Via E-Mail

January 12, 2024

September Coyne
Supreme Court of Ohio
65 South Front Street, 7th Floor
Columbus, OH 43215-3431
ruleamendments@sc.ohio.gov
clc@sc.ohio.gov

Comment of Ohio Alliance for Civil Justice, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, Ohio Business Roundtable, Lawyers for Civil Justice, DRI Center for Law and Public Policy, International Association of Defense Counsel, Federation of Defense & Corporate Counsel, Association of Defense Trial Attorneys, Product Liability Advisory Council, Inc., National Federation of Independent Business, U.S. Chamber Institute for Legal Reform, Coalition for Litigation Justice, Inc., American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Washington Legal Foundation, American Tort Reform Association, Pharmaceutical Research and Manufacturers of America, American Coatings Association, and Alliance for Automotive Innovation Supporting Revised Proposed Amendment to Ohio Evidence Rule 702

The above-listed public policy, business, civil justice and legal organizations have strong ties to Ohio.[1] We strongly support the proposal to align Ohio Rule of Evidence 702 ("Ohio Rule 702") with its updated federal counterpart, Federal Rule of Evidence 702—2023 Amend.

The proposed amendment clarifies that the proponent of expert testimony must demonstrate "to the court that it is more likely than not" that the rule's admissibility requirements are met. The amendment underscores the need for judges to act as gatekeepers against the admission of unreliable expert testimony.

The proposed amendment also provides that an expert's opinion must reflect "a reliable application of the principles and methods to the facts of the case." We filed a comment in October 2023 encouraging the court to harmonize Ohio Rule 702 with new Federal Rule of Evidence 702(d). We applaud the Court for putting the language in the text of the rule.

The Proposed Amendment Avoids Problems that Led to New Federal Rule 702

Ohio Rule 702 was last amended in 1994, when expert testimony admissibility requirements were less developed nationally. Ohio was at the forefront of state efforts to improve the reliability of expert testimony. The 1994 amendment recognized that "Ohio cases have . . . clearly rejected the standard of *Frye v. United States* (D.C. Cir. 1923), 293 F. 1013, under which scientific opinions are admissible only if the theory or test in question enjoys 'general acceptance' within a relevant scientific community." Ohio R. Evid. 702, Staff Note—1994 Amend. The amendment favorably cited what was then a recent U.S. Supreme Court decision addressing the admission of expert testimony, *Daubert v. Merrell Dow Pharms.,Inc.*, 509 U.S. 579 (1993).

[1] For a summary of the signatory organizations, see Appendix.

In 2000, Federal Rule 702 was amended in response to *Daubert* and subsequent cases.[2] The Federal Advisory Committee on Rules of Evidence explained that the U.S. Supreme Court's jurisprudence "charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony" and that the "amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702, Committee Notes—2000 Amend. The Committee Notes also provided that "the admissibility of all expert testimony is governed by the principles of [Federal] Rule 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." *Id.*

Despite this guidance, many federal courts incorrectly applied the rule, leading to "roulette wheel randomness" in court decisions.[3] Many courts "resist[ed] the judiciary's proper gatekeeping role, either by ignoring Rule 702's mandate altogether or by aggressively reinterpreting the Rule's provisions."[4] For example, many federal courts, including in Ohio, focused on statements in *Daubert* regarding the "liberal thrust" of the Federal Rules of Evidence and the "flexible" nature of the inquiry instead of focusing on the text of the 2000 amendments.[5]

Federal Rule of Evidence 702 was amended again on December 1, 2023 to fix widespread misapplication of the Rule. The Committee Note accompanying the amendments explains that "many courts" incorrectly "held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility." Fed. R. Evid. 702, Committee Notes—2023 Amend. The amendment clarifies that expert testimony may not be admitted unless "the proponent demonstrates to the court that it is more likely than not" that the proffered testimony meets each admissibility requirement. *Id.*

The new federal rule also emphasizes that "each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." *Id.*

The proposed amendment to Ohio Rule 702 will promote greater consistency in the proper admission of expert evidence in state and federal courts. The changes will allow Ohio courts to benefit from the body of case law interpreting new Federal Rule 702 and avoid disparate treatment of expert evidence that incentivizes forum shopping. The amendment will also further the Court's

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[2] *See General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[3] Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 218 (2006).

[4] David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rules of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 1 (2015).

[5] For federal cases in Ohio, *see Mitchell v. Michael Weinig, Inc.*, No. 2:17-cv-905, 2020 WL 5798043, at *20 (S.D. Ohio Sep. 29, 2020) ("Determining the admissibility of expert testimony entails a flexible inquiry and any doubts should be resolved in favor of admissibility."); *In re Davol C.R. Bard Mesh Prod. Liab. Litig.*, No. 2:18-cv-01509, 2020 WL 6603389, at *2 (S.D. Ohio Sep. 10, 2020) ("The Court explained that Rule 702 displays a liberal thrust with the general approach of relaxing the traditional barriers to opinion testimony.") (quoting *John v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000)); *Chapman v. Tristar Prods., Inc.*, 2017 WL 1718423, at *1 (N.D. Ohio Apr. 28, 2017) ("Rule 702 evinces a liberal approach regarding admissibility of expert testimony. Under this liberal approach, expert testimony is presumptively admissible.").

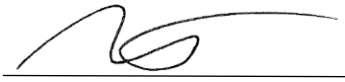
previous work to promote harmony between key state and federal court rules, such as the Court's adoption of the federal concept of discovery "proportionality" in 2020.

We encourage the Court to adopt the proposed amendment as currently written.

Thank you for the opportunity to submit this comment.

Ohio Chamber of Commerce	Ohio Alliance for Civil Justice
The Ohio Manufacturers' Association	Ohio Business Roundtable
Lawyers for Civil Justice	DRI Center for Law and Public Policy
International Association of Defense Counsel	Federation of Defense & Corporate Counsel
Association of Defense Trial Attorneys	Product Liability Advisory Council, Inc.
National Association of Mutual Insurance Companies	American Property Casualty Insurance Association
American Tort Reform Association	Washington Legal Foundation
American Coatings Association	Coalition for Litigation Justice, Inc.
Pharmaceutical Research and Manufacturers of America	National Federation of Independent Business
U.S. Chamber Institute for Legal Reform	Alliance for Automotive Innovation

Respectfully submitted,



Victor E. Schwartz (Ohio Bar #0009240)
Former Dean, University of Cincinnati College of Law
Shook, Hardy & Bacon L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
vschwartz@shb.com

APPENDIX: SUMMARY OF SIGNATORY ORGANIZATIONS

- **Ohio Alliance for Civil Justice (OACJ):** OACJ is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. OACJ members support a balanced civil justice system that will not only award fair compensation to injured persons, but will also impose sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs not unjustly enriched. The OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and others may know what risks they assume as they carry on commerce in this state.
- **Ohio Chamber of Commerce (Ohio Chamber):** Founded in 1893, the Ohio Chamber is Ohio's leading business advocacy trade organization, representing nearly 8,000 businesses and professional organizations located or operating in Ohio who range from small sole proprietorships to some of the nation's largest companies. The Ohio Chamber's mission is to champion free enterprise, economic competitiveness, and growth on behalf of all Ohioans. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system that fosters a business climate where enterprise and Ohioans prosper.
- **The Ohio Manufacturers' Association (OMA):** OMA is a statewide association of approximately 1,300 manufacturing companies, which collectively employ the majority of the 690,000 men and women who work in manufacturing in Ohio and account for almost 18% of Ohio's gross domestic product. Member companies are engaged in various businesses or industries in Ohio and are incorporated or conduct substantial business operations in the state.
- **Ohio Business Roundtable (OBRT):** OBRT was established to improve Ohio's business climate. Since its inception, the OBRT has worked with Ohio's governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. The Roundtable is a nonpartisan, nonprofit organization comprised of over 110 presidents and CEOs of Ohio's top companies.
- **National Federation of Independent Business (NFIB):** NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies. NFIB supports a stable, predictable legal climate that helps its members to thrive.
- **Lawyers for Civil Justice (LCJ):** LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 36 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
- **DRI Center for Law and Public Policy:** The Center for Law and Public Policy ("the Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, the Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of DRI. The Center undertakes in-depth studies on a

variety of issues, such as class actions, judicial independence, climate change litigation, data privacy, legal system abuse, and artificial intelligence, and also advocates for meaningful changes to rules of civil procedure and evidence at both the state and federal level. Since its inception, the Center has been the voice of the civil defense bar on substantive issues of national importance.

- **International Association of Defense Counsel (IADC):** The IADC has served a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. The IADC is an invitation-only, peer-reviewed membership organization of the world's leading lawyers who primarily represent the interest of defendants in civil litigation. The IADC's substantive committees cover over twenty different areas of law.
- **Federation of Defense & Corporate Counsel (FDCC):** The FDCC is a not-for-profit corporation with national and international membership of over 1,500 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives.
- **Association of Defense Trial Attorneys (ADTA):** The ADTA is a select group of diverse and experienced civil defense trial attorneys whose mission is to improve their practices through collegial relationships, educational programs, and business referral opportunities, while maintaining the highest standards of professionalism and ethics.
- **Product Liability Advisory Council, Inc. (PLAC):** PLAC is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.
- **Coalition for Litigation Justice, Inc. (Coalition):** The Coalition is a nonprofit association formed by insurers in 2000 to address the litigation environment for asbestos and other toxic tort claims. The Coalition has filed nearly 200 *amicus* briefs in asbestos and other toxic tort cases, including cases before this Court. The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc.; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.
- **American Property Casualty Insurance Association (APCIA):** APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in Ohio, throughout the U.S., and across the globe.
- **National Association of Mutual Insurance Companies (NAMIC):** NAMIC consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $391 billion in annual premiums and represent 68% of homeowners,

56% of automobile, and 31% of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

- **Washington Legal Foundation (WLF):** Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Ohio. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF supports efforts to exclude unreliable expert evidence from state and federal courtrooms.
- **American Tort Reform Association (ATRA):** ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote the goal of ensuring fairness, balance, and predictability in civil litigation.
- **Pharmaceutical Research and Manufacturers of America (PhRMA):** PhRMA represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier and more productive lives. Over the last decade, PhRMA member companies have more than doubled their annual investment in the search for new treatments and cures, including nearly $101 billion in 2022 alone. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines.
- **American Coatings Association (ACA):** ACA is a voluntary, nonprofit trade association representing more than 180 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the leading organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and judicial issues at all levels. In addition, ACA undertakes programs and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with over 90% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.
- **U.S. Chamber Institute for Legal Reform (ILR):** ILR is a division of the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. Its members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations. The U.S. Chamber is proud to count many Ohio businesses among its broad membership.
- **Alliance for Automotive Innovation:** Auto Innovators represents the manufacturers that produce most of the cars and light trucks sold in the U.S., original equipment suppliers, battery makers, technology companies, and other value chain partners within the automotive ecosystem. Representing approximately 5% of the country's GDP, responsible for supporting 10 million jobs, and driving $1 trillion in annual economic growth, the automotive industry is the nation's largest manufacturing sector.

No. 2023-1101

IN THE

United States Court of Appeals for the Federal Circuit

ECOFACTOR, INC.,
Plaintiff, Appellee,

v.

GOOGLE LLC,
Defendant, Appellant.

On Appeal from the United States District Court
for the Western District of Texas
No. 6.20-cv-00075-ADA
Hon. Alan D. Albright

BRIEF OF AMICUS CURIAE LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF APPELLANT

YAR CHAIKOVSKY
MICHAEL COSTELLO-CAULKINS
WHITE & CASE
3000 El Camino Real
2 Palo Alto Square, Suite 900
Palo Alto, California 94306

MARK DAVIES
ETHAN PLAIL
KUFERE LAING
WHITE & CASE
701 Thirteenth Street, NW
Washington, DC 20005
mark.davies@whitecase.com

Counsel for Amicus Curiae

November 26, 2024

CERTIFICATES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rules 29 and 47.4, counsel for *amicus curiae* Lawyers for Civil Justice certifies the following:

I. The full name of every party or *amicus* represented by me is:

Lawyers for Civil Justice

II. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

III. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curaie* represented by me are:

None

IV. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this Court are:

Yar Chaikovsky, Mark Davies, Ethan Plail, Kufere Laing, and Michael Costello-Caulkins of White & Case LLP.

Dated: November 26, 2024

Respectfully submitted,

/s/ Mark Davies
Mark Davies

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STATEMENT OF INTEREST[1]

Lawyers for Civil Justice (LCJ) is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.[2] Since 1987, LCJ has advocated for procedural reforms that: (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

Working through the Rules Enabling Act process, LCJ often urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence. LCJ has specific expertise on the meaning, history, and application of Rule 702, drawing from both its own efforts undertaken during the rulemaking process and the collective experience of its members who engage in litigation in the federal courts. LCJ

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[1] Counsel certifies that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person or entity – other than amicus curiae – contributed money intended to fund the preparation or submission of this brief. White & Case represented Google here but all White & Case lawyers have withdrawn from the case as of November 3, 2021. *See EcoFactor, Inc. v. Google LLC*, No. 6:20-cv-00075-ADA (W.D. Tex. Nov. 3, 2021) (text order granting Motion to Withdraw White & Case attorneys Michael Songer and Henry Yee-Der Huang as counsel for Google).

[2] LCJ's members are listed on its webpage, at the "About Us" tab. https://www.lfcj.com/about.

submitted several comments, including original research, to the Judicial Conference Advisory Committee on Evidence Rules (referred to in this brief as the Advisory Committee) during the rulemaking process that resulted in enactment of the 2023 amendment to Rule 702. *See*, *e.g.*, Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to Advisory Committee on Evidence Rules (Sept. 1, 2021);[3] Lawyers for Civil Justice, *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee on Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020);[4] Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, submitted to Advisory Committee on Evidence Rules (Sept. 30, 2021).[5]

[3] https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007

[4]https://www.uscourts.gov/sites/default/files/20evy_suggestion_from_lawyers_for_civil_justice_rule_702_0.pdf

[5] https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008

LCJ's analysis identified widespread misunderstanding of Rule 702's requirements, and also established that many courts had failed to recognize the sufficiency of an expert's factual basis is an *admissibility* consideration under Rule 104(a)'s burden of proof to expert admissibility decisions. During Rule 702 rulemaking, LCJ advocated for specific changes, including adding an explicit reference to the court as the decision-maker to the rule's test so Rule 702 would give unmistakable direction about judges' gatekeeping responsibility. LCJ's contributions affected the rulemaking process, as recognized by the Reporters to the Advisory Committee. *See* Memorandum from Daniel J. Captra and Liese L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, Possible Amendment to Rule 702 (Oct. 1, 2024), at 4, in Advisory Committee on Evidence Rules November 2021 Agenda Book 135 (2021) ("LCJ's suggestion to reinsert a reference to the court has much to commend it. … Given the fact that the reason the rule is being amended is that some courts did not construe the 2000 amendment properly, it makes eminent sense to make it as explicit as possible.").

In addition, LCJ has recently submitted amicus briefs in the United States Supreme Court and in federal courts of appeals urging courts to give meaning to Rule 702 and its requirements.[6] In each case, as it does here, LCJ has endeavored to clarify the proper standards for determining whether expert testimony is admissible Rule 702.

LCJ files this brief to provide the Court with its views on the development and meaning of Federal Rule of Evidence 702. LCJ and its members have an interest in ensuring that the Federal Rules of Evidence are consistently interpreted across the nation. That rule, and not local variations that modify or remove elements or alter the explicit admissibility requirements, reflects the result of the Rules Enabling Act's rulemaking process and is the governing law. LCJ also strongly believes that judges should play a central role as gatekeepers in deciding the admissibility of opinion testimony and thus ensure the aim of Rule 702 by allowing only what is admissible evidence from experts to be presented to the finder of fact. The issues presented here are at the core of LCJ's

[6] *See, e.g.*, *Monsanto Co. v. Hardeman*, 142 S. Ct. 2834 (2022), 21-241 (United States Supreme Court); *Rutledge v. Walgreen Co., Inc.*, No. 24-916 (2d Cir. Nov. 15, 2024); *In re: Paraquat Products Liability Litigation*, Nos. 24-1865, 24-1866, 24-1867, 24-1868 (7th Cir. Sept. 26, 2024); *Harris v. Fedex Corp. Servs., Inc.*, No. 23-20035, 2023 WL 3564985 (5th Cir. May 10, 2023).

mission and its work over many years on Rule 702. LCJ believes it is essential to the proper interpretation of Rule 702 that the Court emphasize the centrality of Rule 702's text in deciding whether proffered expert opinions are admissible.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 702 requires expert testimony to be grounded on sufficient facts and data, employ reliable principles and methods, and reliably apply those methods to the facts of the case. Before Rule 702 was amended in 2023, "many courts" incorrectly applied the rule and stated that "the critical questions of sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility." Fed. R. Evid. 702 advisory committee's note to 2023 Amendment. Thus, Rule 702's text was changed to "clarify and emphasize that expert testimony *may not be admitted* unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Id.* (emphasis added).

Here, the district court and the panel made the very mistakes that motivated enactment of the 2023 Amendment. Both failed to apply Rule 702's standard: The *court* must rule on admissibility. Instead, the panel, in deferring to the district court's ruling, held that issues with the assumptions of EcoFactor's damages expert, Mr. Kennedy, were best addressed to the jury. The panel also ignored the preponderance of the

evidence standard, as clarified in the 2023 amendment. This Court, now sitting en banc, should seize the opportunity to correct the misapplications of Rule 702, and provide clear direction for lower courts to follow when applying Rule 702 going forward.

I. Rule 702 establishes the standard for admissibility.

The Rules Enabling Act gives the power to establish procedural rules to the Supreme Court and the Judicial Conference committees. 28 U.S.C. § 2072(a) and (b). Those rules must include an "explanatory note" on the rule. 28 U.S.C. § 2073(d).

Rule 702, which sets the standard for expert witness testimony, was originally amended by the Supreme Court and submitted to Congress in 2000 and then again in 2023 through the rulemaking process under the Rules Enabling Act. *See* Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence (Apr. 24, 2023) at 1, 7; Order Amending the Federal Rules of Evidence, 529 U.S. 1189, 1195 (2000).

The subsections of Rule 702 enumerate the specific criteria that the expert must meet. Beginning with (a), the expert's testimony must "help the trier of fact." That is, the testimony must be relevant. Under (b), the

testimony must be "based on sufficient facts or data." And thus, the court must decide the adequacy of an expert's factual foundation as a matter of admissibility. *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 43, in Advisory Committee on Evidence Rules April 2018 Agenda Book 49 (2018). Last, (c) and (d) mandate that the testimony is "the product of reliable principles and methods" and "reflects a reliable application of the principles and methods to the facts of the case." The court must find each of these elements by the preponderance of the evidence.

As a rule of evidence adopted by the Supreme Court, Rule 702 overrides any conflicting laws, including appellate court decisions: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).[7] Thus, the "elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility." Thomas D. Schroeder, *Toward a More Apparent*

[7] *See also Kan. City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) ("At this point, Rule 702 has superseded *Daubert*").

Approach to Considering the Admission of Expert Testimony, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

Because Rule 702 itself, and not caselaw, establishes the admissibility standard, courts must decide whether the necessary elements for admission of opinion testimony have been shown by a preponderance of the evidence. Fed. R. Evid. 702 (the proponent must demonstrate "to the court that it is more likely than not that" the elements are established); *see also Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 586 (2016) (identifying Rule 702 as establishing the criteria under which "an expert may testify").

II. The 2023 amendment corrects courts' failures to perform their gatekeeping function.

Rule 702 was amended because some courts were not properly applying the rule. As the Advisory Committee observed before adopting the 2023 amendment, "many courts have held that the critical questions of the sufficiency of an expert's basis" are questions of "weight and not admissibility," which is an "incorrect application of Rules 702 and 104(a)." FED. R. EVID. 702 advisory committee's note to 2023

Amendment.[8] Courts were frequently observed to misstate and misapply these aspects of Rule 702:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. … *It is not appropriate for these determinations to be punted to the jury, but judges often do so*.[9]

Commenting on research evaluating the breadth of the problem, the Reporter to the Advisory Committee similarly observed:

> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" – *a misstatement made by circuit courts and district courts in a disturbing number of cases*.[10]

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[8] *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert, and* Rule 702(b) or (d)… ("[S]ome courts have defied the Rule's requirements, which stem from *Daubert* – that the sufficiency of an expert's basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence.").

[9] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added).

[10] Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added).

The Federal Circuit was not immune to the issues that the Advisory Committee identified. For example, this Court has overlooked the requirement of Rule 702(b) and declared that "[t]he soundness of the factual underpinnings of the expert's analysis … [is a] factual matter[] to be determined by the trier of fact." *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1320 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015); *see also Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1299 (Fed. Cir. 2015) ("To the extent [an expert]'s credibility, data, or factual assumptions have flaws, these flaws go to the weight of the evidence, not to its admissibility.").

Other decisions have incorrectly declared that "disagreements [] with the … factual assumptions and considerations underlying th[e] conclusions [reached by an expert] … go to the weight afforded to the testimony and not its admissibility." *Active Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012); *see also i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed. Cir. 2010) ("Questions about what facts are most relevant or reliable to calculating a reasonable royalty are for the jury."); *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co.*, 853 F.3d 1370, 1381 (Fed. Cir. 2017) ("Samsung's criticism of

[the damages expert]'s selected benchmark 'goes to evidentiary weight, not its admissibility.'") (cleaned up).

Rather than follow Rule 702 itself, some decisions even relied on caselaw dating to 1986 as justification for the incorrect proposition that the reliability of an expert's opinions should be tested by the adversary process rather than excluded. *See Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) ("Virtually all the inadequacies in the expert's testimony urged here … were brought out forcefully at trial … [t]hese matters go to the weight of the expert's testimony rather than to its admissibility" (quoting *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir. 1986)).[11]

The Advisory Committee determined that the 2023 amendment should stop courts from making these errors:

> the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702 (b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology – are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. *These statements misstate Rule 702*, because its

[11] "Perhaps the worst example of a federal appellate court ignoring the language of amended Rule 702 arose in the 2006 Federal Circuit opinion in *Liquid Dynamics Corp. v. Vaughan Co.*" David E. Bernstein and Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 24 (2015).

> admissibility requirements must be established to a court by a preponderance of the evidence.[12]

After the amendment, it is "certainly incorrect" for a court to declare that "[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court."[13]

The 2023 amendment clarifies Rule 702 in three key ways. *First*, it mandates that the court must determine the admissibility of evidence before presenting it to the jury. *Second*, the amendment integrates the preponderance of the evidence standard into Rule 702, requiring the proponent to prove that it is more likely than not that all of Rule 702's requirements are met. *See* Fed. R. Evid. 702 advisory committee's note to 2023 Amendment. *Third*, the amendment to Rule 702(d) reinforces that the court's gatekeeping obligation is ongoing; each opinion offered must reliably apply the expert's principles and methods to the case facts.

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[12] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2022) at 6, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JUNE 2022 AGENDA BOOK 866 (2022), https://www.uscourts.gov/sites/default/files/2022-6_standing_committee_agenda_book_final.pdf (emphasis added).

[13] Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2022) at 24-25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2022 AGENDA BOOK 125 (2022), https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf; *see also id.* at 24 ("the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text.").

The course correction brought about by the 2023 amendments has been recognized by several courts. For example, the Sixth Circuit observed that the Rule 702 amendments "were drafted to correct some court decisions incorrectly holding 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. 2024); s*ee also Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024) (district court "abdicated its role as gatekeeper" by allowing expert "to testify without a proper foundation," in contravention of Rule 702(b)); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283–84 (4th Cir. 2021) (rejecting "incorrect" decisions finding expert's factual basis and methodological application to be matters of weight and not admissibility).

III. The en banc opinion should provide guidance that prior decisions that conflict with amended Rule 702 no longer reflect good law.

This Court should dispel the lingering misunderstandings of the admissibility standard and remind district courts to evaluate proffered expert testimony using the criteria set forth in Rule 702 itself as they

fulfill their essential gatekeeping role. Judge Schroeder has explained the need for this guidance:

> No doubt, in some cases the courts are misstating and misapplying Rule 702. Correction by the courts of appeals will go a long way to remedying the most obvious outliers.[14]

Litigants and courts will benefit from this Court's disavowal of caselaw statements that disregard the preponderance of evidence test or disregard the sufficiency of an expert's factual basis or methodological application as admissibility issues.

Because this Court's jurisdiction is based on subject-matter, not geography, its articulation of Rule 702 is uniquely important. Every district court that handles a case that is appealable to the Federal Circuit looks to this Court for guidance. And given the importance of expert testimony in patent disputes, this decision will carry significant doctrinal consequences. Further, to avoid repeating the history of noncompliance with Rule 702, clear direction that courts' gatekeeping practices must conform to amended Rule 702 will send an important signal to courts nationally.

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[14] Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. at 2059.

Accordingly, this Court should use this en banc proceeding to reject statements set forth in past cases that erroneously indicate that deficiencies in an expert's methodology go to the opinion's weight, not its admissibility, or that otherwise misstate the admissibility criteria set forth in Rule 702. *See supra* pp. 10–12. Signaling to lower courts that Rule 702 directs the analysis they must undertake when deciding whether to admit proffered opinion testimony should go far to resolve confusion arising from problematic caselaw that amended Rule 702 has superseded.

IV. The expert admissibility decision in this case must conform to the requirements of amended Rule 702.

The panel made three clear errors the Advisory Committee would recognize, and that amended Rule 702 sought to correct.

First, the panel decision did not refer to the preponderance standard, and its opinion suggests that it was not applied. The panel asserts that the reliability of Kennedy's methodology and application to the facts "is a question for the jury," *see EcoFactor, Inc. v. Google*, 104 F.4th 243, 254, 255 (Fed. Cir. 2024), or "for the jury to decide," *id.* at 256. Rule 702 does not permit delegating the gatekeeping role in this fashion. *See Sardis*, 10 F.4th at 282–83. It is a judicial responsibility to assess

whether Kennedy's methodology and its application to the facts of the case was or was not reliable by a preponderance of proof. There is no sign that the court found Kennedy's proponent to have carried this burden.

Second, Kennedy's opinion was not shown to have an adequate factual basis under Rule 702(b), and the panel failed even to address if he did. The royalty rate that Kennedy calculated in his hypothetical negotiation derived from three "purportedly comparable licenses, each reflecting a litigation settlement," where EcoFactor paid a "lump-sum" amount. Google OB at 24–25. But there are "significant differences" between the running royalty and lump-sum payment structures. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 130, 1326–27 (Fed. Cir. 2009). And Kennedy failed to account for these differences in his hypothetical negotiation. Google OB 25–29. Instead, Kennedy's royalty rate was based on "Whereas" clauses in three different licensing agreements, all of which reflected EcoFactor's belief that their lump-sum payments were based on a royalty rate, but not a bargained-for royalty rate. Google OB at 26, 29.

Kennedy also failed to address how much other patents contributed to the royalty rate in the comparable licenses. Instead, he offered generic

statements about built-in apportionment. As the majority explained, Kennedy claimed "the downward pressure that these patents would have" was counterbalanced by the "upward pressure on the $X royalty rate by assuming that the '327 patent was valid and infringed." *EcoFactor*, 104 F.4th at 256. The majority found Google's challenge to Kennedy's factual foundation "a 'factual issue best addressed by cross examination and not by exclusion.'" *Id.* at 15 (*citing ActiveVideo*, 694 F.3d at 1333). But this is precisely the type of punting to the jury that Rule 702 rejects. *See* Fed. R. Evid. 702 advisory committee's note to 2023 Amendment ("[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)."). As the dissent appropriately observes, "Mr. Kennedy failed to account for the impact of the specific remaining patents in EcoFactor's portfolio, other than by referencing a generic 'downward pressure.'" *EcoFactor*, 104 F.4th at 261 (Prost, J., dissenting).

Third, Kennedy's proposed royalty did not reflect "a reliable application of the principles and methods to the facts of the case." Fed.

R. Evid. 702(d). This Court has rejected, even to the point of vacating jury awards, royalty opinions in which the testifying expert relies on "comparable licenses to prove a reasonable royalty," but fails to "account for differences in the technologies and economic circumstances of the contracting parties." *Apple, Inc. v. Wi-LAN, Inc.*, 25 F.4th 960, 971 (Fed. Cir. 2022); *see also Omega Pats., LLC v. CalAmp Corp.*, 13 F.4th 1361, 1380–81 (Fed. Cir. 2021).

Here, two of the licensing agreements that Kennedy used in his hypothetical negotiation were not technologically comparable because they listed additional patents other than the '327 patent at issue. Google OB at 47. The third licensing agreement didn't list the '327 patent at all. *Id.* Thus, regardless of whether the "royalty rates" in these licenses were legitimate, Kennedy still needed to calculate a specific downward adjustment to account for the technological differences. But he made no such calculation. *See* Google OB at 47–51. As the Advisory Committee explained, Rule 702(d) requires that "each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702 advisory committee's note to 2023 Amendment. Kennedy's conclusion amounts to

an ipse dixit resulting from an unreliable application of Kennedy's methodology to the actual facts of the case.

Had the Court viewed the expert testimony through the lens provided by Rule 702, Kennedy's opinions should have been excluded. This analysis fails to meet the admissibility criteria of Rule 702(b) and 702(d), and was never evaluated using the preponderance standard.

CONCLUSION

This Court should provide guidance to lower courts dispelling persistent misunderstandings of the expert admissibility standard that amended Rule 702 was enacted to correct. When assessed using the governing Rule 702 criteria, the opinion at issue falls short of admissibility.

Dated: November 26, 2024

Respectfully submitted,

/s/ Mark Davies

MARK DAVIES
ETHAN PLAIL
KUFERE LAING
WHITE & CASE
701 Thirteenth Street, NW
Washington, DC 20005
mark.davies@whitecase.com

YAR CHAIKOVSKY
MICHAEL COSTELLO-CAULKINS
WHITE & CASE
3000 El Camino Real
2 Palo Alto Square, Suite 900
Palo Alto, California 94306
yar.chaikovsky@whitecase.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Amicus Brief for Lawyers for Civil Justice,

1. Complies with the typeface and type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. Rule 32(b). This brief contains 3,081 words, excluding the parts of the brief exempted by Fed R. App. P. 5(c), 21(d), 27(d)(2), 32(f), and Fed. Cir. R. 32(b)(2), as counted by Microsoft Word, which was used to prepare the brief.

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.

Dated: November 26, 2024

/s/ Mark Davies

Mark Davies

January 30, 2024

Via Email (ADMcomment@courts.mi.gov)

ADM File No. 2022-30

Proposed Amendment of Rule 702
of the Michigan Rules of Evidence

Comment of Lawyers for Civil Justice Supporting
Proposed Amendment of Michigan Rule of Evidence 702

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.[1] LCJ strongly supports the proposed amendment to align Michigan Rule of Evidence 702 ("MRE 702") with its recently amended federal counterpart, Federal Rule of Evidence 702 ("FRE 702") (amended effective Dec. 1, 2023).

The proposed amendment to MRE 702 clarifies that "the court" must decide admissibility employing MRE 702's standards. Further, the proponent of expert testimony must establish "to the court that it is more likely than not" that the rule's admissibility requirements are met. The amendment reminds courts of their gatekeeping role with respect to the admission of unreliable expert testimony. Finally, the proposed amendment clarifies that the court's gatekeeping responsibility is ongoing. The decision to admit expert testimony does not allow the expert to offer an opinion that is not grounded in MRE 702's standards. As the proposed rule states, an expert's opinion must reflect "a reliable application of the principles and methods to the facts of the case." With these changes, MRE 702 will mirror current FRE 702.

The Proposed Amendment Harmonizes MRE 702 and FRE 702

The modern iteration of FRE 702 developed from the "*Daubert* trilogy"—a series of United States Supreme Court cases in the 1990s that articulated the standards for admitting scientific and other expert testimony in federal court: *Daubert v Merrell Dow*

[1] For over 36 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Because LCJ's primary focus is on judicial rulemaking, rather than legislative, its work is driven by thorough research, expert analysis, reasoned advocacy, and nonpartisanship. LCJ was actively engaged with the federal Advisory Committee on Evidence Rules process that led to the adoption of the 2023 amendments to FRE 702. LCJ's interest here is promoting harmony between the amended federal rule and MRE 702.

Pharmaceuticals, Inc,[2] *Kumho Tire Co v Carmichael*,[3] and *General Electric Co v Joiner*.[4] In 2000, FRE 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony.[5] As the advisory committee's note accompanying the 2000 amendments explained,

> In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.[6]

The advisory committee's note further explained that "the admissibility of all expert testimony is governed by the principles of [FRE] 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed R Evid 702 advisory committee's note to 2000 amendment.

Despite this guidance, many federal courts incorrectly applied the rule. In a landmark 2015 article, Professor David Bernstein (co-author of THE NEW WIGMORE: EXPERT EVIDENCE treatise) and co-author Eric Lasker demonstrated that many federal courts were not applying FRE 702 as intended, or even as written.[7] Additional reviews of case opinions back up this observation.[8]

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[2] 509 US 579 (1993).

[3] 526 US 137 (1999).

[4] 522 US 136 (1997).

[5] Fed R Evid 702 advisory committee's note to 2000 amendment ("Rule 702 has been amended in response to *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co v Carmichael*, 119 S Ct 1167 (1999)."). The 2000 amendments added the three reliability-based requirements that are found in subdivisions (b), (c), and (d) of FRE 702.

[6] Fed R Evid 702 advisory committee's note to 2000 Amendment (internal citation omitted).

[7] David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rules of Evidence 702*, 57 WM. & MARY L. REV. 1 (2015).

[8] *See*, *e.g.*, Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2044-59 (2020) (article by chair of FRE 702 subcommittee of Advisory Committee on Evidence Rules discussing cases where courts abdicated their gatekeeper role); Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence*, *Critical Legal Issues: Working Paper Series*, No. 217, WASH. LEGAL FOUND (May 2020).

For example, LCJ reviewed all federal trial court opinions on FRE 702 motions in 2020 to quantify just how chaotic FRE 702 jurisprudence had become.[9] Of the 1,059 trial court opinions studied, 65% did not cite the preponderance of the evidence standard.[10] More disturbing was the extreme inconsistency within judicial districts. In 57 federal judicial districts, "courts split over whether to apply the preponderance standard when assessing admissibility."[11] In 6% of cases, courts cited "both the preponderance standard *and* a presumption favoring admissibility (a 'liberal thrust' approach)"—"a remarkable finding given that these standards are inconsistent with each other."[12]

The federal judiciary's Advisory Committee on Evidence Rules independently studied the issue and confirmed that many courts had failed to correctly apply FRE 702. According to the Advisory Committee, "many courts have held that the critical questions of the sufficiency of an expert's basis and the application of the expert's methodology, are questions of weight and not admissibility." FRE 702 advisory committee's note to 2023 amendment. These decisions "are an incorrect application of Rules 702 and 104(a)." *Id*.

Widespread misapplication of FRE 702 occurred, in part, because the 2000 version of FRE 702 required some effort by courts and litigants to determine that the preponderance of the evidence standard applies. The standard was not included in the text of FRE 702; instead, courts had to study the advisory committee's note to the 2000 version of FRE 702, read the footnotes in *Daubert*,[13] or connect FRE 702 with FRE 104(a)[14] and

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[9] *See* Kateland R. Jackson & Andrew J. Trask, *Federal Rules of Evidence 702: A One-Year Review & Study of Decisions in 2020,* LAWYERS FOR CIVIL JUSTICE (Sept. 30, 2021).

[10] *Id.* at 2.

[11] *Id.*

[12] *Id.* at 4. LCJ's Report explained:

> The preponderance standard establishes a minimum threshold the party putting forth expert evidence must meet. If the proponent fails to meet this threshold, or if the reasons for admitting and denying create a "tie," the evidence is not admitted. In contrast, a presumption favoring admissibility under a "liberal thrust" approach does not hold the proponent of the evidence to a minimum proof threshold, leading to what some courts describe as "shaky but admissible evidence." And even if some proof is shown, "ties" result in admitting the evidence. This data point indicates that some federal courts are confused about the correct standard to apply, or even what the different standards mean.

Id. at 4-5.

[13] *Daubert,* 509 US at 592 n10 (stating that, pursuant to Rule 104(a), "the admissibility of evidence shall be . . . established by a preponderance of proof.").

[14] FRE 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

relevant case law.[15] *See* Memorandum from the Hon. Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rules, to the Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, (Dec. 1, 2020), at 5 ("it takes some effort to determine the applicable standard of proof—Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence.").

FRE 702 was amended effective December 1, 2023 to fix widespread misapplication of the Rule by courts. The amendment clarified that the proponent of expert testimony must demonstrate "to the court that it is more likely than not" that the rule's three admissibility requirements (FRE 702(b)-(d)) are met. As the advisory committee's note explains,

> [T]he rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.

Fed R Evid 702 advisory committee's note to 2023 amendment.

The amendment "reflects an attempt to correct judicial missteps, rather than to substantively change the law." Memorandum from Daniel D. Quick, Chair, MRE 702/703 Review Workgroup to State Bar of Michigan Board of Commissioners, Final Report, Nov. 5, 2022, at 6.[16] Indeed, the chair of the federal Advisory Committee that worked on FRE 702, U.S. District Judge Patrick Schiltz of Minnesota, has said, "This does not change the law at all. It simply makes it clearer." *Working with Experts after Proposed 702 Rule Changes*, JDSupra.com, Jan. 12, 2023.

The Advisory Committee's work to study and ultimately address erroneous rulings by courts on FRE 702 and 104(a) provided a springboard for other amendments to Rule 702. In particular, two leading scientific advisory groups—the National Academy of Science and President's Council of Advisors on Science and Technology (PCAST)—had critiqued

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[15] *Bourjaily v United States,* 483 US 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *see also Huddleston v United States*, 485 US 681, 687 n5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard").

[16] *See also* Note, Archibald Cruz, *The Paradigm Shift in the Proposed Amendment to Federal Rule of Evidence 702*, 75 BAYLOR L. REV. 265, 291 (2023) (stating that the admissibility standard in the 2023 version of Rule 702 "is not new. Rather, the [amendment] reinforces the judge's role as a gatekeeper, which has been the law for decades.").

certain forensic evidence techniques and concluded that FRE 702 had failed to ensure the reliability of such testimony.[17] The PCAST report paid particular attention "to the problem of experts overstating their results." Daniel J. Capra, *Forward: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1459, 1460 (2018).

The Advisory Committee considered various approaches to address unreliable forensic testimony and ultimately chose to amend FRE 702(d) to "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." FRE 702 advisory committee's note to 2023 amendment. The advisory committee's note makes clear that civil and criminal "[f]orensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error." *Id*.

The proposed amendment to MRE 702, like the recent change to FRE 702, would state existing law, not change it. It has long been the law in Michigan that trial courts have a "gatekeeper role" to "ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391, 408 (2004); *see also* MCL 600.2955 (scientific opinion by an otherwise qualified expert is not admissible "unless the court determines" the opinion is reliable and will assist the trier of fact); *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790, 795 (2016) (MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable.").[18]

As to the burden of proof, Michigan courts have long applied MRE 104(a) and its preponderance standard to MRE 702 determinations. *See Gilbert*, 470 Mich at 780-81; 685

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[17] National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009); President's Council of Advisors on Science and Technology, Executive Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016); *see generally* Eric S. Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure The Reliability of Forensic Feature-Comparison Methods in The Criminal Courts*, 86 FORDHAM L. REV. 1661 (2018) (discussing PCAST report).

[18] From January, 1, 2004 to January 1, 2024, MRE 702 stated:

> *If the court determines* that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Emphasis added).

MRE 702; *see generally* Ronald S. Longhofer, *Michigan Adopts Daubert Principles and Evidence-Based Expert Testimony*, MICH. BAR J., at 34 (Oct. 2004).

NW2d at 408 ("the obligation imposed by MRE 702 is reinforced by MRE 104(a)…. The requirements of MRE 104(a) extended to the application of MRE 702 because the admission of expert testimony under this rule hinges on preliminary questions concerning qualification.").[19]

As to new FRE 702(d) addressing overstatement by experts, that too is already Michigan law. *See* MRE 702(d) (the court must find "the expert has reliably applied the principles and methods to the facts of the case."); *Gilbert*, 470 Mich at 782; 685 NW2d at 409 ("The gatekeeper role applies to *all* stages of expert analysis" and the proponent must show that the expert "expresses conclusions reached through reliable principles and methodology.").

Given this Court's work to promote harmony between Michigan and federal court rules, such as the Court's recent amendment to MRE 104 to mirror FRE 104, it makes sense to similarly amend MRE 702 to mirror the 2023 amendments to FRE 702. Further, the proposed amendment to MRE 702 will promote consistency in the admission of expert evidence in state and federal courts.[20] Amending MRE 702 to mirror FRE 702 will also allow Michigan courts to benefit from the body of case law interpreting FRE 702 and avoid disparate treatment of expert evidence that encourages forum-shopping. Other states are moving in the same direction.[21] Finally, the proposed amendment would promote the fair administration of justice, particularly with regard to forensic expert testimony.

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[19] *See also People v Hendrickson*, 459 Mich 229, 241-42; 586 NW2d 906, 911 (1998) (Boyle, J., concurring) ("Under MRE 104(a), preliminary factual questions of admissibility are determined by the trial court utilizing a preponderance-of-the-evidence standard.") (citing *Bourjaily,* 483 US at 175).

People v Yost, 278 Mich App 341, 393-94; 749 NW2d 753, 786 (Mich. Ct. App. 2008) ("Based on the language of MRE 702 and MRE 104(a), which requires trial courts to determine preliminary questions concerning the qualification of a person to be a witness, trial courts have an obligation to exercise their discretion as a gatekeeper and ensure that any expert testimony admitted at trial is reliable.") (citing *Gilbert*); *Wilcoxson-Bey ex rel Wilcoxson-Bey v Providence Hosp & Med Ctrs, Inc*, 2009 WL 2244542, at *3 (Mich Ct App July 28, 2009) ("MRE 104(a) applies to the admission of expert testimony under MRE 702"). As of January 1, 2024, MRE 104(a) mirrors FRE 104(a).

[20] Michigan courts do not appear to have "drifted" from their gatekeeping obligation and misapplied MRE 702, as has been observed in many federal courts, but there are some cases "that arguably get the Rule wrong." MRE 702/703 Review Workgroup to State Bar of Michigan Board of Commissioners, Final Report, *supra*, at 14 and nn 44 & 47.

[21] In the Matter of Rule 702, Rules of Evidence, No. R-23-0004 (Ariz. Aug. 24, 2023) (adopting 2023 amendment to FRE 702 for Arizona Rule of Evidence 702); Proposed Amendments to the Ohio Rules of Practice and Procedure (Ohio Dec. 21, 2023) (proposing same change to Ohio Rule of Evidence 702; comment period ends on February 5, 2024).

For these reasons, LCJ encourages the Court to adopt the proposed amendment as written.

Thank you for the opportunity to submit this comment.

Respectfully submitted,

PLUNKETT COONEY, P.C.

BY: */s/ Mary Massaron*
Attorneys for Lawyers for Civil Justice
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Of Counsel:

SHOOK, HARDY & BACON L.L.P
Mark A. Behrens
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com

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BUTLER | SNOW

September 5, 2024

Mississippi Supreme Court
Attn: Supreme Court Advisory Committee on Rules
P.O. Box 249
Jackson, MS 39205

VIA CERTIFIED MAIL

Re: Request for Amendment to Mississippi Evidence Rule 702

Dear Members of the Committee:

More than 20 years ago, the Mississippi Supreme Court adopted the federal expert admissibility standards with its 2003 Amendments to Mississippi Rule of Evidence 702. *See Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003). Since that time, the state and federal standards have been "identical." *See Worthy v. McNair*, 37 So. 3d 609, 614 (Miss. 2010).

On December 1, 2023, the amended Federal Rule of Evidence 702 went into effect. We request that the Committee move the Supreme Court to amend Mississippi Rule of Evidence 702 to keep it consistent with the federal standard. A proposed amendment is attached to this letter as Exhibit 1.

The proposed amendment clarifies that the proponent of the expert testimony must demonstrate "to the court that it is more likely than not" that each of the Rule's requirements is met. The proposed amendment further clarifies that the court must find that the expert's opinion "reflects a reliable application of reliable principles and methods to the facts of the case."

As practitioners in the State of Mississippi, we believe these changes are critical to ensuring that courts fulfill their gatekeeping obligations.

The Rationale Behind the Proposed Amendment

The advisory committee's note to the 2000 amendment to Federal Rule of Evidence 702 explained that "the admissibility of all expert testimony is governed by the principles of [Fed. R. Evid.] 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

Despite this guidance, courts did not correctly apply Rule 702. In a 2015 analysis, Professor David Bernstein (co-author of The New Wigmore: Expert Evidence treatise) and co-author Eric Lasker demonstrated that many federal courts were not applying Fed. R. Evid. 702 as

Post Office Box 6010
Ridgeland, MS 39158-6010

T 601.948.5711
F 601.985.4500
www.butlersnow.com

Suite 1400
1020 Highland Colony Parkway
Ridgeland, Mississippi 39157

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intended, and the very same issues that the 2000 amendments sought to resolve were still present.[1] Additional reviews of case opinions confirmed these observations.[2]

In considering the 2023 Amendments, the federal judiciary's Advisory Committee on Evidence Rules independently studied the issue and agreed that many courts had failed to correctly apply Fed. R. Evid. 702. As the advisory committee observed, "many courts have held that the critical questions of the sufficiency of an expert's basis and the application of the expert's methodology, are questions of weight and not admissibility." Fed. R. Evid. 702 advisory committee's note to 2023 amendment. "These rulings are an incorrect application of Rules 702 and 104(a)." *Id.*

Courts' failure to apply the preponderance of the evidence standard may have stemmed from the fact that the standard was not explicitly included in the former text of Fed. R. Evid. 702. *See* Memorandum from the Hon. Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rules, to the Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Dec. 1, 2020), at 5 ("it takes some effort to determine the applicable standard of proof—Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence."). The amended Fed. R. Evid. 702 resolves that lack of clarity. As the advisory committee's note explains:

> [T]he rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.

Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

The advisory committee's work to study and ultimately address erroneous rulings by courts on Fed. R. Evid. 702 and 104(a) also led to the other amendments to Rule 702. In particular, two leading scientific advisory groups—the National Academy of Science and President's Council of Advisors on Science and Technology (PCAST)—had critiqued certain forensic evidence techniques and concluded that Fed. R. Evid. 702 had failed to ensure the reliability of such

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[1] David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rules of Evidence 702*, 57 Wm. & Mary L. Rev. 1 (2015).

[2] *See, e.g.*, Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony,* 95 Notre Dame L. Rev. 2039, 2044-59 (2020) (article by chair of Fed. R. Evid. 702 subcommittee of Advisory Committee on Evidence Rules discussing cases where courts abdicated their gatekeeper role); Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence, Critical Legal Issues: Working Paper Series*, No. 217, Wash. Legal Found. (May 2020); Kateland R. Jackson & Andrew J. Trask, *Federal Rules of Evidence 702: A One-Year Review & Study of Decisions in 2020*, Lawyers for Civil Justice (Sept. 30, 2021) (analyzing Fed. R. Evid. 702 decisions published in 2020 and finding that of the 1,059 trial court opinions studied, 65% did not cite the preponderance of the evidence standard).

testimony.[3] The PCAST report paid particular attention "to the problem of experts overstating their results." Daniel J. Capra, *Forward: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 Fordham L. Rev. 1459, 1460 (2018).

The advisory committee considered various approaches to address unreliable forensic testimony and ultimately chose to amend Fed. R. Evid. 702(d) to "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702 advisory committee's note to 2023 amendment. The advisory committee's note makes clear that "[f]orensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error." *Id.*

As noted above, the Mississippi Supreme Court has followed the federal standards for the admissibility of expert witness testimony for more than 20 years. We request that the Committee ask the Supreme Court to continue to do so by amending Mississippi Rule of Evidence 702.

Thank you for consideration of our proposal. Please let us know if you have any questions.

Sincerely

BUTLER SNOW LLP

Chris Maddox

William M. Gage

Rod Richmond

[3] National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009); President's Council of Advisors on Science and Technology, Executive Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016).

Tim Threadgill

Phillip Sykes

WMG:eh
Enclosure

89462936.v1

EXHIBIT 1

Proposed Amendment to Mississippi Rule of Evidence 702

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 the proponent demonstrates to the court that is more likely than not that:

(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~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

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SLS 24RS-157 **ORIGINAL**

2024 Regular Session

SENATE BILL NO. 16

BY SENATOR PRESSLY (On Recommendation of the Louisiana State Law Institute)

EVIDENCE. Provides for expert testimony. (8/1/24)

AN ACT

To amend and reenact the introductory paragraph of Code of Evidence Art. 702(A) and (4), relative to expert testimony; to provide for a burden of proof; to provide with respect to expert opinions; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. The introductory paragraph of Code of Evidence Art. 702(A) and (4) are hereby amended and reenacted to read as follows:

Art. 702. Testimony by experts

A. 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 **the proponent demonstrates to the court that it is more likely than not that**:

* * *

(4) The ~~expert has reliably applied~~ **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.

* * *

Comments – 2024

This amendment does not change the law and is intended to align the

language of this Article with the 2023 amendments to Rule 702 of the Federal Rules of Evidence.

The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Hanna Gettys.

DIGEST

SB 16 Original 2024 Regular Session Pressly

Present law (C.E. Art. 702) provides for testimony by experts.

Proposed law retains present law but clarifies the burden of proof and makes semantic changes consistent with Rule 702 of the Federal Rules of Evidence.

Effective August 1, 2024.

(Amends C.E. Art. 702(A)(intro para) and (4))

October _, 2024

Via Email and Certified Mail R/R/R
Hon. Arnold Natali, J.A.D.
Chair of New Jersey Rules of Evidence Committee
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970
Re: New Jersey Rules of Evidence Committee - December Meeting Agenda - Proposed Amendment to NJRE 702

Dear Judge Natali:

I am the President of the New Jersey Defense Association ("NJDA"), an organization comprised of New Jersey defense attorneys, insurance claim professionals, self-insurers, and other corporations that devote a substantial portion of their time to the defense of damage suits or to claims administration. I am writing to request that a proposed amendment to New Jersey Rule of Evidence 702 ("NJRE 702") be placed on the agenda for the New Jersey Rules of Evidence Committee meeting in December 2024 and that a subcommittee be formed to further examine the proposed amendment. The proposed amendment to NJRE 702 is needed to clarify existing law regarding the admissibility of expert testimony and the gatekeeping role of trial judges to prevent unreliable expert testimony from reaching juries.

The standard for admissibility of expert testimony has received significant attention by the New Jersey Supreme Court in recent years, and a great deal of progress has been made in clarifying the role of trial courts to act as gatekeepers, stopping unreliable expert testimony from reaching juries. However, unreliable expert testimony is still evading the close scrutiny that NJRE 702 requires, and an unambiguous rule is needed to clarify the burden that must be met by proponents of expert testimony before it can be presented to juries.

The following is the proposed language of amended NJRE 702 (the proposed amended language is in red):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (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's opinion reflects a reliable application of the principles and methods to the facts of the case.

The proposed amendment to NJRE 702, which mirrors recently amended Federal Rule of Evidence 702 ("FRE 702"), clarifies that the proponent of expert testimony must demonstrate "to the court that it is more likely than not" that the rule's admissibility requirements are met, and reminds courts of their gatekeeping role. It also provides that an expert's opinion must reflect "a reliable application of the principles and methods to the facts of the case." It should be emphasized that the proposed amendment to NJRE 702 does not seek to impose an onerous burden on the judiciary – it simply clarifies the existing standard for admissibility of expert testimony, while allowing trial judges flexibility in determining how proponents of expert testimony can meet their burden to establish that the standard for admissibility is met.

The Current State of NJRE 702 Jurisprudence

In recent years, the New Jersey Supreme Court has clarified the standard for admissibility of expert testimony and expounded upon the role of trial judges to exclude unreliable expert testimony. Specifically, in *In re Accutane Litigation*, 234 N.J. 340 (2018), the New Jersey Supreme Court declared that it "envisioned the trial court's function as that of a gatekeeper – deciding what is reliable enough to be admitted and what is to be excluded." *Id.* at 388. Such determinations are "not credibility determinations that are the province of the jury, but rather legal determinations about the reliability of the expert's methodology." *Id.* The *Accutane* Court concluded that its "view of proper gatekeeping in a methodology-based approach to reliability for expert scientific testimony requires the proponent to demonstrate that the expert applies . . . scientifically recognized methodology in the way that others in the field practice the methodology." *Id.* at 399-400. When the proponent of the expert fails to demonstrate by a preponderance of the evidence that "the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable." *Id.* at 400.

Since the watershed *Accutane* decision, the quality of expert testimony in New Jersey Courts has improved, but unreliable expert testimony has not been consistently excluded. For example, in *Barden v. Brenntag North America, Inc., et al.*, No. A-0047-20, 2023 WL 6430088 (App. Div. Oct. 3, 2023), the Appellate Division reversed and remanded for a new trial because the trial court "misapplied the well-established judicial gatekeeping procedures required by our courts," by failing to make legal determinations regarding the reliability of the plaintiffs' experts' methodologies. *Id.* at pp. 7-9. The *Barden* Court emphasized the "rigorous role" of the trial court in performing its "gatekeeping function" in order to prevent the jury from "exposure to unsound science that is labeled expert or scientific." *Id.* at p. 10. It concluded that the trial court erroneously permitted the testimony of three expert witnesses who did not utilize a sound methodology or rely upon data and information that was reliable. *Id.*

Similarly, in *Fredella v. Township of Toms River*, No. A-3196-21, 2024 WL 730342 (App. Div. Feb. 22, 2024), a negligence lawsuit arising from an automobile accident, the trial court

denied plaintiff's request for a pretrial hearing and permitted the defendants' expert to testify at length regarding the effects of prior heroin use on plaintiff's vision at the time of the accident. *Id.* at *5. The Appellate Division reversed, remanded, and directed the trial court to "conduct a Daubert hearing and to provide a more detailed and complete factor by-factor Daubert analysis." *Id.* at *9. Specifically, the Appellate Division concluded that the "trial court did not address the second prong of N.J.R.E. 702—whether Dr. Guzzardi's opinion was based on a reliably sound methodology—and instead focused on whether his testimony amounted to an impermissible net opinion." *Id.* at *7. The Appellate Division determined that "the trial court's analysis failed to sufficiently adhere to the Daubert standard and the principles set forth by our Supreme Court more recently in Accutane and Olenowski." *Id.* Ultimately, the testimony of defendants' expert may have influenced the jury to allocate 60% of the fault to the plaintiff, precluding an award of damages. *Id.* at *1. The *Fredella* decision highlights an important truth - the problem of unreliable expert testimony exerting undue influence over juries is not limited to the defense bar – it affects plaintiffs as well.

Moreover, the undue influence of unreliable expert testimony can have troubling consequences, including nuclear verdicts. For example, in *Barden*, the jury awarded four plaintiffs with mesothelioma compensatory damages of $37,300,000 and punitive damages of $186,500,000. 2023 WL 6430088, at *1. Thus, the consequences of misunderstanding and/or misapplication of the gatekeeping analysis that is required by NJRE 702 and related case law can have a profound impact on the integrity of jury verdicts and the administration of justice in an even handed, impartial manner.

The Proposed Amendment Harmonizes NJRE 702 and FRE 702

Although New Jersey is not bound by the Federal Rules of Evidence, New Jersey Courts often look to the Federal Rules of Evidence and related case law for guidance. *See New Jersey v. Gomez,* 246 N.J. Super. 209, 220 (App. Div. 1991). Facing similar problems related to unreliable expert testimony, FRE 702 was amended in December 2023, in order to clarify the burden that proponents of expert testimony must meet, as well as trial courts' role in gatekeeping to preclude unreliable expert testimony from reaching juries. The analysis that led to the adoption of amended FRE 702, set forth below, is instructive when considering the above proposed amendment to NJRE 702.[1]

The modern iteration of FRE 702 developed from the "*Daubert* trilogy"—a series of United States Supreme Court cases in the 1990s that articulated the standards for admitting scientific and other expert testimony in federal court: *Daubert v Merrell Dow Pharmaceuticals, Inc*,[2] *Kumho*

[1] A full discussion of the 2023 amendment to FRE 702 and source for some of the background for this comment is forthcoming at Mark A. Behrens & Andrew J. Trask, *Federal Rule of Evidence 702: A History and Guide to the 2023 Amendments Governing Expert Evidence*, 12 Tex. A&M L. Rev. – (2024).

[2] 509 US 579 (1993).

Tire Co v Carmichael,[3] and *General Electric Co v Joiner*.[4] In 2000, FRE 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony.[5] As the commentary accompanying to the 2000 amendments explained:

> In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.[6]

The Committee Note further explained that "the admissibility of all expert testimony is governed by the principles of [FRE] 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." FRE 702, Committee Note on Rules-2000 Amendment.

Despite this guidance, many federal courts incorrectly applied the rule. In a landmark 2015 article, Professor David Bernstein (co-author of THE NEW WIGMORE: EXPERT EVIDENCE treatise) and co-author Eric Lasker demonstrated that many federal courts were not applying FRE 702 as intended, or even as written.[7] Additional reviews of case opinions back up this observation.[8]

For example, Lawyers for Civil Justice ("LCJ"), an organization comprised of respected companies, leading law firms, and distinguished defense bar organizations, reviewed all federal trial court opinions on FRE 702 motions in 2020 to quantify just how chaotic FRE 702

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[3] 526 US 137 (1999).

[4] 522 US 136 (1997).

[5] FRE 702, Committee Note on Rules-2000 Amendment ("Rule 702 has been amended in response to *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co v Carmichael*, 119 S Ct 1167 (1999)."). The 2000 amendments added the three reliability-based requirements that are found in subdivisions (b), (c), and (d) of FRE 702.

[6] FRE 702, Committee Note on Rules-2000 Amendment (internal citation omitted).

[7] David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rules of Evidence 702*, 57 WM. & MARY L. REV. 1 (2015).

[8] *See*, *e.g.*, Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2044-59 (2020) (article by chair of FRE 702 subcommittee of Advisory Committee on Evidence Rules discussing cases where courts abdicated their gatekeeper role); Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence*, *Critical Legal Issues: Working Paper Series*, No. 217, WASH. LEGAL FOUND (May 2020).

jurisprudence had become.[9] Of the 1,059 trial court opinions studied, 65% did not cite the preponderance of the evidence standard.[10] More disturbing was the extreme inconsistency within judicial districts. In 57 federal judicial districts, "courts split over whether to apply the preponderance standard when assessing admissibility."[11] In 6% of cases, courts cited "both the preponderance standard *and* a presumption favoring admissibility (a 'liberal thrust' approach)"—"a remarkable finding given that these standards are inconsistent with each other."[12]

The federal judiciary's Advisory Committee on Evidence Rules independently studied the issue and confirmed that many courts failed to correctly apply FRE 702. According to the Advisory Committee, "many courts have held that the critical questions of the sufficiency of an expert's basis and the application of the expert's methodology, are questions of weight and not admissibility." FRE 702, Committee Note—2023 Amend. These decisions "are an incorrect application of Rules 702 and 104(a)." *Id*.

Widespread misapplication of FRE 702 occurred, in part, because the 2000 version of FRE 702 required some effort by courts and litigants to determine that the preponderance of the evidence standard applies. The standard was not included in the text of FRE 702; instead, courts had to study the Committee Note to the 2000 version of FRE 702, read the footnotes in *Daubert*,[13] or connect FRE 702 with FRE 104(a)[14] and relevant case law.[15] *See* Memorandum from the Hon.

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[9] *See* Kateland R. Jackson & Andrew J. Trask, *Federal Rules of Evidence 702: A One-Year Review & Study of Decisions in 2020,* LAWYERS FOR CIVIL JUSTICE (Sept. 30, 2021).

[10] *Id.* at 2.

[11] *Id.*

[12] *Id.* at 4. LCJ's Report explained:

> The preponderance standard establishes a minimum threshold the party putting forth expert evidence must meet. If the proponent fails to meet this threshold, or if the reasons for admitting and denying create a "tie," the evidence is not admitted. In contrast, a presumption favoring admissibility under a "liberal thrust" approach does not hold the proponent of the evidence to a minimum proof threshold, leading to what some courts describe as "shaky but admissible evidence." And even if some proof is shown, "ties" result in admitting the evidence. This data point indicates that some federal courts are confused about the correct standard to apply, or even what the different standards mean.

Id. at 4-5.

[13] *Daubert,* 509 US at 592 n10 (stating that, pursuant to Rule 104(a), "the admissibility of evidence shall be . . . established by a preponderance of proof.").

[14] FRE 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

[15] *Bourjaily v United States,* 483 US 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due

Patrick J. Schiltz, Chair, Advisory Committee on Evidence Rules, to the Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, (Dec. 1, 2020), at 5 ("it takes some effort to determine the applicable standard of proof—Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence.").

FRE 702 was amended effective December 1, 2023, to fix widespread misapplication of the Rule by courts. The amendment clarified that the proponent of expert testimony must demonstrate "to the court that it is more likely than not" that the rule's three admissibility requirements (FRE 702(b)-(d)) are met. As the Committee Note to the 2023 amendment to FRE 702 states:

> [T]he rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.
>
> FRE 702, Committee Note—2023 Amend.

The chair of the Federal Advisory Committee that worked on FRE 702, U.S. District Judge Patrick Schiltz of Minnesota, has said, "This does not change the law at all. It simply makes it clearer." *Working with Experts after Proposed 702 Rule Changes*, JDSupra.com, Jan. 12, 2023.

The Advisory Committee's work to study and ultimately address erroneous rulings by courts on FRE 702 and 104(a) provided a springboard for other amendments to Rule 702. In particular, two leading scientific advisory groups—the National Academy of Science and President's Council of Advisors on Science and Technology (PCAST)—critiqued certain forensic evidence techniques and concluded that FRE 702 had failed to ensure the reliability of such testimony.[1] The PCAST report paid particular attention "to the problem of experts overstating their results." Daniel J. Capra, *Forward: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 Fordham L. Rev. 1459, 1460 (2018).

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consideration."); *see also Huddleston v United States*, 485 US 681, 687 n5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard").

[1] National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009); President's Council of Advisors on Science and Technology, Executive Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016); *see generally* Eric S. Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure The Reliability of Forensic Feature-Comparison Methods in The Criminal Courts*, 86 FORDHAM L. REV. 1661 (2018) (discussing PCAST report).

The Advisory Committee considered various approaches to address unreliable forensic testimony and ultimately chose to amend FRE 702(d) to "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." FRE 702 Advisory Committee's Note to 2023 Amendment. The advisory committee's note makes clear that civil and criminal "[f]orensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error." *Id*.

Conclusion

As demonstrated in *Barden* and *Fredella*, additional clarity regarding the standard for admissibility of expert testimony and the gatekeeping role of trial courts is needed. In addition, the proposed amendment to NJRE 702 would harmonize the standard for admissibility of expert testimony in New Jersey with that in Federal courts, thereby avoiding disparate treatment of expert evidence that encourages forum-shopping. Other states are moving in this direction, and it serves an admirable goal – the fair and evenhanded administration of justice throughout the courts of New Jersey without the taint of unreliable expert testimony.[16]

For these reasons, NJDA encourages the Committee to place the proposed amendment to NJRE 702 on the agenda for the December 2024 meeting, and to form a subcommittee to further evaluate the proposed amendment. We look forward to continued discussions to improve the New Jersey Rules of Evidence and enhance the quality and reliability of expert testimony in courts throughout the State of New Jersey. Thank you for your time and consideration.

Respectfully submitted,

Katelyn E. Cutinello, Esq.

cc: Glenn A. Grant, J.A.D.
Mark A. Behrens, Esq.

[16]Amendments to State Rules of Evidence 702 that mirror FRE 702 have occurred in Arizona, Kentucky, Louisiana, Michigan, Ohio, and the US Virgin Islands, while initiatives to make similar amendments are underway in several other states.