June 30, 2020

Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room 7-300
Washington, D.C. 20544

Attention: Rebecca A. Womeldorf, Secretary

Re: Comment on Potential Amendment to Federal Rule of Evidence 702

The Federation of Defense & Corporate Counsel (FDCC) is advised that the Advisory Committee on Evidence Rules is considering potential amendment to Federal Rule of Evidence 702 and a Committee Note on that rule. The purpose of this correspondence is to provide the FDCC's comments on the specific need for such amendments and Committee Notes to Rule 702.

Introduction

The FDCC is comprised of over 1,400 members who work in private practice, as in-house counsel, and as insurance-claims professionals and executives. Membership is limited to attorneys and insurance professionals nominated and then vetted by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. The FDCC constantly strives to provide access to and protect the American system of justice and to improve its efficiency. Its members have established a strong legacy of leadership in representing the interests of civil defendants.

FDCC members are some of the most-experienced litigators in America. They are on the front lines of complex and multi-district litigation (MDL) defending businesses and individuals in civil actions. As a result, FDCC members are intimately familiar with Rule 702 and its real-world applications and varying interpretations by the Courts. They know its strengths and weaknesses and bring a practical perspective on improving the Rule in manner consistent with the rule of law. Based upon that perspective, the FDCC believes that two aspects of Rule 702, and its existing committee notes, should be clarified by amendment.

I. Rule 702 Should Provide that the Proponent of Expert Testimony Bears the Burden of Establishing Admissibility.

Rule 702 is silent on the burden for establishing admissibility of expert testimony. This absence of guidance has led to the unfortunate circumstance of inconsistent interpretation and application of the Rule, as well as the resulting unsettled framework of varying opinions in which expert testimony has been either admitted or excluded. Admittedly, the Advisory Committee Notes on the 2000 amendments recognize that admissibility is governed by Rule 104(a). And, it is well-established under Rule 104(a) that the proponent of any evidence "has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[1] Nevertheless, in the experience of FDCC members, trial courts considering the admissibility of expert testimony regularly overlook the weight and significance of that burden.

Many decisions recognize the burden, but immediately lighten it with statements that are unsupported by the law. For example, trial courts throughout the country espouse the principle that there is a "presumption of admissibility" for expert opinions.[2] A related proposition is the maxim that "rejection of expert testimony is the exception and not the rule."[3] Yet, presuming admissibility is a "paradoxical position" in light of the burden placed on the offeror of expert testimony.[4] Under *Daubert* and Rule 702, trial judges are charged "with the responsibility of acting as gatekeepers to *exclude* unreliable expert testimony …."[5]

This unfounded presumption achieves the exact opposite result -- encouraging trial courts to throw-open the gates of admissibility. The dangers of this were properly stated by the Reporter to the Advisory Committee on Evidence Rules in 2019, "…the key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[6]

Trial courts trumpeting a presumption of admissibility frequently buttress that presumption by claiming that Rule 702 has a "liberal standard of admissibility."[7] That standard is not grounded in the reality of any facts or justification. Nothing in Rule 702, its comments, *Daubert*, *Kuhmo*

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[1]Rule 702 advisory committee's notes, 2000 amend.

[2]*See, e.g., Cates v. Trustees of Univ. of Columbia*, No. 16 Civ. 6524 (GBD) (SDA), 2020 WL 1528124 at *6 (S.D.N.Y. Mar. 30, 2020); *Maes v. Lowe's Home Ctrs.*, LLC, EP-17-CV-00107-FM, 2018 WL 3603114 at *4 (W.D. Tx. May 25, 2018); *Metro Sales, Inc. v. Core Consult. Group, LLC*, 275 F.Supp.3d 1023, 1053 (D. Mn. 2017) (finding rule 702 "favors admissibility over exclusion"); *Chapman v. Tristar Products, Inc.* No. 1:16–CV–1114, 2017 WL 1718423 at * 1 (N.D. Ohio Apr. 28, 2017); *Ass Armour, LLC v. Under Armour, Inc.*, No. 15-cv-20853-Civ-COOKE/TORRES, 2016 WL 7156092 at * 2 (S.D. Fla. Dec. 8, 2016).

[3]*Finch v. City of Wichita*, No. 18-1018-JWB, 2020 WL 3403121 at *21 (D. Kan. Jun. 19, 2020)In *re: Niaspan Antitrust Litigation*, MDL NO. 2460, 2020 WL 2933824 at *5 (E.D. Pa. Jun. 2, 2020); *Koenig v. Johnson*, . No. 2:18-cv-3599-DCN, 2020 WL 2308305 at *2 (D.S.C. May 8, 2020).

[4]5 Mod. Sci. Evidence § 37:5 (2019-2020 Edition).

[5]Rule 702 advisory committee's notes, 2000 amend. (emphasis added).

[6] Minutes of the Judicial Conference Advisory Committee on the Federal Rules of Evidence, May 3, 2019, p.23.

[7]*See, e.g., United States v. Napout*, No. 18-2750 (L), 2020 WL 3406620 at *18 (8th Cir. Jun. 22, 2020); *United States v. Fernandez*, 795 Fed.Appx. 153, 155 (3d Cir. 2020).

Tire or other Supreme Court precedent endorses liberal admission of expert testimony.[8] To the contrary, the only presumption that should exist is exclusion of unreliable expert testimony under the trial court's gatekeeping function.

From a practical standpoint, these newfound rules improperly shift the burden of proof under Rule 702. The proponent no longer bears the burden of demonstrating by a preponderance of the evidence that expert evidence and testimony should be admitted. Instead, the opponent must overcome "presumptions" and "liberal standards" to show that the evidence ought to be excluded. This standard is, in our humble view, the antithesis of what the drafters of Rule 702 had intended.

Accordingly, the FDCC endorses any action by the Committee that will provide explicit direction to litigants, counsel and trial courts that: (a) the proponent of expert testimony bears the burden of proving each subsection within Rule 702 (including the basis and reliability requirements) by a preponderance of the evidence; and, (b) there is no presumption or other standard that favors admissibility. That direction can be accomplished by an amendment to Rule 702 and a Committee Note. The rule itself should define the admissibility burden:

> 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 of the testimony establishes by a preponderance of the evidence…:***[9]

Thus, an amendment to the rule will plainly establish that admissibility must be proven by a preponderance of the evidence. In conjunction with that amendment, a Committee Note will dispel any thoughts of a "liberal" admissibility standard. The FDCC suggests the following addition to the draft Committee Note submitted by the Committee's reporter on October 1, 2019:

> A requirement of an accurate conclusion derived from the methodology is integrally related to the admissibility requirements of Rule 702(b)-(d), all of which are intended to assure that an expert's opinion is helpful. Those admissibility requirements, like the requirement of an accurately stated conclusion, are evaluated by the court under Rule 104(a), so the proponent must establish that the admissibility standards are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987). Unfortunately many courts have held or declared that***: (a) Rule 702 adopts a "liberal standard" requiring a presumption of admissibility; or, (b)*** the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of

[8]*Daubert* recognizes that the basic standard of relevance under Rule 401 is a "liberal one," but does not attribute any such liberality to Rule 702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).
[9]*Cf.* Fed. R. Evid. 702 (suggested addition ***emphasized***).

> weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[10]

These two additions to Rule 702 will help focus litigants and trial courts on the appropriate and more uniform standards for admission of expert testimony.

II. The FDCC Supports the Proposed Committee Note Regarding Weight/Admissibility under Rule 702.

In "a disturbing number of cases," courts make the broad misstatement that "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility."[11] That misstatement is equivalent to a punt on third down – conceding a result when confronted with difficult circumstances. Yet, the difficult task of determining expert validity is unquestionably the role of the trial court and not the jury. And, experienced federal judges are in a far better position to accomplish that task than lay jurors.

These trial courts effectively shift *Daubert*'s gatekeeping requirement to counsel opposing the expert testimony. Any failure by the court to conduct a thorough Rule 702 analysis can supposedly be remedied by vigorous cross-examination.[12] Yet, once the expert is allowed to testify, the horse is out of the barn. Indeed, there are at least two instances where cross-examination of an expert will be insufficient to remedy a failure to conduct a comprehensive Rule 702 analysis.[13]

- First, the significance of cross-examination might "go over the heads" of jurors where expert testimony deals with complex and difficult subject matter.[14] This is the very reason for *Daubert*'s gatekeeping requirement.[15]
- Second, even successful cross-examination of an expert can be ineffective if the expert's opinion is unfairly prejudicial, touching upon sensitive or emotion-laden subjects.[16]

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[10] *Cf.* Daniel Capra, *Memorandum to Advisory Committee on Evidence Rules re: Possible Amendment to Rule 702*, (Oct. 1, 2019)(Agenda Book, Advisory Committee on Evidence Rules (Oct. 25, 2019 meeting) at 163-64)(suggested addition ***emphasized***).

[11] *Id.* at 160.

[12] *Johanessohn v. Polaris Indust., Inc.*, No. 16-CV-3348 (NEB/LIB), 2020 WL 1536416 (D. Minn. Mar. 31, 2020)(finding that criticisms of expert's methodology are matters for cross-examination); *United States v. Symantec Corp.*, No. 12-800 (RC), 2020 WL 1508904 at *10 n.5 (D.D.C. Mar. 30, 2020)("expert testimony with a weak basis in fact can be addressed through cross-examination."); *Clark v. Travelers Comps., Inc.*, No. 2:16-cv-02503 (ADS)(SIL), 2020 WL 473616 at * 5 (E.D.N.Y. Jan. 29, 2020).

[13] *See* 29 WRIGHT & GOLD, Federal Practice & Procedure § 6294. Wright & Gold discuss Rule 705 and the general weaknesses in cross-examining experts. Rule 702 is woven throughout that discussion.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Such an opinion should be inadmissible in the first instance because it does not help the trier of fact under Rule 702(a).[17] "The whole point of Rule 702 – and the *Daubert*-Rule 104(a) gatekeeping function – is that these issues *cannot* be left to cross-examination."[18]

The FDCC knows that the Committee has been wrestling with its considerations pertaining to the weight/admissibility dilemma.[19] It appears that the Committee is "receptive" to a Committee Note addressing the issue and the Committee's Reporter has supplied a proposed note.[20] The FDCC fully supports that Committee Note so far as it addresses the weight/admissibility issue and urges its adoption in order to provide greater clarity and consistent interpretation of Rule 702 by the Courts. As succinctly noted in the Washington Legal Foundation's recent Working Paper, the intent of Rule702 was – and remains – to establish rather than evade a uniform standard courts will use to scrutinize an expert's basis, methodology and application.[21] The Committee must now issue necessary clarification so that the Rule can function as intended and safeguard the trial process against misleading and unqualified opinion testimony.

Conclusion

Thank you very much for your time and valuable consideration on these important issues. We stand ready to provide any further advice or input and look forward to the opportunities to further engage with the committees regarding the importance of Rule 702. We also respectfully endorse and adopt the Comments advanced on this issue by the Lawyers for Civil Justice, as though set forth fully herein.

Respectfully submitted,

Elizabeth Lorell
FDCC President

[17] *See id.*
[18] Capra, *supra* note 9 at 141.
[19] *Id.* at 159-161.
[20] *Id.* at 161, 163-164.
[21] Mickus, G*atekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence,* Washington Legal Foundation, Critical Legal Issues Working Paper Series, Number 217 (May 2020).