

September 3, 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

Dear Ms. Womeldorf:

The Advisory Committee on Evidence Rules is considering an amendment to Federal Rule of Evidence 702 and a Committee Note to clarify that problems with the basis of an expert's opinion or the application of an expert's methodology are threshold issues of admissibility.¹ I write in support of that amendment and a clarifying Committee Note.

I am the managing partner in the Baker • Wotring LLP law firm in Houston, Texas. My firm primarily practices environmental litigation and complex commercial litigation, both of which involve extensive use of expert witnesses. My firm's experience with court application of the rules regarding expert witnesses leads me to believe that an amendment to Rule 702 and a clarifying Committee Note are essential to ensure that the trial court is the gatekeeper and that juries are not asked to consider expert evidence that is not supported by a proper factual basis and proper methodology.

My firm has been involved in various litigation in which a clarifying Committee Note and amendment to Rule 702 would have been relevant and helpful. For example, in cases where statistical methods are to be used in determining financial decisions and amounts in controversy, parties differ greatly in the determination of which statistical methodology should be used to determine the appropriate amounts. In some cases, trial courts have left it to the jury to decide which statistical methodology was proper. A clarification to the rules would clarify the court's gatekeeping responsibilities and what is appropriate for juries to consider.

The Advisory Committee has considered an amendment to the introductory language of Rule 702 clarifying that "the court must find the following requirements to be established by a preponderance of the evidence."² Based on our experience, we believe that such clarification is necessary. A specific amendment and an accompanying Committee Note detailing the rationale for the amendment would clarify the courts' gatekeeping responsibilities and encourage them to apply Rule 702 as intended. Similarly, including language specifying that Rule 702's requirements

¹ See Daniel Capra, *Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) —Weight and Admissibility Questions*, at 1 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules (Oct. 19, 2018, meeting) at 171) ("Capra").

² Capra at 26.

are mandatory and specifically identifying the preponderance standard will focus the courts on their gatekeeping role.

Thank you for your consideration and the opportunity to provide comments on this issue.

Sincerely,


Debra Tsuchiyama Baker