

Via E-Mail

October 26, 2023

The Commission on the Rules of Practice & Procedure
Supreme Court of Ohio
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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, and American Coatings Association Supporting Proposed Amendment to Ohio Evidence Rule 702

The above-listed organizations are leading national organizations representing lawyers who primarily represent civil defendants, including numerous Ohio defense attorneys. We are also leading Ohio and national business, civil justice, and public policy organizations with members in Ohio.¹ We support the proposed amendment to more closely align Ohio Rule of Evidence 702 (“Ohio Rule 702”) with its updated federal counterpart, Federal Rule of Evidence 702—[2023 Amend.](#) (effective Dec. 1, 2023).

The proposed amendment to Ohio Rule 702 clarifies that the proponent of expert testimony must demonstrate “to the court that it is more likely than not” that the rule’s existing admissibility requirements are met. The amendment underscores the need for judges to act as “gatekeepers” against the admission of unreliable expert testimony. Clarifying the Ohio rule will help avoid misapplication of the rule that has occurred with the analog federal rule and will promote harmony in Ohio’s state and federal courts.

We also urge the Court to consider further harmonizing Ohio Rule 702 with new Federal Rule 702(d), which requires a proponent to show “that it is more likely than not that . . . the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.”

I. 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’

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

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).

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 have incorrectly applied Federal Rule 702—2000 Amend.³ Scholarly articles have identified a “roulette wheel randomness” to court decisions.⁴ Many courts have “resist[ed] the judiciary’s proper gatekeeping role, either by ignoring Rule 702’s mandate altogether or by aggressively reinterpreting the Rule’s provisions.”⁵ For example, many federal courts, including in Ohio, have focused on statements in *Daubert* regarding the “liberal thrust” of the Federal Rules of Evidence and “‘flexible’ nature of the inquiry in which trial courts must engage” over the text of the 2000 amendments.⁶

In 2021, Lawyers for Civil Justice (LCJ) reviewed *all* federal trial court opinions considering Rule 702 motions in 2020 in an effort to quantify just how chaotic Federal Rule 702 jurisprudence had become.⁷ LCJ found that of the 1,059 trial court opinions in the study, 65% did

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

³ See Fed. R. Evid. 702, Committee Notes—2023 Amend.

⁴ 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).

⁵ 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).

⁶ *Id.* at 5 (cleaned up). 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.”).

⁷ See Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, at 2 (Sept. 30, 2021).

not cite the appropriate preponderance standard.⁸ More disturbing was the extreme inconsistency within judicial districts themselves. For example, in 57 federal judicial districts, courts were split over whether to apply the “preponderance” standard or the more permissive “liberal thrust” standard.⁹ In 6% of cases, courts cited *both* the “preponderance” and “liberal thrust” standards—“a remarkable finding given that these standards are inconsistent with each other.”¹⁰

In 2022, the Judicial Conference of the United States approved proposed amendments to address misapplication of Federal Rule 702. The Committee Note included with the amendments recognizes that “many courts” have improperly “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.*

Incorporating this language into Ohio’s Rule 702 will promote greater consistency in the proper admission of expert evidence in state and federal courts. It will allow state 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 proposed amendment will also further the Court’s 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.

II. The Court Should Consider Aligning Ohio Rule 702 with New Federal Rule 702(d)

We support the Ohio Rule 702 amendment as written. We also urge the Court to consider amending Ohio Rule 702 to incorporate the requirement in new Federal Rule 702(d), which requires a proponent of expert evidence to demonstrate by a preponderance of the evidence that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” Fed. R. Evid. 702, Committee Notes—[2023 Amend](#). This change would “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, Committee Notes—[2023 Amend](#).

Ohio Rule 702 would benefit from a similar clarification to ensure consistent application of expert evidence standards in Ohio’s courts. A comment submitted by the Ohio Insurance Institute discusses this potential addition in greater detail, stating it could be accomplished either by a rule amendment or Staff Note discussion. We support any approach that improves clarity.

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

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 4.

Association of Defense Trial Attorneys

National Association of
Mutual Insurance Companies

American Tort Reform Association

American Coatings Association

Pharmaceutical Research and
Manufacturers of America

U.S. Chamber Institute for Legal Reform

Product Liability Advisory Council, Inc.

American Property Casualty
Insurance Association

Washington Legal Foundation

Coalition for Litigation Justice, Inc.

National Federation of
Independent Business

Respectfully submitted,



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APPENDIX: SUMMARY OF SIGNATORY ORGANIZATIONS

- **Ohio Alliance for Civil Justice (OACJ):** OACJ is group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations and others. OACJ helps promote a healthy economic climate in Ohio by promoting a common-sense civil justice system in the state. 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. OACJ's leadership includes members from the NFIB-Ohio, Ohio Chamber of Commerce, Ohio Society of Certified Public Accountants, Ohio Hospital Association, Ohio State Medical Association, The Ohio Manufacturers' Association, and Ohio Council of Retail Merchants, as well as other organizations, businesses and professionals.
- **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.