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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*

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[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,

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