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Daniel J. Capra
Fordham University School of Law

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Foreword: Symposium on Forensic Expert Testimony, *Daubert*, and Rule 702

Erratum

Law; Criminal Law; Evidence; Courts; Judges

THE PHILIP D. REED LECTURE SERIES

FOREWORD: SYMPOSIUM ON FORENSIC EXPERT TESTIMONY, *DAUBERT*, AND RULE 702

*Daniel J. Capra**

On October 27, 2017, the Judicial Conference Advisory Committee on Evidence Rules held a Symposium to obtain input and guidance on critical matters involving the admissibility of expert testimony. The Symposium consisted of presentations and discussions by brilliant scientists, outstanding federal judges, academics with deep expertise in both evidence and science, and stellar practitioners from private and public practice. The transcript of the Symposium and the accompanying articles establish an important agenda for the Advisory Committee to tackle over the next few years.

The idea for this Symposium originated from a contact between Professor Charles Fried of Harvard Law School and the Reporter to the Committee. Professor Fried was working with Dr. Eric Lander on the President's Council of Advisors on Science and Technology (PCAST). PCAST was working on a report on feature-comparison expert testimony, that is, testimony comparing a source sample to an evidentiary sample. Dr. Lander was cochair of the project—and the question arose as to whether the Advisory Committee on Evidence Rules might have a role in implementing a set of “best practices” for this kind of forensic expert testimony. The then-chair of the Advisory Committee, Hon. William Sessions, III, envisioned this Symposium as the first step in considering how the Advisory Committee should respond to the recent challenges to the reliability of feature-comparison expert testimony, such as latent fingerprints, ballistics, bite marks, and so on.

The best background for considering whether rulemaking has a role in addressing the challenges to forensic expert evidence is to get some idea of what those challenges are. The 2016 PCAST report—*Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*—provides an exhaustive analysis of why certain forensic comparison methods are questionable, and how at least some of them can be strengthened so that they can become scientifically valid (while others, such

* Reed Professor of Law, Fordham University School of Law; Reporter, Judicial Conference Advisory Committee on Evidence Rules. On behalf of the Advisory Committee, I would like to thank the *Fordham Law Review* for all its fine work in publishing this Symposium and the accompanying articles.

as bite-mark analysis, simply need to be abandoned).¹ Particular attention is given to the problem of experts overstating their results. But it must be emphasized that the Symposium was never intended to be about the PCAST report itself. The question for the Symposium, and for the Advisory Committee, is not about any specific conclusion in the PCAST report but rather this: taking the PCAST report as a jumping-off point, what, if anything, should the Advisory Committee do about the many legitimate questions and concerns that have been raised about the validity of feature-comparison testimony?

In order to frame the discussion at the Symposium, I prepared a discussion draft of an amendment to the Federal Rules of Evidence: a new rule that would regulate the admissibility of experts testifying to feature-comparison methods. The draft provides as follows:

Rule 707. Testimony by Forensic Expert Witnesses. If a witness is testifying on the basis of a forensic examination [conducted to determine whether an evidentiary sample is similar or identical to a source sample], [or: “testifying to a forensic identification”] the proponent must prove the following in addition to satisfying the requirements of Rule 702:²

(a) the witness’s method is repeatable, reproducible, and accurate for its intended use—as shown by empirical studies conducted under conditions appropriate to that use;

(b) the witness is capable of applying the method reliably—as shown by adequate empirical demonstration of proficiency—and actually did so; and

(c) the witness accurately states, on the basis of adequate empirical evidence, the probative value of [the meaning of] any similarity or match between the evidentiary sample and the source sample.³

1. See generally PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/R76Y-7VU>].

2. See FED. R. EVID. 702. This Rule provides:

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Id.

3. Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, Symposium on Forensic Expert Testimony, *Daubert* and Rule 702 (Oct. 1, 2017), in ADVISORY COMMITTEE ON RULES OF EVIDENCE OCTOBER 2017 AGENDA BOOK 371, 381 (2017) (alterations in original) (proposing a new rule, Federal Rule of Evidence 707), http://www.uscourts.gov/sites/default/files/a3_0.pdf [<https://perma.cc/>]

The draft certainly raises a lot of questions. For example:

- (1) How do the standards of this new rule relate to the basic standards of Rule 702? Is there an overlap?
- (2) Is the amendment necessary, or is forensic expert testimony sufficiently regulated by the existing standards of Rule 702?
- (3) Presumably one reason for the amendment would be to have an Advisory Committee note that would lay out helpful criteria for assessing the admissibility of forensic expert feature-comparison evidence. But how detailed can or should a note be? Would it have to be written with scientific consultants? Would it become outdated by scientific developments?
- (4) What about the alternative of a best practices manual outside the rulemaking function?⁴

These are all difficult questions. But at least the Committee now has the guidance of all the brilliant Symposium participants to help it in working through the answers.

Finally, while forensics was the initial focus of the Symposium (and remains the prime focus), the Advisory Committee after deliberation decided to expand the agenda to cover problems faced by courts and litigants in applying Federal Rule of Evidence 702—the basic rule on expert testimony—more generally. The second panel explored particular problems in applying the standards originally set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵ and codified and expanded by the 2000 amendment to Rule 702.⁶ The inquiry started by this second panel is a beginning and not an end—there is no attempt to be comprehensive on all the issues that have arisen in applying *Daubert* and Rule 702; the second panel is a sampling.

VJST-RAG3]. Thanks to Dr. Eric Lander for reviewing an earlier draft and providing helpful comments.

4. The downside of this alternative is that it would not have the force of law, nor the imprimatur of the Advisory Committee.

5. 509 U.S. 579 (1993).

6. FED. R. EVID. 702 advisory committee's notes to 2000 amendments.