

WASHINGTON LEGAL FOUNDATION

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March 12, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

Washington Legal Foundation (WLF) writes to request that you share the attached WLF Legal Studies Division publications with the members of the Advisory Committee on Evidence Rules. As these publications showcase, many federal courts have eroded the effectiveness of Federal Rule 702 and ignored the principles the U.S. Supreme Court set out for expert evidence in *Daubert*, *Joiner*, and *Kumho Tire*. This disparity deprives the civil-justice system and its stakeholders of the clarity and consistency sought by the Committee on Rules of Practice and Procedure when it promulgated Rule 702.

The first WLF WORKING PAPER, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts* by attorney Lawrence A. Kogan, highlights the growing acceptance of an inherently unreliable method for reaching scientific or technical conclusions on causation. The First Circuit became the first court to accept this methodology in *Milward v. Acuity Special Products Group, Inc.* The court held that testimony developed through a weighing of multiple lines of evidence and an application of the "Bradford Hill criteria" was admissible. This "weight-of-the-evidence" methodology applies non-traditional abductive reasoning and places too much discretion in the expert witness's hands to pick and choose data to evaluate.

Before *Milward*, some federal appeals courts and even the Second Edition of the Federal Judicial Center's (FJC) respected *Reference Manual on Scientific Evidence* recognized the pitfalls of finding weight-of-the-evidence a reliable methodology for developing expert testimony. But within six months of *Milward's* release, the FJC reversed course and endorsed weight-of-the-evidence as acceptable in its manual's Third Edition. As the WORKING PAPER documents through extensive case analysis, federal courts are increasingly following *Milward's* and the FJC's lead, admitting testimony derived from abductive reasoning.

Mr. Kogan argues that the *Reference Manual's* Third Edition has in effect changed the way that judges conduct their review of expert evidence, usurping the role of the Committee on Rules of Practice and Procedure. As a result, some courts are exposing juries to unreliable expert evidence, an outcome that can have devastating consequences for defendants, especially those in mass-tort litigation.

The second WLF WORKING PAPER is ***Inconsistent Gatekeeping Undercuts the Continuing Promise of Daubert***, written by Joe G. Hollingsworth and Mark A. Miller. The authors point to examples such as a California-based federal district court judge's *Daubert* decision in glyphosate products-liability litigation as support for their conclusion that gatekeeping isn't being performed consistently. Along with detailing deviations from *Daubert* in Ninth Circuit trial courts, the paper provides examples from courts in other circuits, including the Sixth and the Eleventh.

The Advisory Committee on Evidence Rules takes an understandably cautious approach to amending federal rules of evidence. As the March 2, 2020 letter from 50 corporate chief legal officers noted, the Committee acts "to clarify rather than change standards" and to "address problems of adherence to, rather than understanding of, the rule." The WORKING PAPER by Kogan makes the case that judicial decisions, following the lead of a highly respected *Reference Manual* published for (and by) the judiciary, has in effect changed the Rule 702 standard. The Hollingsworth and Miller WORKING PAPER notes instances in which courts have failed to adhere to rule.

We encourage the Advisory Committee on Evidence Rules to consider the information and analysis in these educational papers when weighing whether to formally amend Rule 702.

Thank you for your consideration.

Sincerely,



Glenn G. Lammi
Chief Counsel, Legal Studies Division

Attachments