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Submitted via regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Proposed Amendments to Federal Rule of Evidence 702

Judge Bates:

Washington Legal Foundation submits this comment on proposed changes to Federal Rule of Evidence 702. WLF appreciates the opportunity to weigh in on whether the Committee on Rules of Practice and Procedure should submit the proposed changes to the Supreme Court for approval. As explained below, the Committee should submit the proposed changes, with slight modifications.

I. WLF Has An Interest In Ensuring That Jurors Do Not Consider Junk Science.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF participated in this rulemaking process by submitting a letter to the Committee when it was considering whether to publish the proposed changes to Rule 702. *See* WLF Letter, *In* re *Federal Rule Of Evidence 702 Amendment* (Mar. 12, 2020).

WLF often appears before federal tribunals urging that district courts act as gatekeepers to prevent jurors from considering junk science. *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Adams v. Merck Sharp & Dohme Corp.*, No. 21-55342 (9th Cir. brief filed Oct. 25, 2021); *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.,* 858 F.3d 787 (3d Cir. 2017).

WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on legal issues related to federal courts' misapplication of Rule 702. *See, e.g.*, Lee Mickus, *Trial Court's Evidentiary Ruling in Natural Vanilla Class Action Reflects Need for Changes to Rule 702*, WLF LEGAL OPINION LETTER (Nov. 12, 2021); Lawrence A. Kogan, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*, WLF WORKING PAPER (Mar. 2020); Joe G. Hollingsworth & Mark A. Miller, *Inconsistent Gatekeeping Undercuts the Continuing Promise of* Daubert, WLF WORKING PAPER (July 2019).

II. Circuit Courts And District Courts Continue To Misapply Rule 702's Requirements.

Many circuit courts and district courts misapply Rule 702. A recent decision highlights how these courts avoid Rule 702's requirements. In *In re Roundup Prod. Liab. Litig.*, 358 F. Supp. 3d 956 (N.D. Cal. 2019), the defendant challenged the plaintiffs' experts because the experts admitted that their methodology failed to rule out idiopathic causes of non-Hodgkins lymphoma. *Id.* at 959. As the Court recognized, "[u]nder a strict interpretation of" Rule 702, the plaintiffs' experts could not testify. *Id.* But the Ninth Circuit refuses to follow Rule 702's command. *See id.*

Ignoring Rule 702, the Ninth Circuit's decisions allow for specific-causation opinions that are based on speculation. *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1234 (9th Cir. 2017); *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1198-99 (9th Cir. 2014). As the *Roundup* court explained, "district courts in the Ninth Circuit must be more tolerant of borderline expert opinions than" they should be. *Roundup*, 358 F. Supp. 3d at 959.

The Ninth Circuit's continued practice of allowing "expert" testimony based on speculation conflicts with Rule 702. Under the rule, an expert's testimony must be "based on sufficient facts or data." Fed. R. Evid. 702(b). But the Ninth Circuit allows expert testimony bottomed on almost no data. *See Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1060 (9th Cir. 2003). Second, the evidence must be "the product of reliable principles and methods." Fed. R. Evid. 702(c). The Ninth Circuit, however, allows differential diagnoses that do not consider idiopathic causes. This is not a reliable scientific method. Finally, expert testimony is admissible only if "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(d). Yet the

Ninth Circuit allows experts to testify based on art rather than science. *Messick*, 747 F.3d at 1198.

Although improper admission of "expert" testimony on specific causation in mass tort cases accounts for some Rule 702 errors, district courts incorrectly apply Rule 702 in many contexts. A recent decision exemplifies this problem. In *Vizcarra v. Unilever U.S., Inc.*, 2021 WL 5370754 (N.D. Cal. Oct. 27, 2021), the defendants moved to exclude the plaintiffs' expert's testimony. The expert's testimony was based on a consumer survey of consumers' perceptions about where the vanilla flavor in ice cream came from, whether the origin affected their purchasing decisions, and how much more they paid because of the vanilla flavor's origin.

The district court denied the motion to exclude. In its view, it is improper for district courts to act as a gatekeeper when the expert evidence is about survey data. *Vizcarra*, 2021 WL 5370754, at *6. According to the *Vizcarra* court, the defendant's challenge went to the weight of the expert's evidence—not its admissibility. *Id.* (citation omitted). This was wrong. The only way that witnesses can offer expert testimony is under Rule 702. And that rule requires that the district court act as a gatekeeper to ensure the jury hears only admissible evidence that meets Rule 702's rigorous standards.

Unfortunately, lower courts' Rule 702 errors are not limited to the Ninth Circuit. For example, in *Canary v. Medtronic, Inc.*, 2018 WL 5921327 (E.D. Mich. Nov. 13, 2018), the plaintiff's expert was allowed to testify about causation despite neither conducting a differential diagnosis nor considering idiopathic causes. *Id.* at *2-3. This means that the expert's opinion was based on insufficient facts and data. *Cf.* Fed. R. Evid. 702(b). Nor did the expert use reliable scientific methods. *Cf.* Fed. R. Evid. 702(c). This is the type of evidence that Rule 702 forbids. But because of some ambiguity in the rule's language, district courts can ignore the rule's command and admit "expert" testimony that does not follow the scientific method.

There are multiple reasons why circuit and district courts, have trouble applying Rule 702's straightforward standard. First, the Rule does not specify who bears the burden of proof and what that burden is. Must the plaintiff show probable cause that the expert testimony is admissible? Or must the defendant show that the evidence is inadmissible beyond a reasonable doubt? Neither Rule 702 nor its comments answer these questions.

Rule 702's current language is also ambiguous about what link is required between an expert's reliable principles and methods and the expert's opinion in the case. The rule can be interpreted to allow expert testimony if the expert's testimony is based on reliable principles and methods even if the

testimony does not result from the reliable application of those principles and methods to these facts. In other words, the court can bifurcate the inquiry to eliminate the need for a testifying expert to reliably apply the methods and principles to the facts of the case.

Pre-Rule 702 case law is also a hinderance to the rule's proper application. Many attorneys fail to live up to their ethical obligations and cite case law that has been superseded by Rule 702. And because a few courts of appeals have not explicitly overturned their pre-Rule 702 decisions, courts and attorneys often cite these cases. There are three decisions that are particularly problematic. Courts and parties often cite *Loudermill v Dow Chem. Co.*, 863 F.2d 566 (8th Cir. 1988), *Viterbow v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987), and *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). These cases have very quotable holdings that predated, and conflict with, Rule 702. All these problems are pressing matters that deserve the Committee's attention.

III. The Proposed Rule Changes Fix Problems With Courts' Current Interpretations of Rule 702.

The proposed change fixes some problems that lead to courts' misapplication of Rule 702. The first amendment fixes the problem of courts' requiring the party objecting to expert testimony to show that the testimony was inadmissible. The amendment explicitly states that the party offering the expert testimony carries the burden of proving the evidence's admissibility. The proposal also eliminates any confusion about what that burden of proof is. The party offering the expert testimony must show its admissibility by a preponderance of the evidence. In other words, satisfying only a lower standard—like probable cause—cannot make expert testimony admissible.

The second proposed amendment fixes the problem of expert opinions unmoored from the application of reliable methods and principles to the facts of the case. The amendment explicitly requires that the expert's testimony be based on sound application of reliable methods and principles to these facts. So courts will be unable to bifurcate the inquiry if the amendment takes effect. This would be a positive development and would help ensure that juries do not hear junk science from "expert" witnesses. As both proposed amendments to Rule 702 fix ambiguities, WLF urges the Committee to submit the proposed amendments to the Supreme Court for its approval.

IV. Slight Modifications To The Proposed Changes Would Further Clarify District Courts' Gatekeeping Function.

Although the proposed changes to Rule 702 should be submitted to the Supreme Court, there are refinements that would further address circuit courts' and district courts' flawed application of Rule 702. The Committee should thus consider modifying the changes before it submits the proposal to the Supreme Court.

A. The Committee should explicitly disavow bad case law.

As discussed above, there are a few cases that courts disproportionately rely on when admitting expert testimony that violates Rule 702. There is an easy way for the Committee to stop courts from citing these cases. The Committee should add a comment that specifically states that those cases are not good law. The Committee took this approach in 2015. Then, the Committee added a note stating that a rule "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002)." Fed. R. Civ. P. 37 committee note.

Here, the Committee should add a note that Rule 702 rejects *Loudermill*, *Viterbow*, and *Smith*. This would ensure that those cases receive a red flag on Westlaw and Lexis, which in turn would help avoid courts erroneously citing the cases. And for those plaintiffs' attorneys who continue to cite these cases, explicitly rejecting them in the Committee's note would allow courts to impose sanctions under Federal Rule of Civil Procedure 11.

B. The Committee should ensure that courts apply Rule 702 fairly.

As discussed above, the clarification that the proponent of expert evidence must prove by a preponderance of evidence that it is admissible under Rule 702 is a positive development. But further clarification would ensure that courts understand how the burden of proof operates. The Committee should add a note that states there is no presumption that district courts should admit expert evidence.

There is nothing explicit in the rule or committee notes that explains if courts should apply a presumption when deciding a Rule 702 issue. The Committee should fix this by adding a note that explicitly states that there is no presumption that expert testimony is admissible. Nor is there a presumption against admissibility. Rather, district courts must decide whether the party proffering the expert testimony has satisfied the

preponderance-of-the-evidence standard. If so, then the evidence is admissible. If not, it's inadmissible.

C. The Committee should ensure courts decide the admissibility of expert evidence.

Adding the burden of proof to Rule 702 presents an opportunity for enterprising plaintiffs' attorneys and district courts to skirt the rule's requirements by having the jury decide whether the expert's evidence is admissible. They could argue that since you are applying a preponderance-of-the-evidence standard, it is a factual question for the jury—not the judge. But since our Nation's founding, questions about the admissibility of evidence must be decided by the trial judge. *See* 1 Burr's Trial 443 (1807).

There is an easy solution to this potential problem. The Committee should propose amending Rule 702 as follows: "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 court finds that the proponent has demonstrated by a preponderance of the evidence that." These four words would ensure that judges, not juries, decide the admissibility of expert evidence.

* * *

Many district courts and courts of appeals refuse to follow Rule 702's command and act as a gatekeeper. They allow witnesses to testify as "experts" despite the witnesses' using unreliable methods. The proposed amendments to Rule 702 go a long way in instructing these courts about their duties to permit juries to hear expert evidence only if Rule 702's requirements are satisfied. In other words, not everything goes to the weight of the evidence. Many issues affect the evidence's admissibility, which the judge must decide. So the proposed amendments to Rule 702 are a good start. But slight modifications will help ensure that courts properly apply Rule 702. The Committee should thus submit slight revised amendments to Rule 702 to the Supreme Court for its approval.

Respectfully submitted,

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