NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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Judicial Conference Advisory Committee
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

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USC-RULES-EV-2021-0005

As the oldest and largest association representing state and local prosecutors in the country, the National District Attorneys Association (NDAA) advocates for the use of reliable forensics to exonerate the innocent and inculpate the guilty. With more than 5,000 members nationwide, NDAA is recognized as the leading source of national expertise on the prosecution functions, including forensic science, and is a valuable resource for the media, academia, government, and community leaders.

As detailed below, the NDAA strongly opposes the proposed amendments to Federal Rule of Evidence 702. The NDAA has two primary concerns regarding the Committee's proposed amendments: (1) The proposed substantive change to Rule 702(d) conflicts with *Daubert* and infringes on the province of the jury because it requires trial judges to assess and assign weight to an expert's *opinion*, even if that opinion results from the reliable application of reliable principles and methodology; and (2) The proposed Committee Note inappropriately singles out "forensic experts" and expert opinion testimony related to "feature comparison evidence" and urges application of additional and specific admissibility standards *not required* by the text of Rule 702 or *Daubert* for these categories of evidence.

The Federal Rules of Evidence govern the introduction and admissibility of evidence in civil and criminal proceedings in United States federal courts. The purpose of the rules is to "administer every proceeding fairly . . . and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." *Fed. R. Evid. 102*. While the Rules have been formally adopted in whole or in part by some state courts and local jurisdictions, they have significant influence in courtrooms nationwide.

Rule 702 was substantively amended in 2000 to codify the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] Since that time, Rule 702 has provided a clear and definitive roadmap for judges acting as gatekeepers for the admission of expert

[1] See Fed. R. Evid. 702, 2000 Advisory Committee Notes; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594–95 (1993).

testimony.[2] Rule 702 remains today an accurate statement of the law regarding the admission of expert testimony as outlined in *Daubert*. As such, the NDAA has serious concerns about the current proposed amendments to Federal Rule of Evidence 702 and urges the Committee to maintain Rule 702 in its present form.

Although the Supreme Court's rule in *Daubert* announcing the applicable standard for the admission of expert testimony has not changed, the Committee claims two amendments to Rule 702 are necessary to "clarify and emphasize" how federal judges should apply the Rule. The NDAA strongly *disagrees* that such amendments are necessary. Federal judges are well-aware of their gatekeeping function and approach this responsibility with appropriate prudence. It is vital that trial courts maintain the ability to flexibly apply Rule 702, after they consider the unique facts and circumstances of each case. The current text of Rule 702 is supported by an expansive body of case law interpreting the Rule and its application. These provide adequate guidance and a clear-cut framework for judges to fulfill their role as gatekeepers in determining the admissibility of expert testimony. In short, the proposed amendments to Rule 702 are a solution in search of a problem.

<u>Proposed Amendment to Rule 702(d)</u>

The NDAA is especially concerned with the proposed change to Rule 702(d). Currently, in assessing whether a qualified expert may testify, the trial judge applying Rule 702(a) through (c) determines whether the proposed expert's knowledge, skill, experience, training, or education will help the trier of fact to understand the evidence or determine a fact in issue, whether the proffered expert testimony is based on sufficient facts or data, and whether the testimony is the product of reliable principles and methods. Assuming a proffered expert's testimony satisfies these criteria, Rule 702(d) in its present form *requires* a trial judge to additionally ascertain whether "the expert has reliably applied the principles and methods to the facts of the case." Thus, the focus is on the reliability of the methodology and its application in the case at issue.

The proposed amendment to Rule 702(d) would change this in a substantial and pernicious way. The amendment would task a trial judge with determining that "**the expert's opinion reflects a reliable application** of the principles and methods to the facts of the case[,]" before allowing its admission. This would force the court to conduct an assessment of the expert's conclusion itself. Thus, amending Rule 702(d) in the proposed manner would run afoul of the Court's express pronouncement in *Daubert* that, "[t]he inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. *The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."*[3]

The proposed amendment to Rule 702(d) fundamentally alters the role of the trial court judge by elevating the judge far beyond the "gatekeeper" of expert testimony contemplated in *Daubert* and

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[2] In 2011, the language of Rule 702 was amended to make the Evidence Rules more easily understood and to provide consistency in both style and terminology. The changes were intended to be stylistic only.

[3] *Daubert,* 509 U.S. at 594–95 (emphasis added).

its progeny. The practical effect of requiring the trial judge to dissect the precise wording of an expert's opinion is to transform the trial judge from gatekeeper to that of a subject matter expert who must evaluate the substance of any proffered expert's opinions and conclusions. The gatekeeping role is intended to exclude clearly invalid and unreliable expert testimony - it is not to weigh the probative value of the expert's opinion or determine what, if any, weight that opinion should be given in the context of the case. That determination is properly left to the factfinder. Yet, the proposed amendment to Rule 702(d) would command a trial judge to assess and assign weight to expert opinions, which necessarily infringes on the province of the jury. The proposed amendment also could, in turn, lead to the frequent appointment of "court" experts who must be vetted for bias in prior testimony, research, publications or employment. Thus, the proposal undoubtedly would lengthen and complicate litigation.

Furthermore, in both federal and state, civil and criminal actions, the procedural mechanism of a Motion in *Limine* allows the parties to bring controversial evidence to the attention of a trial judge to secure a preliminary evidentiary ruling. This allows an adverse party to challenge the credibility of an expert or skilled witness and secure pre-trial rulings on the admissibility of evidence. In doing so, an adverse party to the controversial evidence can explore contrary expert opinions and evidence, if appropriate, well before the matter is presented to a jury. Adhering to the principles firmly established in *Daubert*, and codified in Rule 702, and procedures available under the law, parties to a matter are already able to parse out *credible* evidence from that which is *incredible*.

The NDAA considers the reasoning provided in the proposed Committee Note for amending Rule 702(d) to be both unsupported and faulty. Nothing in the Note justifies a drastic departure from the established and well-understood role that a trial judge plays in determining the admissibility of expert testimony under Rule 702 and *Daubert*. The Committee Note begins its discussion of Rule 702(d) with the assertion that "Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert." However, the Committee fails to acknowledge that trial judges are *already* armed with the necessary tool to exclude "extravagant claims that are unsupported by the expert's basis and methodology."[4] Indeed, Federal Rule of Evidence 403 empowers trial judges to exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[5]

The *Daubert* Court specifically identified Rule 403 as the correct means of assessing and excluding an errant expert *opinion*, even where reliable methodology was employed, where the Court stated: "Finally, Rule 403 permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .' Judge Weinstein has explained: 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over

[4] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, p. 311.
[5] Fed. R. Evid. 403.

experts than over lay witnesses.'"[6] The *Daubert* Court further noted that, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[7] Indeed, trial by jury and the adversarial process serve as an effective crucible to boil away overbroad assertions and unsupported claims from expert witnesses. The proposed amendment to Rule 702(d) is, therefore, unnecessary.

The Committee's articulated intent to "clarify" the Rule signifies that the proposed amendments are *reactive* in nature and intended to implicitly overrule the decisions of "many courts" who, in the Committee's view, have misapplied Rule 702. The NDAA submits that any perceived misapplications of Rule 702 are appropriately addressed by the judicial process, not the Committee. Unlike the Committee, reviewing courts have the benefit of access to the entire record below and are positioned to directly correct any errors in a lower court's analysis under Rule 702 and/or its application of Rule 702 to the facts of a particular case. Amending the Rule and indirectly suggesting in a Committee Note that pre-amendment cases were incorrectly decided sidesteps the judicial process and will only serve to create confusion regarding existing case law addressing Rule 702.

One need only look to the Committee's *own* discussion of Rule 702 in the Preliminary Draft of the rule amendments to see that the proposed change to Rule 702(d) is unnecessary. The Committee stated:

> "The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. *But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology.* If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). *The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.*"[8]

Thus, the Committee itself has acknowledged that Rule 702(d) in its present form is sufficient to exclude unreliable expert opinion testimony.

The Committee's discussion further suggests that the driving force behind the proposed amendment to Rule 702(d) is a desire to impose exceptional regulations on the testimony of "forensic experts."[9] The NDAA, however, believes that amending the text of Rule 702 is not an

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[6] *Daubert*, 509 U.S. at 595, citing Weinstein, 138 F.R.D., at 632.
[7] *Daubert*, 509 U.S. at 596.
[8] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, p. 297 (emphasis added).
[9] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, pp. 296-297.

appropriate way to resolve scientific controversies related to any particular subject matter about which expert testimony may be proffered.

Proposed Committee Note Regarding "Forensic Experts" and "Feature Comparison Evidence"

The Committee is overreaching when they dictate the necessity of adhering to categorical standards set forth in the Committee Note apparently intended to explicitly regulate testimony regarding particular types of expert testimony without a textual change to the Rule itself. For this reason, the proposed Note addressing the testimony of "forensic experts" in civil and criminal cases and suggesting specific additional limitations for expert opinion testimony regarding "feature comparison evidence" is highly inappropriate and misguided. The proposed Committee Note discourages the court from using its discretion to flexibly apply its inquiry as envisioned by Rule 702.[10] It also presents a drastic departure from current practice.

In addition, the Committee Notes explicitly directs the court to determine scientific validity based on a predetermined set of standards outlined in the Note which are not necessarily the practice of the relevant scientific community. Notably, a Subcommittee on Rule 702 was appointed "to consider possible treatment of forensic experts, as well as the weight/admissibility question"[11] and the Subcommittee recommended *against* the exact course of action now proposed by the Committee. Specifically, the Subcommittee found that:

> *"It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate."*[12]

Despite professing its agreement with the conclusions of the Rule 702 Subcommittee, the Committee nonetheless proposes a Committee Note which ignores the Subcommittee's astute observations and sound recommendations. Without explanation or justification from the Committee, the proposed Committee Note in fact includes a lengthy paragraph outlining specific testimony that forensic experts should "avoid," the types of evidence trial judges "should … receive" related to the admission of testimony about "subjective" methodology, and detailed limits which "*must be*" imposed on the articulation of opinions from experts related to "feature comparison evidence."[13]

It is not the role of the Committee to advocate for reform within a particular scientific discipline in a Committee Note. Thus, assuming the Committee decides to adopt the proposed changes to Rule 702, the section of the proposed Committee Note directing experts how to testify regarding forensic and feature comparison evidence *must be stricken*.

Conclusion

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[10] *Daubert,* 509 U.S. at 594–95.
[11] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, p. 296.
[12] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, p. 296.
[13] Preliminary Draft/Advisory Committee Notes on Fed. R. Evid. 702, p. 311 (emphasis added).

The Federal Rules of Evidence are intended to allow forensic disciplines to evolve in their own arenas with scientific experts challenging the theories and practices of their respective peer communities. However, the proposed amendments to Rule 702 and the proposed Committee Notes encourage experts in the law, namely judges, to don the illusion of a cloak of expertise in the realms of science. This practice would undoubtedly undermine the inherent value of the adversarial nature of both the civil and criminal justice system to an undesired end.

On behalf of our membership, we respectfully submit our opposition to the proposed amendments to Rule 702 and the content of the proposed Committee Note. These changes will create confusion, restrict judicial discretion, and infringe on the role of the jury. The existing Rule with its accompanying Committee Notes provide the necessary guidance to the federal courts and state jurisdictions who have adopted the Federal Rules to fittingly perform their gatekeeping role in determining the admissibility of expert testimony.

Staff Contacts: Nelson Bunn, Executive Director, National District Attorneys Association, nbunn@ndaajustice.org & Frank Russo, Director of Government & Legislative Affairs, National District Attorneys Association, frusso@ndaajustice.org