March 12, 2021

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rule of Evidence 702

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the Advisory Committee on Rules of Evidence's consideration of rulemaking related to Federal Rule of Evidence 702 ("Rule 702"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules, including Rule 702, in their practice.

As the Committee has continued its consideration of whether to modify Rule 702, two suggestions have emerged: whether to add a "preponderance of the evidence" standard to the rule itself and whether the rule should address what have been labeled "overstatements" by expert witnesses. While AAJ members remain concerned about this rulemaking in general, and recommend no amendments to Rule 702, for the purposes of this comment it is the latter suggestion on which AAJ now focuses, specifically whether a new subdivision (e) should be added to the rule to prohibit overstatements by experts.[1] It is AAJ's position that the proposed amendment should be rejected as it needlessly divides the bar, would not work for the variety of cases that use the rule, and has numerous likely unintended consequences—including judicial misapplication of the rule.

[1] See Standing Committee Agenda Book, 444 (Jan. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf ("At its November meeting, the Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. In a provisional vote, a majority of the members decided that the amendment was not necessary, because Rule 702(d) already requires that the expert's opinion be a reliable application of a reliable methodology.").

The Proposed Amendments are Far-Reaching and Controversial

This rulemaking commenced in an attempt to respond to issues specifically surrounding forensic expert evidence. The Committee has indicated that it is interested in amending the rule to focus on "one important aspect of forensic testimony," overstatements, and consulted extensively with DOJ on the issue.[2] Forensic experts have continued to be the focus of the rulemaking, despite the fact that such a rule change would impact far more than just forensic experts and criminal cases. That is, the rulemaking has naturally expanded in a way that would impact virtually all cases. The expansion has also resulted in disagreements between different factions of the bar and a clear division between how these proposed amendments would impact criminal and civil cases.

1. **Rule 702 Must Work for All Parties**

Instead of working for all different types of practitioners, this rulemaking pits prosecutors against criminal defense lawyers, with the former declaring that Rule 702 as currently written is working as intended and the latter indicating concerns that without a rule change, criminal defendants will be wrongfully convicted based on improper expert testimony. AAJ takes no position on the use or misuse of Rule 702 in criminal cases at this juncture and instead focuses on the application of the rule and proposed changes in civil cases. However, the proposed rulemaking has aligned the plaintiff's bar, normally naturally aligned with the criminal defense bar, with prosecutors. That is, AAJ members generally agree that Rule 702 as currently written has been able to address any concerns about overstatements.

There is also strong disagreement between the civil plaintiff bar and civil defense bar. The civil defense bar has made it clear that it believes Rule 702 to be vastly misunderstood and misapplied by the courts, commenting that the rule must be changed in order to clarify the law.[3] In contrast, the civil plaintiff bar has grave concerns about the impact of such an unnecessary rule change—on an issue that is already able to be addressed by the rule itself (along with the existing Note, which provides sufficient guidance)—which is sure to lead to confusion, delay, and erroneous restrictions on testimony.

While it is to be expected that proposals to change rules will lead to divergent views on opposite sides of the bar, where a proposal to change a Rule of Evidence sounds sirens of deep division in both the criminal and civil bar, it strongly suggests that the rule change is likely to create greater controversy and less clarity. Reaching a consensus amidst these and other diverging viewpoints is a challenge and indicative that the proposed rule will vastly differ in the way that it impacts attorneys and their clients.

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[2] *Id.* ("But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.").

[3] *See, e.g.*, Lawyers for Civil Justice Comment (Oct. 20, 2020), https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-20-ev-y.

2. Rule 702 Must Work for All Cases

The consensus of the Committee thus far has been that the proposed rule will apply broadly and not be limited to a specific kind of case (i.e. not limited to criminal cases and/or forensic experts). Central to the Federal Rules of Evidence is its application to *all* kinds of cases and different types of witnesses. There are many cases that use Rule 702 in addition to those most frequently discussed by this Committee, namely criminal cases and pharmaceutical drug and medical device-based MDLs. However, the Committee has not fully considered the impact of an overstatement amendment to these cases.

A quick look at the wide variety of cases that use Rule 702 and would be impacted by a subdivision (e) demonstrates that the proposed changes are untenable in each and every such case. Examples of such scenarios include: 1) forensic accounting for white collar crime, commercial business and insurance litigation; 2) building and structural engineers for ADA cases; 3) auto and trucking accident reconstruction experts; 4) aviation experts, including aeronautical engineers; and 5) business experts, such as specialists in forensic economics, business valuation, and lost business/earnings evaluations. This list is certainly not exhaustive, but illustrates the breadth of litigation that is likely to apply Rule 702. The type of testimony elicited from each such expert witness is sure to vary greatly in each instance, as is the potential for alleged overstatements.

Further, the rule amendment would increase expert witness expenses, and unnecessarily burden the Court, in relatively low-dollar/limited damage cases, hindering the ability of injured plaintiffs to pursue relief in a "just, speedy and inexpensive" determination of their cases, as Fed. R. Civ. P. 1 dictates. In such cases, if there is a new layer of challenges to experts, case management and case costs will increase disproportionately in comparison to high-dollar value cases where there is already a commitment to substantial sums being spent on both sides. That is, the smaller cases will be unnecessarily "punished" by this rule change and that impact will disproportionately affect plaintiffs pursuing certain civil claims, including state claims removed to federal court due to diversity jurisdiction that just barely meet the amount in controversy threshold of $75,000.00.

3. AAJ Recommends Against Moving Forward with Rule 702(e)

In order to reach consensus—and not send to formal rulemaking a rule that hopelessly divides the bar—AAJ recommends against moving forward with proposed Rule 702(e). At best, this rule change will not change current practice. At worst, the rule change will lead to increased motion practice, will clog the courts' dockets without tangible benefits, will cause confusion, and will further delay. These harms do not outweigh any benefit of a proposed rule change that adds language to deal with a potential problem that can already be covered and considered by Rule 702 as it is currently written.

Moreover, as indicated in its November 6, 2020 letter, DOJ has proposed that this rulemaking be paused in order to determine whether DOJ's Uniform Language for Testimony and Reports ("ULTR") initiatives are working.[4] And thus far, it appears that these recommendations

[4] Department of Justice Letter, 952 (Nov. 6, 2020), https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf ("The Department's Forensic Science webpage currently contains 16 ULTRs, many updated this past

are being followed to properly limit the scope of forensic expert testimony. As the DOJ's letter expresses, steps are being taken to address the issues and perceived problems with overstatements and Rule 702. This process should be allowed to continue in order to determine how overall implementation is working for cases, especially since the rulemaking commenced as a result of those types of cases that the ULTR initiatives are affecting. To properly determine whether a rule change is actually needed, the process must be given a sufficient amount of time to play out.

There is a real risk of unintended consequences as a result of amendments to Rule 702 that apply to all experts. First, related appellate litigation will undoubtedly proliferate as a result, adding years to the lifetime of each affected case, when judges themselves do not believe there is a real problem with the rule. Unnecessary delay and related costs of appeal do not benefit the parties or the courts. Second, many courts were already backlogged prior to the pandemic, which has created further delays for parties.[5] The proposed amendment would compound this problem. Third, confusion will inevitably arise over interpretation of the amendment—specifically, what, if any, substantive differences exist between the existing Rule 702 and the amended version? Instead of providing clarity, the addition of 702(e) will lead to uncertainty. For example, as one Committee member posited at the October 2020 Evidence Rules Committee meeting, an unintended consequence to the addition of 702(e) may be that practitioners and courts see a rule change and believe that they now need to do something differently under Rule 702, even when nothing has really changed. There is broad agreement that Rule 702 is equipped to deal with overstatements as it is currently written; what message is being sent by a rule change or addition of this language to the Committee Note?

With criminal issues resolving themselves, the need for an amendment diminishes while the risk of the unintended consequences as a result of Rule 702(e) remains.

Specific Problems with Proposed Rule: FRE 702(e)

1. **There is a risk for judicial misapplication of this rule.**

Some courts will not understand that "overstatement" has limited application. And, improper limits by a court on an expert due to confusion surrounding overstating conclusions will result in restrictions on otherwise reliable expert testimony. Even non-forensic experts sometimes may be questioned about the principles or methods used to reach an opinion. Is this actually an overstatement problem? This potential rule change opens a Pandora's Box of potential time-consuming issues that the courts will have to manage. For example, in a construction defect case, besides evaluating the testimony of experts in the fields of engineering and architecture (the heart of such a case), the court must decide tangential issues that under a Rule 702(e) become the subject

summer to further address important qualifications and limitations of expert testimony in various forensic disciplines").

[5] *See, e.g.*, Melissa Chan, *'I Want This Over.' For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts*, TIME (Feb. 22, 2021), https://time.com/5939482/covid-19-criminal-cases-backlog/; ABA, *Pandemic disrupts justice system, courts* (Mar. 16, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/; Deborah Becker, *Mass. Court Case Backlog Doubles During The Pandemic*, WBUR News (Dec. 5, 2020), https://www.wbur.org/news/2020/12/25/mass-court-case-backlog-covid; Jeff Amy, *Georgia judges: Pandemic could backlog jury trials for years*, AP News (Jan. 20, 2021), https://apnews.com/article/pandemicstrialsgeorgiacoronaviruspandemiccourtsd1682648277dd4d3bfc918fee31777e5

of additional expert testimony on insurance or reinsurance policies covering a general contractor or builder. Or, in a case involving construction defects, if an expert testifies that they have never before observed such a serious defect, could that expert's testimony technically be considered an overstatement, even if true? Indeed, is there a risk that expert opinions in cases featuring novel claims could be susceptible to issues of overstatement generally? And is each foundational aspect of an expert's opinion subject to an "overstatement" challenge?

2. Examples of how "overstatement" by experts can be misconstrued.

The term "overstatement" alone will lead to confusion and avoidable challenges for the courts. How is the term defined? What guidelines does a judge have to determine what opinions amount to an overstatement? How many appeals result from the revised rule? The very fact that the term does not lend itself to a uniform understanding runs counter to the stylistic focus the Federal Rules of Evidence place on "easily understood terminology."

Additionally, there may be experts that provide both a scientific and a professional opinion. For example, an engineer providing an opinion about shoddy construction may apply his or her engineering degree to testify about the wrong type of support beam installed or cement poured in a building, which resulted in a building collapse. This expert may also testify, based on experience, about the size and scope of the problem. Are all parts of this expert's opinion now subject to additional scrutiny and will this disproportionately negatively affect plaintiff-side experts? There is a reason that corporate defense interests heavily favor this rule change.

Indeed, there are many experts who combine quantitative and qualitative results, or are necessary to provide testimony that is in part scientific and in part unempirical or experience-based. It seems as if these common civil litigation fact patterns have not been fully reviewed, yet these are the types of questions and situations that courts will need to grapple with should Rule 702(e) be added, fueled by additional challenges by parties seeking to exclude expert testimony.

Below are just two examples to illustrate how an "overstatement" rule could be misconstrued:

a) **Automobile Products Defect Cases.** In litigation that involves seatback failures, the injuries occur when a car is rear ended, causing the driver or passenger front seat to collapse backward. The driver falls backwards, often sustaining a head injury, and in some instances colliding with their own child who is seated in a car seat behind them. The injuries can be catastrophic. Experts provide complicated information relating to accident reconstruction, biomedical experts, and design experts, many of whom are running tests on the failed part of car to show structural and design defects, and could include the following:

   i. Accident Reconstruction Experts. These are engineers, most often mechanical engineers, who evaluate the damage done to the car and the speeds involved in the crash, and who sometimes perform crash tests to determine the speed and severity of the crash, which can be compared against crash test data run by the manufacturers.

ii. Biomechanical Engineers or Doctors. Such experts would explain how the specific injuries suffered by the plaintiff are related to the failed part of the car and not just related to the impact of the crash itself. Testimony would show how the defective design resulted in a specific type of injury.

iii. Design Engineer. This expert is often someone who previously worked for a manufacturer or who is an engineer with a degree in mechanical engineering. They will offer opinions about how the seat or the fuel tank could have been designed differently, the cost of an alternative design, and the technical feasibility of such a design. In the seatback cases, there are some seat designs that are much stronger and more rigid than others. Those are usually the designs that a plaintiff's expert will testify about. (There is also an emerging type of case in which the issues deal with algorithms used to determine when a seat belt pretensioner or airbag should deploy, which require an engineer who has training in developing computer algorithms.)

Defendants already make regular motions to exclude these experts, even though they have engineering and medical backgrounds and often years of familiarity with the product defect alleged. A proposed rule change on overstatement would lead to additional arguments regarding the expert's qualifications and scope of testimony.

b) **Civil Rights Cases.** Cases involving qualified immunity and police misconduct for civil rights violations are certainly not new; however, they have gained more attention in the past year. Recent examples include: a deputy sheriff who ordered 6 children at gunpoint to lie on the ground and shot one of them, a 10-year-old, while attempting to shoot a pet dog; a police dog being unleashed on a suspect who was sitting with his hands in the air; an inmate held in appallingly inhumane conditions.[6] The types of experts that may be necessary for these types of cases are seemingly endless and include experts commonly used in criminal cases, such as toxicologists and forensic pathologists.

i. Toxicologists. These experts generally have an M.D. or B.S. in Chemistry/Biology/Toxicology paired with experience in a forensic lab. They may be necessary to discuss the application of claimed intoxication or "excited delirium." Toxicologists draw data on whether an amount is "toxic" or "lethal" from literature published in the field, and it may be perplexing for a court to determine whether the expert is overstating the weight they give to the studies to support their opinion despite the expert's proper use of an accepted scientific methodology.

ii. Biomechanical Engineers. These experts are necessary to analyze the physical evidence to determine if injuries are consistent or inconsistent with certain factual scenarios. They are particularly important in asphyxiation cases. They typically have a Ph.D. in fields such as engineering, biomechanics, or

[6] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S.Ct. 110 (Mem) (2020); *Baxter v. Bracey*, 751 Fed.Appx. 869 (6th Cir. 2018), *cert. denied*, 140 S.Ct. 1862 (2020); *Taylor v. Riojas*, 141 S.Ct. 52 (2020).

ergonomics. Application of a biomechanical engineer expert testimony to a police force incident may require nuanced application of methodologies that will require courts to determine whether the new application is still "scientific."

iii. Forensic Pathologists. These experts are necessary to connect the use of force with an injury and/or cause of death. They can be of particular importance in asphyxiation cases. Courts may find it more difficult to assess whether opinions regarding bullet path, entry/exit wound identification, and observable injuries such as stippling in the skin from a burn are "scientific" or "medical" opinions as opposed to general observations from experience.

iv. Sociologists. These experts are used to discuss implicit bias, racial bias, and biased policing. As their opinions are typically based on sociological studies and statistics, under Rule 702(e) the court may find it difficult to separate out their testimony to determine to which parts the overstatement rule applies.

All of these experts can apply "scientific principles and methodology," yet are susceptible to overstatement challenges, particularly when their testimony is more subjective in nature.

The sheer number of potential scenarios provides just a small sample of how an amendment on overstatements could delay litigation and backlog dockets. Confusion by courts would be multiplied if the Committee wrote a note overturning certain case law. Such situations must be avoided by the Committee as it considers how this rulemaking should move forward.[7]

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AAJ thanks the Committee for its continued work on this rulemaking and respectfully requests that the Committee remove from consideration the addition of a subdivision (e) to Rule 702. It is an unnecessary rule change that would only lead to confusion and misapplication of a rule that is already working as it should. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org or (202) 944-2885.

Respectfully submitted,

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[7] A suggestion to specifically overturn case law in the Rule 702 Committee Note was recently suggested by Lawyers for Civil Justice (Feb. 8, 2021), https://www.uscourts.gov/sites/default/files/21-ev-a_suggestion_from_lcj_-_rule_702_0.pdf. Specific rejection of established case law precedent would not only lead to confusion, it would lead to a substantial increase in appellate review, causing further delay.