ANAPOLWEISS

**8700 E. Vista Bonita Drive ~ Suite 268 ~ Scottsdale, Arizona 85255**
**Phone (480) 515-4745 ~ Fax (480) 515-4744**

Larry E. Coben, Esquire*
lcoben@anapolweiss.com
*Managing Partner

Jo Ann Niemi, Esquire
jniemi@anapolweiss.com

December 21, 2021

**Commentary Regarding Proposed Changes to Rule 702**

As a Trial Lawyer for forty-years, and having addressed the admissibility of expert opinion testimony in hundreds of civil cases litigated in federal and state courts across the United States, I regularly present or answer challenges to expert testimony predicated upon Rule 702 of the Rules of Evidence. Admittedly, when this Rule was amended to address the *Daubert* criteria of admissibility, a "learning curve" arose. As with many areas of the law, it has taken attorneys and courts years to appreciate the "rules of the road" compelled by the objective boundaries of Rule 702, but in my view that has happened and, at least in the civil practice of law, there is virtually no abuse or misuse of these evidentiary principles of admissibility. Litigants have every opportunity to proffer expert opinions and/or object to their proffer and courts have the necessary tools to evaluate admissibility. Changing the verbiage of Rule 702 is unnecessary and in my opinion it will only

serve to confuse litigants and courts who have adjusted well to the perquisites for the admissibility of expert testimony.

I therefore provide these comments in my capacity as a trial lawyer and also as Chief Counsel for the Attorneys Information Exchange Group (AIEG). AIEG is a non-profit organization of over Eight Hundred (800) civil litigators who work throughout the United States and, in their professional capacity we have in the past and continue to represent thousands of Americans who pursue financial compensation from those who have caused them injury as the result of design and manufacturing flaws in consumer products. These lawsuits almost always require forensic analyses by competent experts in a host of scientific fields including medicine, engineering, bio-engineering, physics, and human factors. Thus, we are routinely required to assure ourselves and the courts in which we appear that our expert witnesses are providing reliable and competent expert opinion testimony. We do this with an understanding and appreciation of the requirements of Rule 702 and have uniformly found that as it currently exists—and as it is applied across the United States—Rule 702 provides appropriate criteria and boundaries, affording jurors an opportunity to decide civil disputes with reasoned opinion evidence.

## **Comments Regarding Proposed Changes to Rule 702**

The adage "if its not broken don't fix it" resonates here. Adding to the introductory sentence "the proponent has demonstrated by a preponderance of the information" is "superfluous to the existing Rule.

> " . . . proponents of expert testimony bear the burden of establishing its admissibility but do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, **they only have to demonstrate by a preponderance of evidence that their opinions are *reliable*** [because] evidentiary requirement of reliability is lower than the merits standard of correctness. *U.S. Magnesium, LLC v. ATI Titanium, LLC*, 2021 WL 615412, at *2 (D. Utah Feb. 17, 2021).

*E.g., Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001); *In re Mirena IUD Prod. Liab. Litig.,* 169 F. Supp. 3d 396, 411–12 (S.D.N.Y. 2016).

Amending Rule 702 (d) by adding/changing the verbiage of this sub-part again alters the words but not the meaning of this evidentiary prerequisite. Demonstrating that an expert's opinions are based upon a reliable application of reliable principles and methods to the facts remains a prerequisite without a reasoned change in the language of this sub-part. Courts have appropriately applied the language and intent of this sub-part, recognizing that Rule 702 ". . . is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." *Vox Mktg. Grp., LLC v. Prodigy Promos L.C.,* 521 F. Supp. 3d 1135, 1142–43 (D. Utah 2021).

The primary concern about elevating to the introduction of Rule 702 the "preponderance of the information" is that trial courts may now believe that their gatekeeper role has changed. And, while the commentary makes it clear that this inference is unintended, it then begs the question why make the change. Certainly, the proposed changes are not meant to create a "13th juror", allowing the Court to

decide—not the jury—which expert's opinions convince the Court that their analysis is right and the other expert's assessment is wrong. If this feared inference were the end result of these semantical changes, it could effectively and radically alter the very purpose of Rule 702. The gatekeeper role was never intended to supplant the adversary system or the role of the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531–32 (6th Cir. 2008). Arguments regarding the weight to be given any testimony or opinions of an expert witness are properly left to the jury. *Id.* "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." *Id.*

Rule 702 represents a liberal standard of admissibility for expert opinions, as compared to the previous and more restrictive standard set out in *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923). *See, e.g., Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 588–89, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (*Frye* test of general acceptance in the scientific community superseded by the Federal Rules; "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony' ") . . . *In re Mirena IUD Prod. Liab. Litig.,* 169 F. Supp. 3d 396, 411–12 (S.D.N.Y. 2016).

To aid the committee in appreciating the procedural trap that may lie ahead for litigants if these proposed changes are adopted, we provide examples of expert analyses (accepted in reported cases) that would seem threatened now:

- Ford Pinto fuel-fed fire cases
- IUD design cases
- Tobacco cases
- Breast implant cases

- Asbestos cases
- Hip replacement devices
- Toyota runaway cases
- Pelvic mesh devices

In the arena of civil litigation, the Rule 702 prerequisites have worked well. Counsel and the parties are well informed of the necessity to provide well credential experts whose analyses are based upon reliably principled opinions and these proposed changes are unnecessary.

Respectfully submitted,

Larry E Coben Digitally signed by Larry E Coben
DN: cn=Larry E Coben, o=Anapol Weiss, ou, email=lcoben@anapolweiss.com, c=US
Date: 2021.12.21 11:24:13 -07'00'

Larry E. Coben