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Comment of Lawyers for Civil Justice Supporting
Proposed Amendment of Maryland Rule of Evidence 5-702

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 supports the Court's proposal to amend Maryland Rule of Evidence 5-702 ("MRE 5-702") to bring the Rule into closer alignment with its recently amended federal counterpart, Federal Rule of Evidence 702 ("FRE 702") (amended effective Dec. 1, 2023).

The proposed amendment clarifies and emphasizes that the proponent of expert testimony must establish to the court "by a preponderance of the evidence" that all of the Rule's requirements are met. The amendment reminds courts of their gatekeeping role with respect to the exclusion of unreliable expert testimony. The proposed amendment further clarifies that the court must find that an expert's opinion has a "sufficient factual basis" based on "whether the expert's opinion: (A) has an adequate supply of facts or data; and (B) reflects a reliable application of reliable principles and methods to the facts of the case."

The Proposed Amendment Harmonizes MRE 5-702 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 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

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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 5-702.

[2] 509 U.S. 579 (1993).

[3] 526 U.S. 137 (1999).

[4] 522 U.S. 136 (1997).

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." FRE 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]

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

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[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 U.S. 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).

[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.

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 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

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[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 U.S. at 592 n.10 (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 U.S. 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 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard").

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.

FRE 702 advisory committee's note to 2023 amendment.

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 certain forensic evidence techniques and concluded that FRE 702 had failed to ensure the reliability of such testimony.[16] 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 "[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*.

This Court adopted MRE 5-702 in 1994, a year after the U.S. Supreme Court's *Daubert* decision. In *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020), the Court formally adopted *Daubert* as the standard by which trial courts admit or exclude expert testimony. In 2021, the Court amended to MRE 5-702 to codify the *Daubert-Rochkind* standard. The *Daubert-Rochkind* standard "embrace[s] a regime that prizes the reliability of an expert's methodology" and "empower[s] trial judges to protect juries from junk science." *Katz, Abosch, Windersheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 342, 301 A.3d 42, 46 (2023).

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[16] 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).

The proposed amendments are consistent with the Court's "understanding of meaningful gatekeeping…." 485 Md. at 379, 301 A.3d at 68. The "preponderance of the evidence" language in the text of the proposed Rule reflects existing law[17] and would help ensure that the Rule is correctly applied.[18] Further, clarifying that an expert's opinion must reflect a "reliable application of reliable principles and methods to the facts of the case" will promote the fair administration of justice, particularly with regard to forensic experts.[19] Other states are moving in the same direction.[20]

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

Respectfully submitted,

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[17] *State v. Matthews*, 479 Md. 278, 309, 277 A.3d 991, 1010 (2022) ("The proponent of challenged expert testimony must establish the three prongs of MRE 5-702 (including the two subfactors that make up a 'sufficient factual basis") by a preponderance of the evidence."); *see also Crane v. Dunn*, 382 Md. 83, 92, 854 A.2d 1180, 1185 (2004).

[18] *Katz, Abosch, Windersheim, Gershman & Freedman,* 485 Md. at 380, 301 A.3d at 69 (stating the 2023 amendment to FRE 702 "emphasizing the preponderance standard 'specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of [FRE 702].'") (quoting FRE 702 advisory committee's note to 2023 amendment).

[19] *Abruquah v. State*, 483 Md. 637, 696, 296 A.3d 961, 997 (2023) (finding "analytical gap" between expert's "generally reliable" methodology and the opinion offered).

[20] In the Matter of Rule 702, Rules of Evidence, No. R-23-0004 (Ariz. Aug. 24, 2023) (adopting 2023 amendment to FRE 702); Proposed Amendments to the Ohio Rules of Practice and Procedure (Ohio Dec. 21, 2023) (same; comment period ended February 5); Proposed Amendments of Rules 702 and 804 of the Michigan Rules of Evidence, ADM File No. 2022-30 (Mich. Oct. 25, 2023) (same comment period ended February 1); Proposed Amendments of Kentucky Rules of Evidence (Ky. Feb. 15, 2024) (same; comment period ends April 15).