd-sourced websites whose reliability was unknown. *See also Regents of the Univ. of Minnesota v. AT&T Mobility LLC*, No. CV 14-4666 (JRT/TNL), 2024 WL 844579, at *2 n.2 (D. Minn. Feb. 28, 2024) (denying motions to exclude patent damages experts and reasoning that "the result would be the same regardless of whether the Court applied the current or prior version of the rule").

Practical Takeaways for Patent Litigators

Based on the first six months under the new Rule 702, practical takeaways for patent litigators are:

· The language of Rule 702 is now more favorable to those seeking to exclude an expert opinion because the Rule's new language clarifies that the proponent of expert evidence bears the burden of showing the prerequisites to admissibility, including that the expert's opinion "reflects a reliable application of the principles and methods to the facts of the case." Nevertheless, courts—particularly those in the busiest patent litigation districts—have continued to deny *Daubert* motions at a high rate.

· Some courts have avoided tricky *Daubert* issues by stating that criticisms of an expert's methodology and application are questions of weight, not admissibility. If you face this issue, use the 2023 Advisory Committee Notes to your advantage; these Notes expressly reject the notion that defects in an expert's methodology or its application go only to the weight and not to admissibility. According to the Notes, that tendency is "an incorrect application of Rules 702 and 104(a)."

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