December 16, 2021

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

Re: Proposed Amendment to Federal Rule of Evidence 702

Dear Committee members:

As senior legal officers of organizations that frequently litigate in federal courts, we are writing in support of the amendment to Federal Rule of Evidence 702 proposed by the Advisory Committee on Evidence Rules (the "Proposed Amendment"). The Proposed Amendment would significantly improve trial practice by clarifying that: (1) the proponent of expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence, and (2) an expert shall not assert a degree of confidence in an opinion that is not derived from sufficient facts and reliable methods.

The Proposed Amendment addresses a significant problem that we have seen in many courts—both district and circuit—across the country: a widespread misunderstanding about courts' "gatekeeping" obligation to ensure that proffered opinion testimony meets Rule 702's admissibility standards before allowing the jury to hear it. Too often, we see courts allowing juries to consider expert testimony without first determining whether that testimony is "based on sufficient facts or data," is "the product of reliable principles and methods," and reflects a reliable application of those principles and methods to the facts of the case. Although Rule 702 ostensibly requires courts to make such a determination, the misunderstanding about the rule's requirements frequently results in the admission of factually unsupported or otherwise unreliable opinion testimony that misleads juries, undermines civil justice, and erodes public confidence in the courts.

There are two primary reasons why Rule 702 is widely, but inconsistently, misunderstood. First, the current rule text does not clearly distinguish between the court's responsibility under Rule 104(a) to decide the preliminary question of whether a witness is qualified and the evidence admissible, and the 104(b) standard that allows the jury to determine what weight to give the evidence *after* the court has ruled it admissible. A comprehensive study by Lawyers for Civil Justice shows that, of the 1,059 federal district court opinions issued during 2020 in which the judge decided to admit, deny, or partially admit expert evidence, there were 686 instances (65 percent of decisions) in which the court failed to cite the preponderance of evidence standard.[1] The Proposed Amendment would remedy this problem by adding clear language that the proponent of expert testimony bears the burden of establishing admissibility "by a preponderance of the evidence," which is the 104(a) standard. This is a much-needed clarification that will help both courts and counsel adhere to the rule, particularly in jurisdictions where courts have erroneously characterized Rule 702 as reflecting a "presumption of admissibility."[2] In

[1] Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, available at: https://www.regulations.gov/document/USC-RULES-EV-2021-0005-0001/comment.

[2] Of the 1,059 federal district court opinions examined in the Lawyers for Civil Justice study, 135 inaccurately stated that Rule 702 has a "liberal thrust favoring admissibility," and 61 decisions simultaneously cited both the preponderance standard and the inconsistent notion of a "liberal thrust favoring admissibility." *Id*.

addition to this change, we also suggest adding that "the court" must determine admissibility—a clarification that would directly address the core confusion about the Rule's allocation of responsibility between the judge and the jury.

The second reason for confusion about Rule 702 is that many courts continue to recite and apply pre-2000 caselaw even where it directly contradicts the Rule. Research provided by Lawyers for Civil Justice demonstrates that "many widely cited descriptions of the courts' role are not interpretations of Rule 702 at all, but rather are recycled statements of law that the 2000 amendment rejected."[3] The Proposed Amendment addresses this problem by stating in the Committee Note that such rulings "are an incorrect application of Rules 702 and 104(a)," which will certainly help careful readers to understand the rule better. But the Committee Note would be more accurate—and therefore more helpful to courts and counsel—if it explicitly states that the incorrect rulings "are rejected by this amendment," as it did in the Committee's previous draft.[4] Restoring this language would be a straightforward explanation of the Committee's purpose for drafting the Proposed Amendment.[5]

We appreciate the Committee's work to address the serious problems of expert evidence admissibility. We support the Proposed Amendment with the modifications suggested above and urge its approval. Thank you for considering our views.

Sincerely,

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[3] Lawyers for Civil Justice, *Why* Loudermill *Speaks Louder Than The Rule: A "DNA" Analysis Of Rule 702 Case Law Shows That Courts Continue To Rely On Pre-Daubert Standards Without Understanding That The 2000 Amendment Changed The Law,* Oct. 20, 2020, *available at* https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf.

[4] Advisory Committee on Evidence Rules, Agenda Book April 30, 2021, at 105, *available at* https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021.pdf.

[5] Advisory Committee on Evidence Rules, Draft Minutes of the Meeting of November 13, 2020, Committee on Rules of Practice and Procedure Agenda Book, January 5, 2021, at 845 ("It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule.").

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