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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

ARIZONA RULE OF EVIDENCE 702

Arizona Supreme Court No. R-23-_____

PETITION TO AMEND ARIZONA
RULE OF EVIDENCE 702

PETITION TO AMEND ARIZONA RULE OF EVIDENCE 702

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Advisory Committee on Rules of Evidence (the “Committee”), by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 702, as reflected in the attachment hereto, effective January 1, 2024.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, based on the Federal Rules of Evidence, adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all these amendments have become part of the Arizona Rules of Evidence. Instead, this Court's Advisory Committee on Rules of Evidence ("Petitioner") evaluates proposed federal changes consistent with its June 2012 chartering administrative order:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012. Given this directive, the Committee has reviewed Arizona Rule of Evidence 702 in light of proposed amendments to Federal Rule of Evidence 702.

At its regular meeting on September 9, 2022, after discussion at that meeting and those previous to it, the Committee unanimously recommended that Arizona Rule of Evidence 702 be amended consistent with the proposed amendments to Federal Rule of Evidence 702, which are expected to become effective December 1,

2023. Accordingly, the Committee files this Petition to initiate the public comment and amendment process set forth in Rule 28 of this Court’s rules.

II. SUMMARY OF THE PROPOSED AMENDMENTS TO FEDERAL RULE OF EVIDENCE 702

The proposed amendments are intended to conform Arizona Rule of Evidence 702 (titled, “Testimony by Expert Witnesses”) to considered amendments to proposed Federal Rule of Evidence 702. The federal Advisory Committee on Evidence Rules (the “federal Advisory Committee”) recently spent several years considering Rule 702, examining how the rule has been applied in practice since its amendment in 2000. The federal Advisory Committee investigated feedback coming from multiple perspectives—including both that courts have applied the rule too liberally to admit expert testimony despite the testimony not meeting Rule 702’s existing standards; and that courts have applied the rule too strictly to preclude expert testimony that would have been helpful to the factfinder. *See, e.g.*, Supreme Court Transmittal Package, dated October 19, 2022, at page 248, *available at* https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf (noting more than 500 comments received regarding the proposed amendments to Rule 702). The federal Advisory Committee determined that the rule should be amended to address two distinct issues.

The first issue concerns the standard a trial judge must apply in deciding whether expert testimony should be admitted. Rule 702 requires that expert

testimony be based on sufficient facts or data, be the product of reliable principles and methods, and that the expert have reliably applied such principles and methods to the facts of the case. Fed. R. Evid. 702(b)–(d). Notwithstanding the Rule’s existing language, the Advisory Committee observed that many judges have not been applying these requirements correctly and many court decisions contain confusing or misleading language. *See id.* at 228 (text of proposed Committee note to federal amendments).

Specifically, the Advisory Committee noted that several courts have treated challenges to whether these threshold requirements have been met as merely going to the testimony’s weight, rather than to its admissibility. *Id.* at 229 (text of proposed Committee Note to federal amendments). The federal Advisory Committee thus unanimously voted to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds *by a preponderance of the proof* that all these requirements are met—i.e., the expert is relying on sufficient facts or data, employing a reliable methodology, and applying that methodology reliably. *See id.* at 228. The federal Advisory Committee emphasized that this amendment was not intended to change the law,¹ but rather to clarify the rule to avoid its misapplication.

Id.

¹ Federal Rule of Evidence 104 already imposes on a trial court a duty to decide whether evidence is admissible. *See* FED. R. EVID. 104(a). The Supreme Court has clarified that such determinations are to be established by a preponderance of the

The second issue the federal Advisory Committee found it appropriate to address via amendment to Rule 702 is that of expert overstatement—i.e., experts overstating the certainty of their opinions beyond what can reliably be supported by the science or methodology underlying the expert’s opinion. *Id.* at 230. The Advisory Committee found this to be a problem especially pertinent to the testimony of forensic experts in both criminal and civil cases. *See id.* Several potential amendments were considered, with the U.S. Department of Justice and some elements of the plaintiffs’ bar urging that no amendment was needed to address expert overstatement, and various other stakeholders contending that the problem of expert overstatement necessitated an amendment. *Id.* at 254. Ultimately, the federal Advisory Committee recommended what it deemed a compromise position.

To address the issue of expert overstatement, which the Advisory Committee found to indeed be problematic, the Committee has recommended changing Rule 702(d)’s current requirement that the “expert has reliably applied the principles and methods to the facts of the case” to require, instead, that the “expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” The proposed Advisory Committee note explaining this change emphasizes that the change is intended to help focus judges and parties on whether an expert’s

proof. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993); *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

conclusions are overstated. *See id.* at 254-55. This amendment clarifies that the trial judge’s gatekeeping role extends to precluding experts from overstating their opinions when otherwise permitted to testify and not merely to evaluating whether the experts used a reliable methodology. *See id.* at 230.

In sum, the federal Advisory Committee unanimously recommended Rule 702 be amended to clarify (1) the proponent of expert testimony must establish that the requirements of Rule 702 are met by a preponderance of the proof (more likely than not) standard before it can be presented; and (2) an expert shall not assert an unreliable degree of confidence in the expert’s opinion. The U.S. Supreme Court is expected to prescribe those changes, and—unless Congress takes contrary action—they will become law effective December 1, 2023. After review and consideration, Petitioner recommends making the same changes to the Arizona counterpart rule, to become effective January 1, 2024.

III. SPECIFICS OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 702

As noted, the proposed amendments to Federal Rule of Evidence 702 are twofold. Pursuant to this Petition, and to make Arizona Rule of Evidence 702 in accord with the proposed changes to Federal Rule of Evidence 702, Arizona’s Rule 702 would be modified as follows:

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Rule 702. Testimony by Expert Witnesses

A witness who is 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:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

On a split but majority vote, Petitioner also recommends the following brief comment to the 2024 amendment: “Rule 702 was amended effective January 1, 2024, to conform to the changes made to Federal Rule of Evidence 702 that took effect on December 1, 2023. These changes are intended to clarify the standard of proof a proponent of expert testimony must satisfy as well as to address the issue of expert overstatement.” The majority of our Committee’s members felt that the aim of the changes proposed to be made to Rule 702 might be lost to their subtlety without the proposed Comment to the 2024 Amendment.

CONCLUSION

Petitioners respectfully request that the Court consider this Petition and its proposed rule changes at its earliest convenience. Petitioners additionally request that the Petition be circulated for public comment until May 1, 2023, and that the

Court adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2024.

DATED this 3rd day of January, 2023.

/s/ Sara J. Agne _____

Sara J. Agne

Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission _____

Maria Elena Cruz

Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT²

ARIZONA RULE OF EVIDENCE 702

Rule 702. Testimony by Expert Witnesses

A witness who is 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:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

COMMENT TO 2024 AMENDMENT

Rule 702 was amended effective January 1, 2024, to conform to the changes made to Federal Rule of Evidence 702 that took effect on December 1, 2023. These changes are intended to clarify the standard of proof that the proponent of expert testimony must satisfy as well as to address the issue of expert overstatement.

² Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.