

Please accept this comment on behalf of the Kentucky Defense Counsel, Lawyers for Civil Justice, DRI Center for Law and Public Policy, International Association of Defense Counsel, Federation of Defense & Corporate Counsel, and Association of Defense Trial Attorneys in support of the proposed amendment to align Kentucky Rule of Evidence 702 (“KRE 702”) with its recently amended federal counterpart, Federal Rule of Evidence 702 (“FRE 702”) (amended effective Dec. 1, 2023).

The proposed amendment to KRE 702 clarifies and emphasizes that the proponent of expert testimony must demonstrate “to the court that it is more likely than not” that the Rule’s requirements are met. The amendment reminds courts of their gatekeeping role and reflects existing law. See *Renot v. Secura Supreme Ins. Co.*, 671 S.W.3d 282, 287 (Ky. 2023) (“Trial courts are charged to act as gatekeepers regarding expert opinions in order to prevent the admission of pseudoscientific, unreliable evidence.”). Further, the proposed amendment is supported by existing Kentucky case law under KRE 104: “[W]hen the determination depends upon the resolution of a preliminary question of fact, the resolution is determined by the trial judge under KRE 104(a) on the basis of a preponderance of the evidence[.]” *Young v Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001), citing *Bourjaily v United States*, 483 U.S. 171, 175 (1987). 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.

The Proposed Amendment Harmonizes KRE 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.*, 509 U.S. 579 (1993), *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). In 2000, FRE 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony. See FRE 702 (b-d). 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.

Fed R. Evid. 702 advisory committee’s note to 2000 Amendment (internal citation omitted).

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 misapplied 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. See 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). Additional reviews of case opinions back up this observation. 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); 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) (reviewing all federal district court opinions on FRE 702 in 2020 and documenting chaotic FRE 702 jurisprudence).

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* (509 U.S. at 592 n10) or connect FRE 702 with FRE 104(a) and relevant case law. 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 (stating “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 all of the rule’s admissibility requirements 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 amendment reflects an attempt to correct judicial missteps, not a substantive change in the law. 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 FRE 104(a) provided a springboard for other changes 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. See 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 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.

Expert evidence standards in Kentucky have followed the lead of FRE 702 and United States Supreme Court case law. When the Kentucky Rules of Evidence were adopted in 1992, KRE 702 "used the same language as Federal Rule of Evidence 702." KRE 702, *Evid. Rules Review Comm'n Notes* (2007). In 1995, this Court adopted the rationale of the United States Supreme Court's *Daubert* decision in *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995), *overruled on other grounds*, *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999). In *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000), this Court followed the United States Supreme Court's *Kumho Tire* decision and held that the *Daubert* analysis applies to all expert testimony. See also *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35 (Ky. 2004). KRE 702 was amended in 2007 to mirror the 2000 version of the federal rule. The latest proposed amendment to KRE 702 would align the Kentucky rule with the current version of FRE 702.

Given this Court's past work to promote harmony between the Kentucky and federal court rules, such as the 2007 amendment to KRE 702, it makes sense to similarly amend KRE 702 to mirror the 2023 amendments to FRE 702. Further, the proposed amendment to KRE 702 will promote consistency in the admission of expert evidence in state and federal courts. Amending KRE 702 to reflect FRE 702 will also allow Kentucky courts to benefit from the body of case law interpreting FRE 702 and avoid disparate treatment of expert evidence that incentivizes forum shopping. Additionally, the proposed amendment would promote the fair administration of justice, particularly with regard to forensic experts. Finally, the proposed amendment is consistent with the national trend. See *In the Matter of Rule 702, Rules of Evidence*, No. R-23-0004 (Ariz. Aug. 24, 2023) (adopting 2023 amendment to FRE 702, effective January 1, 2024); *Order, Amendments of Rules 702 and 804 of the Michigan Rules of Evidence*, ADM File No. 2022-30 (Mich. Mar. 27, 2024) (adopting 2023 amendment to FRE 702, effective May 1, 2024); see *also* *Proposed Amendments to the Ohio Rules of Practice and Procedure* (Ohio Dec. 21, 2023) (same; comment period ended February 5); *La. S.B. 16* (2024) (same; passed out of Senate by a vote of 38-0).

For these reasons, the listed organizations support the proposed amendment.

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