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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: Advisory Committee on Evidence Rules Consideration of Amendments to Federal Rule of Evidence 702

Dear Ms. Womeldorf:

We are writing to offer brief comments that we hope might be of value to the Advisory Committee on Evidence Rules as it weighs possible amendments to Federal Rule of Evidence 702. The Committee has already received many submissions, some of which are lengthy and cover multiple issues. Accordingly, we are keeping these comments brief and limiting our focus to a trend that we observe in our practice, which we suggest highlights the importance of the issue.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that the district court plays the role of a gatekeeper to assess whether an expert witness's testimony should be presented to the jury. The Court established a multi-part test for the district court to use in making that determination. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that the district court's gatekeeping role extends to all experts, not only to those who are scientists.

Federal Rule of Evidence 702, as currently written, reflects changes made in response to *Daubert* and its progeny. *See* Advisory Committee Note to 2000 Amendment to Rule 702. The text of Rule 702 appears to make the district judge's gatekeeping role plain:

A witness **who is qualified** as an expert ….. may testify in the form of an opinion or otherwise **if:**

(a) the expert's … knowledge **will help the trier of fact …;**
(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 the principles and methods … .**

The district court's role is to determine whether the witness proffered as an expert satisfies the test. Implicit in the role is the notion that the proponent of the expert has the burden of demonstrating to the judge that the proffered expert testimony satisfies the requirements of Rule 702.

The Advisory Committee attempted to resolve any doubt about the meaning and intent of Rule 702 at the time of the 2000 Amendment of the Rule. The Committee Notes state in pertinent part: "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. … [T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." *Advisory Committee Note to 2000 Amendment to Rule 702* (emphasis added).

Notwithstanding the seeming clarity of the Rule and the Advisory Committee's effort to affirm its requirements, as others submitting comments and writers in other contexts have pointed out, circuit courts and district courts have sometimes failed properly to apply Rule 702. *See, e.g., Wendell v. GlaxoSmithKline LLC*, 858 F. 3d 1227, 1237-38 (9th Cir. 2017), *cert denied sub. nom.*; *Teva Pharms. USA, Inc. v. Wendell*, 138 S. Ct. 1283 (2018); *Sappington v. Skyjack, Inc.*, 512 F. 3d 440, 448 (8th Cir 2008); Memorandum from Daniel J. Capra, Reporter, *Advisory Committee on Evidence Rules to Advisory Committee on Evidence Rules, Forensic Evidence, Daubert and Rule 702* (April 1, 2018) at 50.

Our practices, and those of many of our colleagues, focus on environmental litigation and related toxic tort cases. Those are areas of litigation where expert testimony is of critical importance. It involves many disciplines, including toxicology, epidemiology, medicine, genetics, botany, ecology, chemistry, geology, engineering, air modeling, property valuation and economics. One fairly recent, but significant, development that we have seen is the expanded use in litigation of citizen science in some of these complex disciplines.

Today, members of the public are able to collect data related to air emissions and water quality using inexpensive and readily available devices. Public interest and advocacy groups can utilize such data when attempting to influence regulatory processes. Sometimes the data is of value. Sometimes, however, it is of low quality and lacking a basis in a scientific methodology, and as a result can be misleading.

Plaintiffs are now using citizen collected data in litigation, and attempting to introduce it through experts. Those experts will use the data as support for proffered opinions on issues of causation. A good example might be the collection of air quality data via hand held devices by the plaintiffs in a toxic tort case alleging airborne exposures. Depending on the circumstances, there can be questions about whether the devices have been properly calibrated or recalibrated, let alone whether the citizens have utilized the devices correctly, and whether they have logged all of the data properly. The expert witness will not have been present to observe the collection of data. He or she may not even have vetted the methodology of collection in the particular case.

One would think that the opinions of an expert – be it an air quality expert or a toxicologist utilizing the citizen collected data – would not be admissible in the face of such questions because of the reliability of the data on which the opinions are based. However, what would the result be in the Ninth Circuit? In *Messick*, *supra*, 747 F. 3d at 1198-99, that court held that the district court erred when it rejected expert medical testimony as unreliable because "medicine partakes of art as well as science." Would such testimony be admissible in the Eighth Circuit given its holdings that the district court should reject expert testimony "only if it is so fundamentally unsupported that it can offer no assistance to the jury?" *Sappington*, 512 F. 3d at 448.

To be sure, we are presenting a hypothetical for the Committee's consideration. However, it is a hypothetical based on developments we see in our practice and tomorrow's cases follow from yesterday's decisions. The Eighth Circuit's holdings are inconsistent with *Daubert*. The Ninth Circuit's decisions are as well. Both fail to adhere to the meaning of Rule 702 and the accompanying Advisory Committee note. As other commenters have pointed out, there are district courts in other circuits that have also failed to follow the Rule.

We respectfully suggest that the Advisory Committee should propose an amendment that confirms the existing requirements and purpose of Rule 702 and makes plain the district court's important gatekeeping function.

Very truly yours,

Bina R. Reddy

Very truly yours,

John S. Guttmann