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September 30, 2020

Via Federal Express

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

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

It is my understanding that the Advisory Committee on Evidence Rules (the "Committee") is considering amendments to Federal Rule of Evidence 702. On behalf of Ballard Spahr, LLP, and as a commercial litigator who had addressed myriad issues arising under Rule 702 over the past 42 years of practice in numerous federal courts around the country, I am writing to point out some of the conflicting positions taken by various Circuits in interpreting and applying Rule 702.

Expert testimony is often critically-important in cases involving complex or technical subject matter, as it carries great weight with juries. The standards applied by the courts in determining the admissibility of expert testimony often play a significant, if not determinative, role in the outcome of numerous high-stakes cases. However, in the many years since the Committee last amended Rule 702 in 2000, and the Supreme Court last addressed Rule 702 in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), uncertainty and confusion have been engendered by conflicting decisions of the appellate and trial courts on various issues arising under Rule 702. The Committee should consider adopting amendments to the Rule to provide courts and practitioners with additional clarity and to promote much-needed uniformity in the application of the Rule.

In particular, an amendment is needed to resolve a circuit split in which some courts have improperly limited a trial court's gatekeeping function under *Daubert* to a review of the reliability of an expert's methodology under Rule 702(c), without regard to whether the expert reliably applied this methodology based upon sufficient facts or data.

For example, in *City of Pomona v. SQM North America Corp*., 750 F.3d 1036, 1048 (9th Cir. 2014), the Ninth Circuit held that "only a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony." The Court of Appeals held that the trial court abused its discretion in excluding the proposed expert testimony, declaring that defendant's reliability challenges to the expert's testimony "is an issue for the jury" and "go to the weight that a fact finder should give to his expert report." *Id.* at 1047-1048.

The Court made no effort to reconcile this holding with Rule 702's requirement that the expert "has reliably applied" his or her chosen "principles and methods to the facts of the case" and that the testimony be "based upon sufficient facts or data." Fed.R.Evid. 702(b), (d). Moreover, the Court expressly acknowledged (*id*. at 1047) that its rule conflicts with the Third Circuit's oft-quoted holding in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994) (*Paoli II*), that "*any step* that renders the expert's testimony unreliable under the *Daubert* factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." (emphasis added). Significantly, *Paoli II's* "any step" approach was cited with approval in the Advisory Committee's Note to the 2000 amendment.

In a memorandum sent by Professor Daniel Capra to the Rule 702 Subcommittee on October 1, 2018, he discussed the conflict between *SQM* and *Paoli II*; emphasized that "the language used by the court [in *SQM*] is definitely at odds with Rule 702(d);" and commented that the *SQM* decision was one of "a fair number of courts [that] appear to have not read the Rule as it is intended." *See* Daniel Capra, Memorandum to Rule 702 Subcommittee re: Rule 702(b) and (d) — weight and admissibility questions, at 1, 12-13 (Oct. 1, 2018) (Agenda Book, Advisory Committee on Evidence Rules Oct. 19, 2018, meeting) at 171, 182-83.

The Ninth Circuit's "faulty methodology" rule also conflicts with rulings by the Second, Fifth, Sixth, Tenth, and Eleventh Circuits, each of which have endorsed the Third Circuit's "any step" requirement. *See Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 267 (2d Cir. 2002) (quoting *Paoli II*); *Curtis v. M&S Petroleum, Inc*., 174 F.3d 661, 670-71 (5th Cir. 1999) (same); *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665, 670 (6th Cir. 2010) (same); *Attorney General of Oklahoma v. Tyson Foods, Inc*., 563 F.3d 769, 779-81 (10th Cir. 2009) (same); *McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1245 (11th Cir. 2005) (same).

On the other hand, decisions from other circuit courts are more closely aligned with the position adopted by the Ninth Circuit. For example, the First Circuit has held that "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Milward v. Acuity Specialty Prods. Grp., Inc*. 639 F.3d 11, 22 (1st Cir. 2011). Similarly, the Seventh Circuit has stated that "[t]he reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology – the

framework – of the expert's analysis." *Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 808 (7th Cir. 2013).

And the Eighth Circuit has concluded that "the factual basis of expert testimony goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Bonner v. ISP Techs., Inc*., 259 F.3d 924, 929 (8th Cir. 2001). These appellate courts take the position that "[t]he district court usurps the role of the jury, and therefore *abuses its discretion*, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed." *Manpower, Inc*., 732 F.3d at 806 (emphasis added).

The foregoing conflict in the circuits has been discussed in numerous articles. *See, e.g*., "Defendant's Chances on *Daubert* May Vary By Circuit," Law360, Oct. 1, 2019; "High Court Ensures Split Over Gatekeeping Role Persists," Law360, Feb. 10, 2015 (noting that the Supreme Court denial of certiorari in *City of Pomona v SQM* "leaves open the question of whether faults in an expert's methodology require the wholesale exclusion of their proffered opinions or merely go to the weight of those opinions. As a result, *Daubert* challenges will continue to be governed by a more permissive standard in the Seventh, Eighth and Ninth Circuits and a more restrictive analysis in the Second, Third, Sixth and Tenth Circuits.")

Unfortunately, as exemplified by the *City of Pomona* decision by the Ninth Circuit, courts are all too frequently abdicating their gatekeeping responsibility under Rule 702 and *Daubert*. They are allowing the admission of unreliable expert testimony, based on the flawed assumption that a jury can properly understand and evaluate it with the benefit of competing expert evidence and vigorous cross-examination. The Ninth Circuit's "faulty methodology" rule creates a great risk that liability determinations will be based upon unsound science and too often leads to coercive settlements and substantial jury verdicts, which appellate courts are loathe to second-guess.

Thus, an amendment to Rule 702 is needed to resolve the conflicts and disarray in the circuit courts over the proper treatment of the factual foundations of expert testimony. Litigants should not be subjected to different admissibility standards under Rule 702 based upon the vagaries of where their case was brought.

Very truly yours,

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Burt Rublin
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Burt M. Rublin

BMR/sdm