SHOOK
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Via Electronic Mail

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Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice & Procedure
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One Columbus Circle, NE
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Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Wolmeldorf:

On behalf of Shook, Hardy & Bacon L.L.P. ("Shook"), we respectfully submit this Comment to the Advisory Committee on Evidence Rules ("Committee") and its Rule 702 Subcommittee concerning potential amendments to Rule 702 and its Committee Notes. We urge the Committee to clarify that the proponent of expert testimony bears the burden of satisfying the admissibility requirements of Rule 702 by a preponderance of the evidence.

Shook is an international, trial-oriented firm with an emphasis on defending complex civil cases. The *Global Legal Post* recently recognized Shook as "the most active defendants' firm for product liability cases between 2015 and 2019, working on 27,240 cases."[1] Shook's vast trial experience gives it specific insights into courts' application of Rule 702 and the ways in which that use sometimes goes awry. In particular, Shook has identified three problematic trends in the application of the Rule: (1) the substitution of cross-examination for gatekeeping; (2) perfunctory references to weight versus admissibility; and (3) allowing experts to offer opinions based on cherry-picked data.

1. The substitution of cross-examination for gatekeeping

Judge Sarah Vance of the Eastern District of Louisiana recently observed during a panel discussion on expert testimony, "when I was a lawyer, we always said, 'You don't win a case on cross.' You're not going to win a case on cross-examination, and so I think cross-examining an expert is not going to carry the day with a jury."[2] This is one reason that litigants believe motions to exclude shaky expert testimony are vital: once jurors hear an opinion from an expert designated

[1] Ben Edwards, *Product Liability Case Filings in US Federal Courts Reach Eight-Year High*, The Global Legal Post, June 1, 2020, https://www.globallegalpost.com/big-stories/product-liability-case-filings-in-us-federal-courts-reach-eight-year-high-49884800/.

[2] Daniel J. Capra, et al., *Conference on Best Practices for Managing* Daubert *Questions*, 88 FORDHAM L. REV. 1215, 1227 (2020).

as such by the court, it is unlikely that even brilliant cross-examination will convince them that the testimony is fundamentally unsound. Nonetheless, many courts still back away from their gatekeeping responsibilities, leaving flimsy or outright unsound expert evidence to cross-examination rather than excluding it.

Shook's experience in *Berger v. Philip Morris USA Inc.*, 2014 WL 10715266 (M.D. Fla. Aug. 29, 2014), provides an example. The evidentiary dispute involved the use of a "medical projection" to establish causation in a tobacco case. The plaintiffs offered an expert who had reverse-engineered a "backward projection" that "predicted" the plaintiff's chronic obstructive pulmonary disease in 1996 from pulmonary function test results two years later.

The defendant challenged the testimony on the basis of the "analytical gap." There was no basis, other than the expert's speculation, for the projection. A reconstructed diagnosis like this cannot be proven false. Indeed, it is designed to "fit" subsequent facts in the case rather than adhere to any scientific method.

The trial court admitted the questionable evidence, holding that the analytical gap was better addressed through cross-examination. It also held that the plaintiff would have to inform the jury that the opinion was not a "*conclusion reached through hard science*." *Id.* at *2 (emphasis in original). Thus, the jury heard the evidence *despite* the fact that it was scientifically questionable, and despite the fact that cross-examination is a limited tool for correcting any scientific error.

2. Perfunctory references to "weight versus admissibility"

As numerous other commenters have pointed out,[3] one of the primary difficulties with the current application of Rule 702 is that courts frequently conflate questions of admissibility (which determine whether evidence should be heard at trial) with questions of "weight" or "credibility." Challenges to an expert's underlying methodology should be *admissibility* questions, resulting in exclusion. Nonetheless, many courts—without analysis—treat them as *credibility* questions, which they then allow the jury to hear. Shook's experience in two different cases illustrates this issue.

In *Kay v. Sunbeam Products, Inc.*, 2010 WL 2292474 (W.D. Mo. May 27, 2010), plaintiffs alleged that defendant's electric blanket had caused a house fire.

[3] *See, e.g.,* International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping (July 31, 2020); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019).

Plaintiffs proffered a fire investigator and an electrical engineer to establish that the electric blanket was the source of the fire because its fail-safe circuit had failed, purportedly leading to electrical arcing. The defendant challenged the experts on the grounds that they had not tested the blanket at issue (tests revealed the circuit was working) and there was no way to determine whether melting of the blanket's heating element was caused by an arcing event or the heat of the fire. *Id.* at *2.

The court did not evaluate the experts' methodologies. Instead, after a brief review of each side's contentions, it simply found that the defendant's objections "go more to the weight than the reliability" of the experts' opinions. *Id.* at *4.

Similarly, in *Dover v. R.J. Reynolds Tobacco Co.,* 2014 WL 4723116 (M.D. Fla. Sept. 22, 2014), defendants challenged the admission of testimony from a proposed expert who would testify that there existed "an effective dose range of nicotine necessary to initiate and sustain addiction" to cigarettes. *Id.* at *5. The defendants argued that the proposed expert—who held a doctorate in psychology rather than pharmacology—was proffering a results-driven theory invented by plaintiff's experts to prove that defendants' cigarettes were defective. The court spent only a paragraph on its analysis before allowing the testimony, concluding that the defendants' "contentions regarding methodology . . . go to the weight, not the admissibility," of the testimony. *Id.*

As these cases illustrate, all too often, under the current Rule, courts do not engage their actual gatekeeping responsibilities. Instead, without revealing any reasoning, they find that defendants' objections—even objections to whether the methodology used comports with the scientific method—are merely credibility issues, and then leave it to the jury to decide whether the methodological objections disqualify the testimony.

3. Allowing experts to base opinions on cherry-picked data

Expert testimony, like a computer algorithm, is subject to the principle "garbage in, garbage out." If an otherwise qualified expert is fed one-sided evidence or data generated only for litigation, then the testimony will be unreliable. Shook's experience with *Bryant v. Wyeth,* 2012 WL 12844751 (W.D. Wash. Aug. 22, 2012), illustrates this issue. The lawsuit challenged the prescription of specific types of hormone replacement therapy.

Various defendants moved to exclude two experts after they testified at deposition that, instead of conducting an independent investigation of the literature surrounding the challenged therapy, they "relied on documents 'hand-picked by counsel' to generate their reports." *Id.* at *2. The court nonetheless allowed the testimony, reasoning that "Defendants' objections go to the weight of the evidence to be offered, not its admissibility." *Id.* at *3.

The admissibility of expert evidence is supposed to relate directly to its reliability. The reliability of expert evidence depends upon the underlying information supporting it. Courts rightly look in part to whether expert opinion rests on data and methodology that have been independently developed or done so only for the purposes of litigation. Cherry-picked data, particularly when supplied by counsel, is not reliable, and a finding that one side's testimony rests on such data should preclude its admissibility if there is no other evidence of reliability.

Proposed Amendment

We join other commenters in proposing the following amendment to Rule 702: "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, after findings consistent with Rule 104, the court determines:...."

This language ensures that the trial court will refer to Rule 104 and its preponderance standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence, which should help guide courts through the dangers of relying on cherry-picked or litigation-generated scientific evidence. Finally, it encourages courts to make findings on each factor, instead of perfunctorily dismissing objections as related to jury "weight," or deciding that cross-examination can prevent jury confusion. The Committee Notes to Rule 702 should reflect this intent.

Shook also endorses the comments submitted on these issues by Lawyers for Civil Justice, the International Association of Defense Counsel, and the Washington Legal Foundation, which illustrate, through numerous empirical examples, the gravity of the problem and the need for further guidance from the Committee.

Thank you for your consideration of these important issues.

Respectfully submitted,

Madeline McDonough
Firm Chair