October 2, 2020

Rebecca A. Womeldorf, Secretary
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 Ms. Womeldorf:

The American Association for Justice (AAJ) submits this comment regarding the Advisory Committee on Rules of Evidence's (hereinafter "Committee") consideration of rulemaking related to Federal Rule of Evidence 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 in their practice.

The Committee has undertaken a thoughtful and careful review process on changes to Federal Rule of Evidence 702 (hereinafter "Rule 702"). The proposed amendment language being considered by the Committee "provides that 'if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results.'"[1] The proposed amendment should be rejected as it is confusing in its language and would result in delay and burden to the courts and its litigants.

Some in the defense community have reacted to the Committee's deliberate consideration of the rule by pushing for expanded changes to Rule 702.[2] AAJ is concerned about the direction of these expanded rule suggestions, which do not reflect the consensus of the Committee's "Miniconference on Best Practices for Managing *Daubert* Questions" held at Vanderbilt Law School on October 1, 2019 and the information generally gathered by the Committee. The

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[1] https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf at 643. "This language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded in a numerical probability — such as an electrician testifying that 'the house was not properly wired.'" *Id.*
[2] *See, i.e.*, Suggestions from International Association of Defense Counsel; Federation of Defense & Corporate Counsel; and Lawyers for Civil Justice, *available at* https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions.

defense suggestions, all of which contain similar recommendations, have been filed since March 2020 even though no informal comment period occurred and the Committee's spring meeting was cancelled due to the pandemic. Many of these suggestions are likely to be met with opposition from attorneys who represent plaintiffs.

AAJ members are concerned that an amendment to Rule 702, such as that recently contemplated by the Committee, would be confusing and cause disagreements over application, lead to more litigation and significant delays,[3] and create more problems than it would help solve. To that end, any rule change must be written clearly and ensure that its meaning is unambiguous and comprehensible.

The proposed amendment fails to clarify the rule or its application.

The current draft rule contains rule language written in the negative ("the expert does not claim a degree of confidence unsupported by the results"), making it particularly difficult to understand. This statement puts the emphasis on "not claiming with a degree of confidence," which seems at odds with the remaining requirements of the witness under Rule 702, all of which are stated in the affirmative. Indeed, if the purpose of the expert is to "help the trier of fact to understand the evidence or to determine a fact in issue,"[4] it seems paradoxical to then question the confidence with which the expert's opinion is presented.

Moreover, a rule amendment that is meant to primarily focus on a particular type of expert – here, forensic experts[5] – will cause uncertainty in relation to those other experts to which it may nevertheless apply, even if they were not the source of the Committee's initial focus.[6] Were the proposed amendment to be adopted, it would unquestionably be urged to apply to non-forensic experts. That means that medical, accounting, securities, vocational, engineering, financial, and mental health experts, all with varying principles and methodologies, will be impacted by a rule amendment largely imposed due to perceived issues with forensic experts.

Similarly, a rule on overstatement that applies only to experts who produce quantitative results is sure to result in arguments as to whether or not a designated expert fits into that box and what constitutes a "quantifiable result." And, what about the expert who combines quantitative and qualitative results into a single report? Qualitative and quantitative distinctions can be challenging. In fact, qualitative and quantitative data are often used together to draw conclusions and illustrate a larger picture, and qualitative data can be easily turned into quantitative evidence grounded in numerical probability. For example, a vocational expert may offer statistical evidence about a plaintiff's ability to return to work that is based on qualitative

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[3] As Rule 702 governs expert testimony in both civil and criminal cases, the Committee must also consider the implication of the rule in criminal cases. This is beyond the scope of this comment. However, with proposed changes to Criminal Rule 16 currently in a formal comment period, AAJ urges the Committee to consider waiting to make any amendments to Rule 702 until the Criminal Rule 16 rulemaking has concluded.

[4] FED. R. EVID. 702(a).

[5] The Committee has stated that this rule is "especially directed toward forensic experts." *See* https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf at 69-70.

[6] In discussing the Boston October 2017 Symposium, the Reporter's memo notes, "…it is about whether there is a problem with forensic evidence that can and should be addressed by rulemaking." *See* https://www.uscourts.gov/sites/default/files/a3_0.pdf at 379.

research. A securities expert may combine quantitative data about the state of the market with qualitative data about a company's practices to determine whether there was fraud or a breach of fiduciary duties. A medical expert may provide qualitative testimony about a plaintiff's medical condition but also testify about the probable lifespan of patients suffering from the condition based on quantitative results.

Questions will also arise as to how such amendment language will be defined and by whom. For example, is it the judge who will determine whether a principle or method is quantifiable, the measure of the "degree of confidence," and whether or not the results are unsupported by the statement? If so, what guidelines does a judge have for making those determinations? AAJ cautions that there is a fine line between a judge deciding an expert's "degree of confidence" and invading the province of the jury. In addition, AAJ members often find themselves in federal court as well as state court. The "degree of confidence" test fails to work in federal cases stemming from diversity jurisdiction, where state substantive law often controls and requires "a reasonable degree of certainty." Again, this would be a change made with forensic evidence in mind that is, in practice, unworkable in many civil cases.

The proposed amendment would result in delay and burden courts and litigants.

AAJ is also concerned that an amendment to Rule 702 will lead to delay in cases, burden on courts and litigants, and gamesmanship by defendants in civil cases who wish to delay cases to the detriment of injured plaintiffs.[7] Litigants are sure to be mired in endless disputes over the opposing parties' experts. Longer, more involved hearings will be necessary to help to build the record, demonstrate that the requirements of any amendment are met, and resolve application of the amendment as to qualitative and quantitative testimony.[8] And, as new evidence is developed, there are likely to be repeated *Daubert* hearings on exclusionary motions. Defendants will attempt to show that new evidence is distinct, requiring its own findings. Thus, such an amendment will be used as a delay tactic even with respect to experts in cases where nothing has changed regarding factors to determine reliability, increasing the burden on the courts and stretching judicial resources. The impact will disproportionately affect plaintiffs, who would have the burden of qualifying an expert who may offer multiple opinions, some of which are not elicited until cross examination thus restarting the process of qualification.

Suggestions have been made to add the standard of proof to the rule itself, but it is AAJ's position that doing so would only further burden the courts with needless litigation. Admissibility, including as it relates to Rule 702, is already covered by Rule 104(a). It would be a mistake to include the standard in just one rule, or even in the committee note, when other rules are also governed by Rule 104(a).[9] With the addition of the preponderance of the evidence standard to Rule 702, the courts would be subjected to arguments or inferences about the standards that apply in other rules.

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[7] Delay and gamesmanship also lead to increased litigation costs.

[8] There could also be satellite litigation over whether various statements constitute a single opinion or multiple ones, as well as over whether each opinion has the same degree of reliability.

[9] The result would not only be additional litigation on whether the standard was met for Rule 702 matters, but whether it was indeed the standard for other rules that do not explicitly include it in the rule text or note. This would open the door to arguments for explicitly including a standard in each rule of evidence or committee note.

The proposals to revise Rule 702 are coming at a time when there is no evidence of incorrect decision-making by juries or courts generally.[10] AAJ members anecdotally have reported instances where a federal judge told defense counsel that *Daubert* challenges could be submitted but that there was no guarantee they would be heard, which allowed the court to avoid frivolous, time consuming challenges. Judges must be able to exercise such discretion. If the Advisory Committee is concerned that courts need further direction about the use of forensic experts or that the courts are systematically misapplying Rule 702 as it is currently written, perhaps judicial education would be more effective than a rule change that will only invite more confusion and misapplication.

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AAJ thanks the Committee for its continued work on this rulemaking and respectfully requests that the Committee consider the points herein. During the COVID-19 pandemic when many cases have been put on hold while courts determine the safest way to proceed, it is important that any rules amendment not risk creating further delay.

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.

Sincerely,

Tobi Millrood
President
American Association for Justice

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[10] "The Chair noted that all of the judges at the Denver symposium raised questions about amending Rule 702, suggesting that it was functioning properly in its current form." https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf at 89.