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February 11, 2022

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rule of Evidence 702

Dear Judge Bates:

The Atlantic Legal Foundation ("ALF") is pleased to submit these comments in support of the proposed amendments to Federal Rule of Evidence 702.

Established in 1977, ALF is a nonprofit, nonpartisan, public interest law firm. One of ALF's key missions is advocating for use of sound science in judicial and regulatory proceedings. For example, on behalf of esteemed scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently cited biochemists), ALF submitted amicus briefs in each of the "*Daubert* trilogy" of cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—concerning admissibility of expert testimony under Rule 702. In *Daubert* the Court quoted the Foundation's brief on the meaning of "scientific . . . knowledge" as used in Rule 702(a). 509 U.S. at 590.

1. The proposed amendments align with ALF's mission of fostering sound science in the courtroom.

Despite the post-*Daubert* amendments to Federal Rule of Evidence 702 that were adopted in 2000, many district court judges have continued to allow juries to be influenced by junk science testimony, which has led to scientifically unwarranted verdicts and grossly disproportionate damages awards. For this reason, ALF has continued to be one of the nation's foremost advocates for strict adherence to the expert testimony admissibility standards imposed by Rule 702. Through the filing of Supreme Court amicus briefs and comments like these, ALF has sought to ensure that federal courts in product liability, toxic tort, and other litigation involving medical or scientific issues exclude junk science and any other expert testimony that it is not scientifically reliable.

For example, in September 2021 ALF filed a petition-stage amicus brief in *Monsanto Company v. Hardeman*, No. 21-241, urging the Supreme Court to review a Ninth Circuit opinion that not only erroneously rejected federal preemption of the plaintiff's pesticide-related failure-to-warn claims, but also affirmed a district court's violation of Rule 702 by admitting expert testimony that relied on "art" rather than science. *See Hardeman v. Monsanto Co.*, 997 F.3d 941, 962-63 (9th Cir. 2021). As another example, ALF filed a petition-stage amicus brief in *SQM North America Corp. v. City of Pomona*, No. 14-297, where the Ninth Circuit incorrectly held that a "measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the *role of the fact finder* in assessing and weighing the evidence." *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) (emphasis added). Rulings like these not only are inconsistent with Rule 702's admissibility criteria and federal judges' gatekeeper role, but also deprive defendants of a fair trial and due process of law.

2. The proposed amendments will help to exclude junk science from federal courtrooms.

As amended, Rule 702 will reinforce federal district judges' gatekeeper role and further clarify that admissibility of expert testimony must be based on proper methodology and valid factual bases. The rule changes will (i) explicitly clarify that the admissibility requirements set forth in Rule 702 must be satisfied by a preponderance of the evidence, and (ii) emphasize that a trial judge must exercise gatekeeping authority with respect to testifying experts' opinions. *See* Committee Note to Proposed Amendments.

More specifically, many courts, such as the Ninth Circuit in the cases cited above, have mistakenly held that the reliability of an expert's opinion is not a

question of admissibility for the judge to decide, but instead, that reliability goes to the weight of the testimony and is for the jury to determine. The proposed amendments, by inserting the preponderance of evidence standard into the text of Rule 702, will correct this critical error by requiring federal courts, in accordance with Rule 104(a), to treat the reliability of expert testimony as a preliminary question of admissibility that must be decided by the judge, not by the jury.

In other words, ALF supports the proposed amendments because they emphasize the importance of district judges' gatekeeping authority. For too long, trial judges have abdicated this due-process responsibility, seemingly unwilling to exclude testimony even when it is based on flimsy methodology or inconsistent application to the facts of the case. Excluding unreliable science fosters due process and judicial fairness because "[a]t its core" the battle against junk science "is ultimately intended to prevent fraud on society and the legal system." Henry P. Sorrett, *Junk Science in the States: The Battle Lines*, Atl. Legal Found., Science in the Courtroom Rev. (Autumn 2000), at 31.

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Rule 702 requires district court judges, not juries, to determine whether an expert's testimony is based upon reliable methods, and whether the methodology is applied reliably to the facts of the case. The proposed amendments should be adopted because they will help to ensure that federal judges will respect and adhere to this crucial gatekeeper role.

Respectfully Submitted,

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