

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

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.