

# COVINGTON

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## By Email

October 23, 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](mailto:RulesCommittee_Secretary@ao.uscourts.gov)

### **Re: Comment on Amending Federal Rule of Evidence 702**

Dear Ms. Womeldorf:

On behalf of Covington & Burling LLP (“Covington”), we respectfully submit this Comment to the Advisory Committee on Evidence Rules (“Committee”) and its Rule 702 Subcommittee concerning the potential amendments to Rule 702 and the 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.

Covington represents many of the nation’s leading corporations in complex litigation, including product liability litigation, intellectual property litigation, antitrust litigation, class actions, and other fields in which expert witness testimony often plays a central role. Whether experts faithfully apply a reliable methodology, supported by an adequate factual basis, is critical to the fair adjudication of disputes, especially for our many clients whose businesses involve sophisticated science and technology.

As a practical matter, questions of expert admissibility commonly rise to a case-dispositive level, including in multidistrict litigations where a Rule 702 determination may lead to the rapid disposition of thousands of individual cases—or to many years of costly litigation. Our clients depend on federal courts to uphold the gatekeeping requirements of Rule 702 and keep unreliable or speculative science out of the courtroom.

Unfortunately, rigorous scrutiny of expert opinions under Rule 702 is less common than it should be. The collective experience of Covington’s litigators mirrors what the Committee has already observed: all too often, courts make the mistake of proclaiming that the Rule 702’s core requirements—sufficient facts or data, and reliable application of a reliable methodology—go to the weight of the proffered testimony rather than its admissibility.<sup>1</sup> The Committee’s Reporter

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<sup>1</sup> Committee Report, June 2020, at 4; *see also* Agenda Book, Spring 2019, at 118.

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has stated the problem with this approach: “The key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don’t get to the jury in the first place.”<sup>2</sup> Truth and fairness suffer when courts abdicate their gatekeeping responsibility, treating expert testimony as presumptively admissible while leaving the jury to sort out the weight of the evidence later.

Clarification is needed. We understand that the Committee has expressed some reluctance to alter the text of Rule 702 because the Rule 104(a) standard already applies to Rule 702. The Committee has suggested specifying the preponderance of evidence standard explicitly in one rule could lead to negative inferences elsewhere in the Rules.<sup>3</sup> In our view, the Committee could alleviate this concern by adding a Note explaining that the amended text of Rule 702 was necessitated by courts’ frequent misinterpretation of that Rule in particular, and that the amendment should not be read to create any negative inference with respect to other Rules.

If the Committee is unwilling to revise the text of Rule 702 itself, the Committee should at minimum add language in the Notes to make clear that that the proponent of the testimony bears the burden of satisfying the Rule 702 requirements, and that the court must decide admissibility under Rule 702 by the preponderance standard.

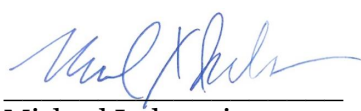
Covington endorses the Comments submitted on these issues by the Lawyers for Civil Justice, the Federation of Defense and Corporate Counsel, and the Washington Legal Foundation, which ably illustrate, through scores of case examples, the seriousness of the problem and the pressing need for clarification by the Committee.

Thank you for your consideration of these important issues.

Respectfully submitted,



Emily Henn



Michael Imbroscio



Henry Liu

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<sup>2</sup> Committee Minutes, May 2019, at 23.

<sup>3</sup> Committee Report, June 2020, at 4.