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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

Arizona Supreme Court No. R-23-0004

ARIZONA RULE OF EVIDENCE 702

REPLY TO COMMENTS

**REPLY TO COMMENTS ON PETITION TO AMEND
ARIZONA RULE OF EVIDENCE 702**

In support of its pending Petition to Amend Arizona Rule of Evidence 702, 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, provides this Reply to (1) respond to comments to the Petition submitted by the public, and (2) correct a typographical error in the Attachment to the Petition.

The Petition proposed amendments to Arizona Rule of Evidence 702 (the “Rule”) to conform the Rule to anticipated changes to Federal Rule of Evidence 702. As set forth in the Petition, these amendments are intended to serve two objectives: (1) to clarify that expert testimony should not be admitted unless the judge first finds by a preponderance of the proof that all the Rule’s requirements are met; and (2) to emphasize the trial court’s role in ensuring that experts do not give opinion testimony that overstates what may reliably be concluded from the science or methodology underlying the expert’s testimony as applied to the evidence. In both instances, the federal Advisory Committee explained that the amendments were not intended to change the existing law governing Rule 702, but rather to clarify the Rule to avoid its misapplication.

In response to the Petition, the Court received the following comments: (1) a Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies (the “Joint Comment”); (2) a Comment by Arizona Attorneys for Criminal Justice (“AACJ”) in Support of Petition to Amend Arizona Rule of Evidence 702; (3) a Comment from the State Bar of Arizona; and (4) a Pinal County Public Defender Comment in Support of Petition to Amend Arizona Rule of Evidence 702. The Committee appreciates the comments and, after review, replies to them as follows.

All the comments support the change to the Rule suggested by the Petition to clarify that, as a prerequisite to admissibility, the trial court must find all the

requirements of Rule 702 to be established by a preponderance of the proof. No comment questions that such clarification is appropriate. Nor do any of the comments take issue with the language of the proposed amendment in this respect.

Similarly, all four comments support amending the Rule to address the issue of expert overstatement. Three of the four comments express support for the language proposed in the Petition, which, to reiterate, tracks the language to proposed amended Federal Rule of Evidence 702. The Joint Comment, however, raises concern that the proposed amendment regarding expert overstatement is too subtle. The Joint Comment points out that the Committee, too, acknowledged the subtlety of the proposed amendment by recommending in its Petition that the amended Rule be accompanied by a Comment noting that the Rule is being amended to address the issue of expert overstatement. According to the Joint Comment, the issue of expert overstatement should be addressed more clearly in the Rule itself rather than having to be supplemented via a comment.

More specifically, the Joint Comment proposes that the last subsection of the proposed amended Rule read as follows, with underlining reflecting the proposed changes to the Rule to conform it to the proposed amended federal rule and the Joint Comment's additional proposed language in ALL CAPS:

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 AND DOES NOT DRAW CONCLUSIONS THAT EXCEED OR OVERSTATE THESE PRINCIPLES AND METHODS AS APPLIED TO THE FACTS OF THE CASE.

(Joint Comment, at 4).

After consideration, the Committee does not recommend the additional amendment proposed by the Joint Comment. The Committee acknowledges the concern expressed both by the federal Advisory Committee and in the Joint Comment that an amendment to Rule 702 is appropriate to reinforce the trial court's important role in policing expert overstatement, including in (but not limited to) criminal and other cases involving forensic science. However, the Joint Comment's additional language would create a difference between an amended Arizona Rule of Evidence 702 and the anticipated Federal Rule of Evidence 702, contrary to Arizona's general preference for the rules to be parallel absent clear reason for departure. This would create the potential for unwarranted confusion about whether the Arizona version is intended to be different in substance or application than the

federal rule. In addition, the additional language the Joint Comment proposes, though being emphatic, is redundant in purpose and function to the amendment to subsection (d) already proposed.

Accordingly, the Committee does not recommend that the Supreme Court adopt proposed amended Rule 702 with the additional language proposed in the Joint Comment. The concern about subtlety raised in the Joint Comment, however, does further support this Court adopting the Comment to the amended Rule that the Committee proposed.

The Petition set forth the text of proposed amended Rule 702, with the amendments identified. The Petition also included an Attachment setting forth the language of the proposed amended Rule 702 with the proposed Comment. That Attachment contained a typographical error in that subsections (c) and (d) of the proposed Rule were consolidated into subsection (c). A corrected Attachment is attached to this Reply.

DATED this 31st day of May, 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

ATTACHMENT¹

ARIZONA RULE OF EVIDENCE 702

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- (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.

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.

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.