December 19, 2025

Via Email & U.S. Mail

Sheree Wright, Esq.
Executive Director
Tennessee Bar Association
3310 West End Ave., Suite 590
Nashville, TN 37203

Re: Request for Amendment to Tennessee Rule of Evidence 702

Dear Sheree:

As you are likely aware, on December 1, 2023, the amended Federal Rule of Evidence 702 went into effect. Although Tennessee expressly rejected the *Frye* standard in 1997 and Tennessee Rule of Evidence 702 generally tracks Rule 702, Tennessee remains an outlier among southeastern states and states within the Sixth Circuit in that it has not expressly adopted the requirements of Federal Rule 702. *See McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257, 264-65 (Tenn. 1997). Given the recent amendments to Federal Rule 702, it is an opportune time for Tennessee to join other states in the Southeast and within the Sixth Circuit by adopting Federal Rule 702. We write to request your assistance in promoting the amendment of Tennessee Rule 702 to track Federal Rule 702, as amended. A proposed amendment is attached to this letter.

Three factors strongly support the proposed amendment to Rule 702 of the Tenn. R. Evid. First, Tennessee precedent is consistent with the gatekeeping requirements imposed by the current version of Federal Rule 702. Second, Tennessee is currently the only state within the Sixth Circuit that has not adopted Federal Rule 702, as amended, and all of Tennessee's contiguous states have enacted Federal Rule 702 (and activities to amend those states' versions of the federal rule to become current with the recent federal amendment are active). Third and finally, given the recent amendments to Rule 702, it is a particularly appropriate time for the Tennessee Supreme Court to consider and adopt the federal version of Rule 702. We provide more detail on each of these factors below.

1. Tennessee Precedent is Consistent with Amended Rule 702

As discussed below in section 3 of this letter, the fundamental purpose of the recent amendment to Rule 702 was to ensure that testimony in the form of expert opinion not be admitted absent a determination of reliability by the trial court. Tennessee precedent is consistent with that goal.

In Tennessee, "[a]n essential role of the judge, as the neutral arbiter in the trial, is to function as a 'gatekeeper' with regard to the admissibility of expert testimony, permitting only expert opinions that are based on relevant scientific methods, processes, and data, and not upon [the] expert's mere speculation." *Payne v. CSX Transportation, Inc.*, 467 S.W.3d 413, 454 (Tenn. 2015) (citation and quotation marks omitted). "[W]e emphasize that it is a trial court's responsibility to act as a gatekeeper regarding the admissibility of expert testimony." *State v.*

Lowe, 552 S.W.3d 842, 871 (Tenn. 2018).

> This gatekeeping role is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. It is not intended to turn judges into jurors or surrogate scientists. Thus, the gatekeeping responsibility of the trial courts is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field. Rather, it is to assure that expert's opinions are based on relevant scientific methods, processes, and data, and not on mere speculation, and that they apply to the facts in issue.

McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257, 265 (Tenn. 1997) (citation and emphasis omitted). The gatekeeping function is "to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005) (citation and quotation marks omitted).

A trial court "must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." *Jacobs v. Nashville Ear, Nose & Throat Clinic*, 338 S.W.3d 466, 479-80 (Tenn. App. 2010) (citation and quotation marks omitted). "Thus, a trial court must act as a gatekeeper in determining whether expert testimony is admitted." *Beaudreau v. GMAC*, 118 S.W.3d 700, 703-04 (Tenn. App. 2003). "[Q]uestions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court," and "[a]s such, the trial court acts as a gatekeeper in determining whether expert testimony is admitted." *Biggs v. Town of Nolensville*, 2022 WL 41117, at *3, n.2 (Tenn. App. Jan. 5, 2022) (citations and quotation marks omitted).

Other Tennessee courts that have discussed "gatekeeping" responsibilities while excluding testimony in personal injury cases are: *Dowdy v. BNSF Railway Co.*, 2023 WL 3000863, at *3 (Tenn. App. April 19, 2023); *Jackson v. Thibault*, 2022 WL 14162828, at *3-4 (Tenn. App. Oct. 25, 2022); *Kidd v. Dickerson*, 2020 WL 5912808, at *6-7 (Tenn. App. Oct. 5, 2020); *Boyd v. BNSF Railway Co.*, 596 S.W.3d 712, 724-25 (Tenn. App. 2018); *Kennard v. Townsend*, 2011 WL 1434625, at *10 (Tenn. App. April 14, 2011); *Johnson v. Richardson*, 337 S.W.3d 816, 818 (Tenn. App. 2010); *Gibson v. Chrysler Corp.*, 2004 WL 1918725, at *13 (Tenn. App. Aug. 26, 2004).

2. Tennessee is Presently an Outlier in the Southeast and Sixth Circuit

As set forth in the chart below, almost all of Tennessee's contiguous states[1] and all other states within the Sixth Circuit have adopted the Federal standard for testimony by expert witnesses.

[1] Although South Carolina and Virginia apply a modified version of Federal Rule 702, neither has expressly adopted the language of Rule 702. SCRE 702; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 331, 534 S.E.2d 672, 677-78 (2000) (noting the South Carolina Supreme Court declined to adopt *Daubert*), holding modified by *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d

State	Citation
Alabama	Ala. R. Evid. 702 (advisory committee notes state that Alabama's rule is "identical to the corresponding Federal Rule of Evidence").
Arkansas	Ark. R. Evid. 702; *Farm Bureau Mut. Ins. Co. of Arkansas v. Foote*, 341 Ark. 105, 115, 14 S.W.3d 512, 519 (2000) ("This court has not previously adopted the holding in *Daubert*. We do so now.")
Georgia	Ga. Code. Ann. § 24-7-702.
Kentucky[2]	KRE 702 (amended June 24, 2024 to make it essentially identical to F.R.E. 702, as amended).
Michigan[2]	MRE 702 (amended by Mich. Supreme Court March 27, 2024 to bring Michigan's rule in line with the amended federal standard).
Mississippi	M.R.E. 702; *Worthy v. McNair*, 37 So. 3d 609, 614 (the state and federal standards under Rule 702 are "identical")
Missouri	Mo. Ann. Stat. § 490.065 (tracking the un-amended version of Rule 702; legislation was introduced in 2025 that would adopt the recent federal amendments).
North Carolina	N.C. Gen. Stat. Ann. 8C-1, 702 (editors' notes state that "the rule is identical to Fed.R.Evid. 702, except that the words 'or otherwise' which appear at the end of the federal rule after the word 'opinion' have been deleted.")
Ohio[2]	Ohio Evid. R. 702. On July 1, 2024 the Ohio Supreme Court adopted a proposed rule amendment to bring Ohio Rule of Evidence into conformity with amended Rule 702.

650, 655 (2012) (listing the factors to be considered to determine the reliability of purported experts); Va. Code Ann. § 8.01-401.1; *Toraish v. Lee*, 293 Va. 262, 273, 797 S.E.2d 760, 766 (2017) (expert testimony will not be admitted where it is based upon an assumption and has no basis in fact).

[2] Sixth Circuit state. As noted above, all states within the Sixth Circuit other than Tennessee have or are adopting the amended version of Federal Rule 702. Apart from the states identified above, Arizona, Louisiana, Oklahoma and the US Virgin Islands amended their expert evidence admission rules to align with amended FRE 702. In Delaware and Maryland, the Supreme Courts of those states ruled that their current expert evidence admission standards are in alignment with amended Rule 702. *See In re Zantac (Ranitidine) Litig.*, 342 A.3d 1131 (Del. 2025); *Katz, Abosch, Windeshei, Gershman & Freedman, P.A. et al. v. Parkway Neuroscience and Spine Institute, LLC*, 301 A.3d 42 (Md. 2023).

3. Now is an Opportune Time to Amend Tenn. R. Evid. 702

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, a 2015 analysis by 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 intended, and the very same issues that the 2000 amendments sought to resolve were still present.[3] Additional reviews of case opinions confirmed these observations.[4]

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

[3] 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).

[4] *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).

> 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 testimony.[5] 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*.

Given the foregoing, we respectfully request your assistance in encouraging the Tennessee Supreme Court to amend Tennessee Rule of Evidence 702 to track the current version of its federal counterpart.

Thank you for consideration of our proposal. We would very much appreciate the opportunity to discuss next steps with you.

BUTLER SNOW LLP	HICKMAN GOZA SPRAGINS	BAKER DONELSON
/s/ Eric Hudson	/s/Hank Spragins	/s/ Derek Mullins
Eric E. Hudson	Hank Spragins	Derek K. Mullins

LAW OFFICE OF MICHAEL T. GOODIN

/s/ Michael Goodin
/s/ Danielle Cheney

Michael T. Goodin & Danielle Cheney

GORDON REES SCULLY MANSUKHANI, LLP.

/s/ Heather Gwinn

Heather Gwinn

[5] 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).

Proposed Amendment to Tennessee's Expert Testimony Admission Standard

Rule 702; Testimony by Experts

If scientific, technical or other specialized knowledge will substantially 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 in the form of an opinion or otherwise, if the proponent demonstrates to the court that it is more likely than not that:

1. The testimony is based upon sufficient facts or data;

2. The testimony is the product of reliable principles; and

3. The expert's opinion reflects a reliable application of the principles and methods reliably to the facts of the case.

Current Tennessee Rule of Evidence and Procedure

Article VII. Opinions and Expert Testimony

Rule 702; Testimony by Experts

If scientific, technical, or other specialized knowledge will substantially 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 in the form of an opinion or otherwise.

Advisory Commission Comments [2001].

The Frye test no longer exists in Tennessee. In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (1997), the Tennessee Supreme Court listed five nonexclusive factors taken from the federal case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993):

"(1) whether scientific evidence has been tested and the methodology with which it has been tested;

"(2) whether the evidence has been subjected to peer review or publication;

"(3) whether a potential rate of error is known;

"(4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and

"(5) whether the expert's research in the field has been conducted independent of litigation."