August 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

Dear Ms. Womeldorf:

In 2015, we co-authored the article *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57(1) William & Mary Law Review 1 (2015). In our article, we reviewed the drafting history of the 2000 amendments to Rule 702, the new language that resulted, and the many ways in which federal courts have either completely ignored or misinterpreted the standard for expert admissibility that was codified in the amended rule.

We have been gratified by the serious attention this article has garnered from the Advisory Committee on Evidence Rules ("Committee"), and we commend the Committee for the further analyses it has conducted on this issue, much of which is set forth in Judge Schroeder's recent article, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95(5) Notre Dame Law Review 2039 (2020). While the Committee has focused on different proposed language for an amended Rule 702 than we proposed in our 2015 article, we believe that the language being considered by the Committee, along with further guidance in an accompanying Committee note, would address many of the more significant problems of judicial recalcitrance noted in our article.

We write now in response to arguments that – notwithstanding clear examples of judicial misapplication of Rule 702 – the Committee should forswear any amendment to the Rule and rely instead on judicial education in the hope that this will persuade recalcitrant courts to more faithfully fulfill their gatekeeping responsibility.

As the Committee may recall, similar arguments were made prior to the 2000 amendments. Now, as then, "[a] number of public commentators asserted that Rule 702 should not be amended because it is currently working well" and that "courts are reaching conformity over the meaning of *Daubert*."[1] In response, Committee Reporter, Professor Capra explained that opponents to a revised Rule "tend[ed] to overstate the existence of post-*Daubert* uniformity" and cited to cases that has misapplied the admissibility standard in the very same ways that many courts continue to misapply the standard today:

[1] *See* March 1, 1999 Memorandum from Dan Capra, Reporter, to Advisory Committee on Evidence Rules, re: *Public comments on, and possible revisions to, Proposed Amendments to Evidence Rule 702*, at 47 ("March 1, 1999 Memo"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV1999-04.pdf.

(1) improperly applying the Rule 104(b) standard to questions of expert admissibility,
(2) failing to follow the rule set forth in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) that requires courts to analyze each step in an expert's analysis including that the expert's methods are reliably applied to the facts of the case,
(3) drawing too strong a distinction between methodology and conclusions, and
(4) applying a non-rigorous approach to expert admissibility and improperly relegating the issue to a jury's consideration on the grounds that it can be subject to cross-examination and contrary proof."[2]

The persistence of these conflicting understandings of Rule 702 over the past 20 years speak strongly to the need for the Advisory Committee to amend the rule once more to secure uniformity and proper application of the expert admissibility standard. As Professor Capra recently noted: "[W]hen a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, *it is a drafting committee's responsibility to resolve the impasse*."[3] Professor Capra continued: "Indeed, one of the main reasons that the Advisory Committee was reconstituted in 1992 was to assist in the resolution of conflicts in the application of the Rules. In the context of damaging and unresolved conflicts, the benefits of uniformity and fairness outweigh the potential costs of dislocation and unintended consequences."[4]

Given these long-standing conflicts, it is sophistry to suggest that further efforts to educate the judiciary on the meaning of a rule that they have been applying for the past twenty years will somehow lead to an evolution in the views of recalcitrant judges. Moreover, such judicial training efforts will do little in the face of a large body of existing precedent misinterpreting amended Rule 702, nor will it address the confusion that this case law has engendered in attorneys and parties to disputes. Judges and litigators naturally rely on precedents from their own circuits, in the absence of a new rule superseding those precedents. Relevant decisions by all parties should be informed by an accurate and consistent application of the expert admissibility standards, not by erroneous precedents that ignored the clear wording and intent of a federal rule of evidence.

Similarly unpersuasive are two additional arguments that have been raised against the currently-proposed amendment to expressly incorporate the Rule 104(a) standard into Rule 702. First, opponents argue that the amendment is unnecessary because the 104(a) standard is referenced in *Daubert* itself and further set forth in the Committee's notes to the 2000 amendment to Rule 702. But with the 2000 Amendment, it is the language of Rule 702 that governs expert admissibility. As Judge Schroeder has recognized, "some courts have defaulted to [other language in *Daubert*] that Rule 702 is not meant to prohibit 'shaky but inadmissible' evidence" as grounds to improperly apply Rule 104(b)'s standard for admissibility.[5] Further, while the Committee's efforts to provide guidance with the Note to the 2000 amendment was admirable,[6] Committee notes are not legally binding and have often been ignored entirely in the context of interpreting Rule 702. .

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[2] *Id.* at 47-48; *compare Toward a More Apparent Approach*, at 2042-43 (noting similar problems with post-2000 opinions).
[3] Capra DJ & Richter LL, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. Rev. 1873, 1886 (2019) (emphasis added).
[4] *Id.* at 1886-87.
[5] *Toward a More Apparent Approach*, at 2042-43.
[6] *See Poetry in Motion*, at 1921-22

Second, considerable effort has been taken to reanalyze the record in some of the cases that misapplied Rule 702 to suggest that those cases might have been resolved similarly under the correct standard.[7] Respectfully, we believe this effort is fundamentally misguided. As none other than the Ninth Circuit recognized in response to a similar argument in the context of a flawed trial court expert admissibility decision, "A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny."[8] In any event, speculation over whether a court would have reached the correct result if it had applied the right standard in an individual case is irrelevant to the legal hazard created by the continued entrenchment of the incorrect legal standard, which may be viewed as binding in subsequent cases.[9]

Finally, as we noted in our 2015 article and Judge Schroeder notes in his article as well, the courts that have been misapplying Rule 702 are not only misinterpreting the Rule's requirements, they are in many instances completely disregarding the work this Committee did in 2000 to more clearly define the expert admissibility standard. These courts repeatedly rely on case law pre-dating the 2000 revisions (and in some instances predating *Daubert* itself). They quote from the prior language of Rule 702. They blatantly contradict the guidance provided in the Advisory Committee note to the 2000 amendment. The Committee should not allow courts to rewrite federal rules to revert back to standards that this Committee and the Federal Rules have rejected. The rules drafted by the Committee – reviewed by the Standing Committee, adopted by the Judicial Conference, approved by the U.S. Supreme Court, and enacted by Congress – are the law, and they must be respected as such.

The proper application of Rule 702 should not depend on the happenstance of where an individual litigant lives or which federal court is called upon to preside over their claim. After twenty years of continued confusion, there is no realistic hope that this confusion will be resolved through developing precedent. As we stated in 2015, it is time to amend Rule 702.

Sincerely,

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[7] *See Towards a More Apparent Approach*, at 2044 ("A closer look at the facts of these cases suggests that some courts may be hewing closer to the Rule 7032 standard than the decisions suggest.")
[8] *Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003)
[9] *See Towards a More Apparent Approach*, at 2050-51 & n. 85 (citing district court *Daubert* opinion that relied on what it concluded was binding 9th Circuit authority, despite the fact that the 9th Circuit's application of Rule 702 is "facially wrong").