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20-EV-A

January 31, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

As chief legal officers of organizations that are frequently engaged with the American civil justice system, we represent stakeholders—including employees, customers, suppliers, communities, and shareholders—who rely on the federal courts to be a just forum for the resolution of legal disputes on the merits.

The Advisory Committee on Evidence Rules ("Committee") is entrusted with the essential task of ensuring the Federal Rules of Evidence ("FRE") are fair, plainly understood, and uniformly applied. We applaud the Committee for the seriousness of purpose with which it is evaluating practices under Rule 702.

Our experience indicates that adherence to Rule 702's standards for the admission of opinion testimony is far from acceptable. We are concerned that, left on its current trajectory without Committee action, judicial practices under Rule 702 will continue to diverge materially from the Committee's purpose when it drafted the rule to give effect to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

Too often, courts fail to execute or enforce the "gatekeeping" obligation. Instead, we see courts inappropriately delegate to juries the job of deciding whether an expert's opinions have the requisite scientific support. Such abrogation of the court's "gatekeeping" role deviates from the Committee's intent that Rule 702 allocate the responsibility between the judge and the jury for deciding preliminary questions under Rules 104(a) (the court must decide the preliminary question of whether a witness is qualified or the evidence admissible) and 104(b) (determining whether there are sufficient facts and data to render evidence relevant). The distinction between these tests is often unclear to both the bench and the bar. Confusion about the court's role in assessing these foundational requirements results in the admission of unreliable opinion testimony that misleads juries, undermines civil justice, and erodes our stakeholders' confidence in the courts.

Moreover, some courts refer to Rule 702's establishing a "presumption of admissibility"—a mischaracterization that inverts the proponent's burden to establish the admissibility of expert testimony. This erroneous "presumption of admissibility" appears to stem in part from the Committee's well-intended but widely misunderstood Note to the 2000 rule amendment stating that "the rejection of expert testimony is the exception rather than the rule." That statement, which was an observation

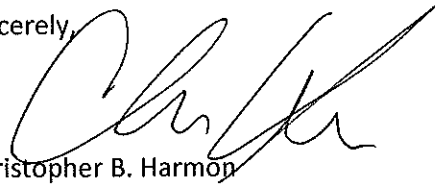
about pre-2000 practice and not intended to characterize admissibility standards, has derailed Rule 702 in many courts, causing unjust results.

We understand that the Committee balances several factors when deciding whether to amend a rule, and we don't make our suggestion lightly. We support the Committee's general caution about amendments that clarify rather than change standards; address problems of adherence to, rather than understanding of, the rule; and affect the development of legal principles in a way perhaps better left to case law. Nevertheless, the Committee has a responsibility to act when doing so would materially improve a situation of widespread disregard for or misapplication of a rule.

We urge you to move forward with an amendment to Rule 702 that would remedy the inconsistency in practice by clarifying that: (1) the proponent of the expert's testimony bears the burden of establishing its admissibility; (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.

Thank you for your consideration.

Sincerely,



Christopher B. Harmon
General Counsel