



November 19, 2021

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: Honorable David G. Campbell – Chair
 Professor Catherine T. Struve – Reporter

Re: Proposed Amendment to Federal Rule of Evidence 702

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

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with national and international membership of 1,505 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives. FDCC members practice in the trial and appellate courts of the United States and of all 50 states. The FDCC's efforts center on affording unfettered access to justice for all while also working to protect and advance the rule of law. Since 1936, its members have established a consistent and strong legacy of representing the interests of civil litigants, including publicly and privately-owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

With that mission in mind, FDCC writes to support the Proposed Amendment to Federal Rule of Evidence 702. As this Committee is well-aware, litigation often involves specialized theories, which are not in the normal understanding of a lay person. Experts are therefore necessary to assist the jury. FRE 702 seeks to reduce the risk that a jury is given bad information: “for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out whether the expert is providing real information or junk.”¹ It is this essential gate-keeping function by the District Courts that ensures that the jury hears only real information—evidence that is “the product of reliable principles and methods.”

¹ Daniel Capra, Memorandum at 132,
https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf (last visited July 19, 2020).

However, in the 20 years that have passed since the 2000 amendment affirming the gatekeeping role, “a fair number of courts have treated the Rule 702 reliability requirements of sufficient basis and reliable application as questions of weight and admissibility.”² Professor Capra is more direct, stating “the fact remains that some courts are ignoring the requirements of Rule 702(b) and (d).”³ He concluded that the issue is that some courts “have a different, less stringent view of the gatekeeper function.”⁴

How a District Court views the standards of Rule 702 and that gatekeeper function may well determine the outcome of the case. For example, in the Roundup Multi-District Litigation, the district court admitted that inter-Circuit differences in Rule 702’s application “could matter in close cases” and that the Ninth Circuit’s approach “has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits.”⁵ Depending on the Circuit, issues such as the reliability of “trending data,” opinions regarding general causation, and the role of drug studies might be admitted whereby the same testimony was excluded in another Circuit.⁶ The proposed amendment in Rule 702(d) is necessary to ensure that District Courts enforce their gatekeeping function.

It is also necessary to ensure that District Court’s properly apply the burden of proof for the admissibility of expert evidence. While FRE 702 is arguably silent, FRE 104(a) places the burden on the proponent of the evidence (by a preponderance). Some District Courts have stated that there is a presumption of admissibility, arguably altering the burden of proof.⁷ It is imperative then that this Committee clearly state the burden of proof within Rule 702 so that District Courts properly and consistently apply the standard.

Our members have been and remain engaged in the trial and pre-trial activities of litigation in the federal courts across the country for the past 85 years. These cases are always filled with uncertainties. However, similar to the other rules set forth within the Federal Rules of Evidence, we believe the implementation of Rule 702 must be uniform. We have seen the administration of the Rule disproportionately applied – at times even within the same District.⁸ While the allegations,

² Memorandum from Debra Ann Livingston, Chair, Advisory Committee Evidence Rules, to David G. Campbell, Chair Committee on Rules of Practice and Procedure (May 14, 2018), Agenda Book for June 12, 2018 Standing Committee meeting minutes, p. 21, https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf (last visited July 20, 2020).

³ Memorandum from Reporter Daniel J. Capra (April 1, 2018), Agenda Book for Advisory Committee on Rules of Evidence April, 2018 meeting, <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018> (last visited July 20, 2020).

⁴ Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, Forensic Evidence, *Daubert* and Rule 702 (April 1, 2018) at 50.

⁵ *In re Roundup*, 390 F. Supp. 3d 1102, 1109 (N.D. Cal. July 10, 2018).

⁶ See *Sheehan Letter Suggestion supra*, 19—21.

⁷ See e.g. *Price v. General Motors, LLC*, No. CIV-17-156-R (W.D. Okla. Oct. 3, 2018) (“[T]here is a presumption under the Rules that expert testimony is admissible.”) (quotation omitted); *Crawford v. Franklin Credit Mgt. Corp.*, 08-CV-6293 (S.D.N.Y. Jan. 22, 2015) (“In assuming this role, the Court applies a presumption of admissibility.”).

⁸ See also, See Lawyers for Civil Justice, [Federal Courts’ Misunderstanding of Rule 702 Demonstrates Need for Amendment](#); Lee Mickus, [Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding about Expert Evidence](#) (Wash. Legal Found., Critical Legal Issues Working Paper No. 217, May 2020) (last visited November 17, 2021).

causes of action, facts and parties litigating cases will differ, those parties should reasonably expect the gatekeeping function to be applied with the same purpose and intention.

Further, in matters in which the specialized knowledge and experience of an expert are sought to be utilized in order to assist the fact finder in better understanding the generally accepted customs, usages, practices or other circumstances at issue, it is of utmost importance that the proffered testimony be based, as the Rule intends, upon sufficient facts or data, that it be the product of reliable principles and methods, and reflect a reliable application of those principles and methods to the facts of the case. The Committee's proposed amendments are a necessary response to common misconceptions held by some courts regarding the admissibility standards applicable to expert opinions and are an important step to ensure that verdicts do not rely on unproven science or invalid data.

The FDCC thanks the Committee in advance for its hard work in considering the issues involved in these amendments. We will be pleased to provide additional comment or evidence from the experience of FDCC members as warranted to establish the basis upon these reforms are required. For the reasons stated herein, FDCC encourages the amendment so that Rule 702 is applied consistently across all Federal Courts. Winning or losing a case should not be dependent upon which District Court it is brought. The fair and predictable administration of justice depends on a consistent application of the Federal Rules of Evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert L. Christie". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert L. Christie
President