REPORT BY THE FEDERAL COURTS COMMITTEE

COMMENTS ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES 106 AND 702 OF THE FEDERAL RULES OF EVIDENCE

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Evidence. The City Bar, founded in 1870, has approximately 24,000 members practicing throughout the nation and in many foreign jurisdictions. The City Bar includes among its membership lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comment on the proposed amendments to Rules 106 and 702 of the Federal Rules of Evidence.

I. PROPOSED REVISION TO FEDERAL RULE OF EVIDENCE 106

The Advisory Committee on Evidence Rules has proposed revisions to Rule 106 of the Federal Rules of Evidence in an effort to resolve a conflict among courts as to whether a statement that satisfies Rule 106's existing fairness standard may be admitted over a hearsay objection. To do so, the Advisory Committee proposes adding language stating that an "adverse party may" require such evidence to be submitted "over a hearsay objection." The Advisory Committee reasons that Rule 106's rule of completeness, which is grounded in fairness, cannot fulfill its function if a party who creates a misimpression about the meaning of a proffered statement can use the hearsay rule to exclude a further statement that would correct the misimpression.

We support this change, but we recommend a further edit to the proposed text of Rule 106 to clarify that otherwise inadmissible hearsay may be introduced only if the trial court determines that fairness requires it. The proposed addition ("The adverse party may do so over a hearsay objection.") could potentially be read to suggest that the trial court lacks discretion to first determine whether fairness requires the introduction of otherwise inadmissible statements. As courts applying the existing version of Rule 106 have recognized, the rule "can adequately fulfill

its function only by permitting the admission of some otherwise inadmissible evidence *when the court finds in fairness* that the proffered evidence should be considered contemporaneously." *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (emphasis added). Without making this explicit in the rule, parties may be empowered to use Rule 106 as a back door for introducing inadmissible evidence, even when fairness does not require it or perhaps even where it would be unfair to the proponent of the evidence to which the adverse party objects.

We therefore propose adding the following language (bolded and underlined) to the proposed amendment:

> If a party introduces all or part of a ~~writing or recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ written or oral statement—that in fairness ought to be considered at the same time. **If the court finds that fairness requires it, then ~~T~~t**he adverse party may do so over a hearsay objection.

II. PROPOSED REVISION TO FEDERAL RULE OF EVIDENCE 702

The Advisory Committee on Evidence Rules has proposed two revisions to Rule 702 of the Federal Rules of Evidence. First, the Advisory Committee proposes clarifying that the proponent of expert testimony must "demonstrate[] by a preponderance of the evidence" that the evidence is admissible. This addition has been proposed "to clarify and emphasize that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence." According to the Advisory Committee, some courts have held that the sufficiency of the basis for an expert's opinions and the application of the expert's methodology go only to the weight of the opinion and not to admissibility. The Advisory Committee explains that this is not a correct application of Rule 702 and Rule 104(a). If after "the court has found the admissibility requirement to be met by a preponderance of the evidence," then "any attack by the opponent [] go[es] only to the weight of the evidence."

The Advisory Committee, in its comments accompanying the proposed rule, states that expert testimony has been admitted without satisfying the Rule 702 requirements by a preponderance of the evidence in "a fair number of cases[.]" The Advisory Committee also explained that this might be understandable, as *Daubert* itself is somewhat equivocal, plainly stating the preponderance standard in a footnote but also discussing the liberal standards of the Federal Rules of Evidence. *Compare Daubert v. Merrill Dow Pharm.*, 509 U.S. 579, 592 n. 10 (1993) (stating the preponderance standard under Rule 104(a)) *with id*. at 588-89 (discussing the "liberal thrust" of the Federal Rules of Evidence and their "general approach of relaxing the traditional barriers to opinion testimony") (internal quotations and citations omitted).

Second, the Advisory Committee proposes a change to Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Currently, Rule 702(d) only requires that the court find that "the expert has reliably applied the principles and methods to the facts of the case." Although the word change is slight, it is meant to reflect the Advisory Committee's view that "a trial judge must exercise

gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert." The rule change is not meant to lead courts to "nitpick" an expert opinion. However, it is meant to prevent experts from "mak[ing] extravagant claims that are unsupported by the expert's basis and methodology."

We support both of these proposed amendments because they will provide needed clarity to litigants and courts that are addressing issues relating to expert testimony. Rule 104(a) is meant to govern questions of preliminary admissibility and it does appear that not all courts are following this standard, perhaps because of the mixed message sent by the *Daubert* opinion. In one recent study commissioned by an organization of defense attorneys, the authors concluded that 65% of federal opinions in 2020 that addressed admissibility under Rule 702 did not mention that the proponent of the evidence bears the burden of proving admissibility by a preponderance of the evidence.[1] The authors also concluded that more than half of district courts are divided about whether to apply the preponderance standard.[2] Even if these statistics overstate the problem, it is still concerning to read that some district court judges may not be applying the correct standard of admissibility.

With respect to the amendment of Rule 702(d), it is appropriate for the rules to confirm what *Daubert* and its progeny were meant to accomplish: that judges act as gatekeepers who make sure that juries only hear from expert witnesses whose testimony meets a baseline standard. Not everything is a matter of weight. In recent years, the issue of "junk science" has been one of particular concern in criminal prosecutions, where there are concerns about the scientific validity of many types of "feature-comparison" methods of identification, such as those involving fingerprints, footwear and hair.[3] Such expert testimony gives the impression of scientific certainty, and often leads to convictions later found to be unwarranted. According to the Innocence Project, the misapplication of science contributed to 52% of wrongful convictions in Innocence Project cases, and false or misleading forensic evidence was a contributing factor in 24% of all wrongful convictions nationally.[4] Before expert testimony is presented to the jury, a judge ought to make sure that the expert's opinion reflects a reliable application of scientific principle. As the Advisory Committee recognizes, "[f]orensic experts should avoid assertions of absolute or one hundred percent certainty . . . if the methodology is subjective and therefore potentially subject to error." The amendment to Rule 702(d) should reduce the incidence of incorrect jury determinations based on unreliable scientific opinion.

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[1] Lawyers for Civil Justice, "Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020," at 2 (Sept. 30, 2021), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_study_of_rule_702_decisions_from_2020_--_sept_30_2021.pdf (all websites last visited Feb. 10, 2022).

[2] *Id*.

[3] *See* Executive Office of the President, Council of Advisors on Science and Technology, "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" (Sept. 2016), at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

[4] The Innocence Project, "Overturning Wrongful Convictions Involving Misapplied Forensics," found at https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/.

For these reasons, we support the proposed amendments to Rule 702 proposed by the Advisory Committee.

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