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December 6, 2022

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendments of Rule 702 and 703 of the Michigan Rules of Evidence

Dear Clerk Royster:

Please find attached the report and recommendations of the State Bar of Michigan's ("SBM") Michigan Rules of Evidence ("MRE") 702/703 Workgroup.

In 1999, the Court appointed an Advisory Committee on the Rules of Evidence in anticipation of then-pending amendments to the Federal Rules of Evidence ("FRE"). The work of that committee ultimately led to the adoption of various amendments to Michigan's rules, including MRE 702 and 703, which address expert witness testimony. Those particular rules have not been updated since that time. Having noted the Court's decision to form a Michigan Rules of Evidence Review Committee in December 2021, and that amendments to the federal rules are once again pending, the State Bar of Michigan's Standing Committee on Civil Procedure & Courts established a workgroup to examine whether to recommend amendments MRE 702 and 703 to the Court.

The workgroup prepared the attached report, which was subsequently reviewed by both the full Civil Procedure & Courts Committee, and SBM's Criminal Jurisprudence & Practice Committee. Having reviewed the recommendations and committee comments at its November 18, 2022 meeting, the Board voted unanimously to take no position on the workgroup's recommendations, but to authorize the submission of the full report and recommendations of the workgroup, as well as the recommendations of the two Bar committees to the Court for its review and consideration.

Thank you for the opportunity to share these recommendations on behalf of the workgroup. I hope that the Court will find them to be an informative addition to the work of the Rules of Evidence Review Committee.

Sincerely,

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

M E M O R A N D U M

To: State Bar of Michigan Board of Commissioners

From: Daniel D. Quick, Chair
MRE 702/703 Review Workgroup

Date: November 5, 2022

Re: Final Report

In 1999, the Michigan Supreme Court ("MSC") appointed the Advisory Committee on the Rules of Evidence in light of the pending 2000 amendments to the Federal Rules of Evidence ("FRE"). Ultimately, the MSC adopted various changes, including to the rules applicable to expert witness testimony: Michigan Rule of Evidence ("MRE") 702 (which addresses when expert testimony is permitted) and MRE 703 (which addresses the bases of opinion testimony by experts). Neither rule has been updated since then.

Effective January 1, 2004, the MSC amended MRE 702, choosing to model it after the then-current version of FRE 702.[1] FRE 702 was amended in 2000 as a response to the U.S. Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals*, which affirmed the trial judge's role as gatekeeper of expert testimony.[2] FRE 702 was amended again in 2011, but the Michigan rule was not updated. FRE 702 is (most likely) due for further amendment effective in 2023.

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[1] See, e.g., *Gilbert v DaimlerChrysler*, 470 Mich 749, 781; 685 NW2d 391 (2004) ("MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability.").
[2] 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

MRE 703 was last amended effective September 1, 2003. FRE 703 allows experts to base opinions on facts or data without admission of same in to evidence. MRE 703, on the other hand, mandates all underlying facts or data particular to the case to "be in evidence." Michigan is one of only two states with this sort of provision.

In December 2021, the Michigan Supreme Court appointed a new "Michigan Rules of Evidence Review Committee" to evaluate the "restyling" of the Federal Rules since 2011 and to review the Michigan Rules "for potential amendments similar to those adopted" for the Federal Rules.[3] The Chair of that Committee, Timothy Baughman, has confirmed that the Committee's work is limited to stylistic edits; the Committee is not evaluating the substantive law inherent in the Rules. He further confirmed that his Committee will not take in to consideration, as it pertains to MRE 702, the additional potential changes to FRE 702 set for 2023.

This Workgroup was charged with examining whether we should recommend any changes to MRE 702 or 703. During the course of our work, the Workgroup also reviewed whether FRE 704(b) ought to be adopted in Michigan.

The Workgroup consisted of the following members:

- Daniel D. Quick (chair) (Dickinson Wright PLLC; Troy)
- Hon. Chris Yates (Court of Appeals)
- Susan McKeever (Bush Seyferth PLLC; Troy)
- Beth A. Wittmann (Kitch; Detroit)
- Steven Stawski (Stawski Law, PLC; Traverse City)

[3] Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("In an effort to remain as consistent as possible with the federal rules, the Michigan Supreme Court is forming a committee to review the Michigan Rules of Evidence for potential amendments similar to those adopted for the Federal Rules of Evidence.").

- Richard Friedman (Univ. of Michigan Law School)
- Eli Savit (Prosecutor, Washtenaw County)

The Workgroup convened remotely multiple times between July and September 2022 and reviewed substantial materials as to the origin of the applicable rules (including materials from 1999-2003 from the Advisory Committee on the Rules of Evidence), academic literature, and materials concerning the evolution of the Federal Rules.

After due consideration, the Workgroup proposes that the Board of Commissioners advance this report to the Michigan Supreme Court for consideration. Since the Michigan Rules of Evidence Review Committee will also be suggesting various proposed changes to the MRE in a final report to be submitted in short order, it is important that the MSC receive this report timely so that it may holistically consider any proposed changes to the Rules.

The Workgroup proposes only one change: an updating of MRE 702 to capture the changes made to FRE 702 over the last 20 years. Two options are presented for consideration, as discussed below and included in Attachment A. The Workgroup, after review, did not have a consensus as to whether MRE 703 should be revised; some description of that deliberation is provided below. Lastly, the Workgroup rejected the adoption of FRE 704(b) in to MRE 704 for reasons discussed below.

Beyond these specific recommendations, the Workgroup also urges the MSC to reconvene a standing committee regarding the MRE. A body like this existed for some number of years but was disbanded. While (as this Report demonstrates) the State Bar of Michigan is an excellent conduit for recommendations concerning the MRE, a standing committee has its unique benefits, including the development of rule-making expertise, the imprimatur of the MSC, the ability to

receive input directly from the MSC (and ability to work with other arms of the judiciary, such as the MJI), and greater ease of inclusion of both civil and criminal practitioners.

Should the Court elect to make any substantive changes to MRE 702 and 703, the Workgroup further recommends coordinating with the State Bar of Michigan to aid in education of the bench and bar concerning the rule, the changes, and the underlying policy considerations.

MRE 702

A. FRE 702 Amendments

1. The 2011 amendments

In 2011, the federal Advisory Committee on Evidence Rules (the "Federal Rules Committee") approved stylistic updates to FRE 101–1103.[4] As part of this update, the Committee reworded FRE 702 and enumerated the factors for consideration more clearly. The Committee's goal was to "make [the rules] more easily understood and to make style and terminology consistent throughout the rules."[5] The Committee made clear: "[t]here is no intent to change any result in any ruling on evidence admissibility."[6]

2. The 2023 amendments

[4] May 6, 2009 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 2, https://www.uscourts.gov/Advisory_Committee_Rules Evidence May 2009. The update was approved in December 2008. December 1, 2008 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 1, https://www.uscourts.gov/Advisory Committee Rules Evidence December 2008.
[5] FRE 702 advisory committee's note to 2011 amendment.
[6] *Id.* See also Michigan Supreme Court, Administrative Order No. 2021-8 (Adopted December 22, 2021) ("[The federal] 'restyling' only included stylistic changes such as reformatting, reducing the use of inconsistent terms, minimizing the use of ambiguous words, and removing outdated or redundant words and concepts; no substantive changes were made.").

The Committee on Rules of Practice and Procedure unanimously approved changes to FRE 702 on June 7, 2022.[7] The Judicial Conference of the United States adopted the proposal with a small language change and recommended adoption to the Supreme Court via October 18, 2022 memorandum.[8] Assuming the rule is adopted by the Supreme Court (and unless Congress then intervenes), the amendments will take effect on December 1, 2023. If adopted, FRE 702 will read as follows (presented here with redlining against the rule's current text):

> 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.

a) Statement of the burden of proof

[7] https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (pp. 870-873, 891-1009). See also *The Phillip D Reed Lecture Series,* 88 Fordham L Rev 1216 (2020) (transcribing comments from members of the federal advisory committee in October 2019 with regard to the "best practices for managing *Daubert* questions" and addressing proposed and potential rule changes).

[8] https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf

The proposed amendment will incorporate the standard of decision-making directly into FRE 702.[9] This requires the proponent of an expert witness to demonstrate by a preponderance of evidence that the enumerated factors are satisfied.

This amendment reflects an attempt to correct judicial missteps, rather than to substantively change the law. Judges must make Rule 702 determinations under FRE 104(a).[10] FRE 104(a), in turn, mandates the court to actively decide whether the evidence is admissible. While the "preponderance" standard is the appropriate standard for those decisions, this fact is not readily apparent. Instead courts must search case law to find it.[11]

The Committee also felt that FRE 702 has been widely misinterpreted by treating factors (b) and (d) as questions of weight, rather than admissibility.[12] Questions of weight are decided by the jury, whereas questions of admissibility are questions for the court. This leaves jurors to weigh

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[9] Committee on Rules of Practice and Procedure, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 308 (August 2021).

[10] FRE 104(a) states: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

[11] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020 ("Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard … requiring a resort to case law.").

[12] See Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM & Mary L Rev 1 (2015); May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 818, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021; Advisory Comm. on Rules of Evidence, Agenda of May 3, 2019, at 62 (2019), https://www.uscourts.gov/Evidence Agenda Book May 2019 [https://perma.cc/99JE-PUTQ] ("The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence."). See also Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702,* 57 William & Mary L Rev 1 (2015).

up flawed testimony that should not have reached the courtroom, and leaves practitioners with cross-examination as their only recourse. Nonetheless, many courts misinterpret the requirement so greatly as to presume that expert testimony is admissible.[13] In fact, a study on 2020 federal court decisions found that 13% of judicial decisions on expert testimony incorrectly noted a presumption of admissibility under FRE 702.[14] The Committee believes that embedding the standard directly into the rule will help judges take notice, and follow through, on actively making Rule 702 determinations.[15]

The advisory committee notes to this amendment provide further guidance. They explain which types of decisions go to weight, and reiterate the types of decisions that require a Rule 702 admissibility determination.[16] The amendment intends to make compliance with Rule 702 difficult to ignore.[17]

The goals of the "preponderance standard" amendment to FRE 702 are to correct judicial misapplications and clarify how these decisions should be made. Several criticisms and alternative suggestions for achieving those goals were considered. For example, some commenters are

[13] May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 823, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021 .
[14] Jackson et al., Lawyers For Civil Justice, *Federal Rule Of Evidence 702: A One-Year Review And Study Of Decisions In 2020*, pp. 3-4 (2021).
[15] FRE 702 advisory committee's note to 2023 amendment.
[16] *Id.*
[17] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 41, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

skeptical that this amendment will change judicial behavior. Courts have ignored the plain rule on a wide scale, and some fear an amendment will not affect judicial behavior in the manner hoped.[18]

Further, the Federal Rules Committee was concerned that inserting the "preponderance" standard into this rule and not others—even though it applies to most evidentiary determinations—might "raise negative inferences" about the other rules.[19] Despite that concern, the pervasive disregard of the applicable standard warranted its explicit mention in the text of the rule.[20]

The Federal Rules Committee also considered, and rejected, three alternatives to this amendment:

- Amending only sub-section (d) and appending a committee note to communicate the preponderance standard instead of adding the language.[21]
- Educating the judiciary by way of a practice manual or otherwise. It was suggested that this could be effective in soliciting adherence to the rule. Ultimately, the Committee decided against that avenue due to questions about its authority to author practical guidance outside of the Rules.[22]

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[18] Nov. 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[19] December 1, 2020 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules December 2020. Ultimately, the Committee felt that including the standard would be a "substantial improvement." May 15, 2021 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2021.

[20] After the amendments were approved, the William and Mary Law Review published an article critiquing the Federal Rules Advisory Committee's solutions as being only part of the answer. Imwinkelried, *(Partial) Clarity: Eliminating the Confusion about the Regulation of the "Fact"ual Bases for Expert Testimony under the Federal Rules of Evidence*, 63 WM & Mary L Rev 719 (2022).

[21] Minutes of the Meeting on October 19, 2018, in November 15, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2018.

[22] Minutes of the Meeting on April 26-27, 2018, in May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 8, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

- Amending FRE 702 to refer directly to FRE 104(a), rather than stating the standard. The Committee concluded that explicitly stating the standard would be more effective.[23]

b) The Subsection (d) change

A recent national critique of conventional forensic evidence techniques by two leading scientific advisory groups spurred the initial discussion of a FRE 702 amendment.[24] The bodies criticized courts for failing to exclude questionable forensic evidence testimony[25] and failing to limit expert testimony that overstates the reliability of forensic techniques such as ballistics and handwriting analysis.[26] For example, DNA analysis in the 1990s exonerated many inmates who had been falsely convicted, often due to faulty forensic evidence allowed into trials.[27] Other national studies found similarly disturbing results: frequent use of forensic evidence "without any meaningful scientific validation, determination or error rates, or reliability testing."[28] Many forensic techniques have a long history at trial, and courts are hesitant to disrupt historically-permitted types of expert testimony. However, based on these and other reports, many believe that FRE 702 has failed to accomplish its goal of ensuring that expert testimony is reliable.[29] A study by the President's Council of Advisors on Science and Technology ("PCAST") recommended

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[23] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[24] The National Academy of Sciences ("NAS"), and the President's Council of Advisors on Science and Technology ("PCAST"). See Lander, *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L Rev 1661, 1676 (2018).

[25] *Id.* at 1662.

[26] November 7, 2016 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 6, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2016.

[27] Lander, *supra* note 23, at 1662.

[28] *Id.* at 1663, citing Nat'l Research Council, *Strengthening Forensic Science in The United States: A Path Forward*, pp. 107-108 (2008).

[29] Lander, *supra* note 23, at 1676.

clarifying the meaning of "reliable methods" in FRE 702 as the most effective way to curb this failure.[30]

The Federal Rules Committee considered several proposals, and ultimately determined that amending sub-section (d) as approved will best accomplish two key goals. While sub-section (d) currently reads "the expert has reliably applied" the principles and methods, it will read "the expert's opinion reflects a reliable application of" the principles and methods. This amendment aims to refocus the court on the expert's opinion itself, ensuring that the opinion or conclusion is also a reliable application of the principles and methods.[31] Relatedly, it will empower the court to assert its gatekeeping authority and not shy away from excluding illogical or overstated opinions even when based on reliable principles and methods.

While the above amendment was ultimately approved, the following suggestions were considered as alternatives.

- The PCAST report suggested a clarifying advisory note or judicial education.[32] However, new advisory notes are issued only when rules themselves change. Similarly, education efforts via a best practices manual authored by the Advisory Committee might be challenged as being outside of the Federal Rules Committee's rulemaking authority.[33]

- The Federal Rules Committee considered adding a new subsection (e) to Rule 702: **"**if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results."[34] The Committee rejected

[30] *Id.* at 1677.
[31] Nov. 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.
[32] Lander, *supra* note 23, at 1667.
[33] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 32, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.
[34] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 5, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.

this amendment due to concern about unintended consequences for testimony on subjects other than forensic evidence. Further, subsection (d) already addresses the overstatement situation: "[i]f an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d)."[35]

- The Committee also considered drafting a freestanding rule that prohibits overstatements, but determined it would overlap problematically with Rule 702.[36]

- Further, prescribing more detailed guidance on forensic science via amendments to the committee notes or a best practices manual both suffer a key problem: they would need extensive, laborious input from the scientific community, and standards are controversial.[37]

- Another option was to distinguish separate rules for scientific and other types of expert opinion testimony, but the Committee decided this option may be "less viable."[38]

Many of the rejected suggestions risked adding unintended confusion. Instead, the Federal Rules Committee ultimately decided on a conservative change, emphasizing that the trial court must also find that the expert's opinion itself correctly applies the underlying principles and methods. This amendment has received only sparse criticism.

B. MRE 702[39]

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[35] *Id.* at 5.

[36] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 35, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

[37] November 15, 2019 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 4, https://www.uscourts.gov/Advisory Committee Evidence Rules November 2019.

[38] May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 37, https://www.uscourts.gov/Advisory Committee Evidence Rules May 2018.

[39] Two Michigan statutes also relate to expert testimony: MCL 600.2169 and MCL 600.2955. MCL 600.2169 further restricts expert testimony on appropriate standard of practice or care in medical malpractice actions. MCL 600.2955 lists factors the court must consider before admitting expert testimony in particular tort actions. The MSC has found these requirements to supplement, rather than conflict with, the Michigan Rules of Evidence. See, e.g., *Clerc v Chippewa Cnty War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007) (finding that the trial court should have ensured the expert was qualified under all three guidelines in order to fulfill its gatekeeping role).

1. MRE 702 in 2004

In 1999, the MSC appointed the Advisory Committee on the Rules of Evidence in light of the 2000 amendments to the Federal Rules of Evidence. The Committee's August 2000 report to the MSC recommended no change to the existing rule.[40] The Committee noted that the then-existing version of MRE 702 already recognized the trial court's gatekeeping function emphasized in *Daubert* (by virtue of the language "If the court determines that recognized…."). The Committee's minutes suggest that there was some debate as to whether *Daubert* really changed Michigan law under the so-called *Davis-Frye* "general acceptance" test, *People v Davis,* 343 Mich 348; 72 NW2d 649 (1955), as applied by Michigan courts, and this uncertainty can be seen in the Committee report's non-committal approach towards revising MRE 702.

Notwithstanding the Committee's suggestion, the MSC did in fact propose amendment of MRE 702 to conform to the 2000 version of FRE 702. Judge Dan Ryan wrote a law review article opposing the amendment, arguing that the MSC had not clearly adopted *Daubert* and that existing Michigan law provided an ample framework.[41] This objection was largely done away in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), wherein the Court stressed the gatekeeping role of the trial courts and noted that MRE 702 was designed to incorporate *Daubert.* See also *Elher v Misra*, 499 Mich 11, 878 NW2d 790 (2016).

2. Should Michigan adopt the changes?

The proposed 2023 changes would apply to the Michigan Rules in similar ways to the federal rule – they would state existing law, not change it.

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[40] August 2000 Report to the Michigan Supreme Court of the Advisory Committee on the Rules of Evidence, pp. 30-33.

[41] Ryan, *Michigan Rule of Evidence 702: Amend or Leave it to Schanz,* 19 TM Cooley L Rev 1 (2002).

As to the burden of proof, MRE 104(a) is essentially the same as FRE 104(a).[42] Case law similarly accepts the preponderance of evidence standard as that governing MRE 104(a).[43] As to the subsection (d) change, that too is already Michigan law, albeit (as noted below) sometimes misapplied.[44]

To the extent one purpose of the rule amendment is to prod courts to remember their gatekeeping functions, the salutary function of the rule is unobjectionable.

One might question whether Michigan courts have "drifted" from the intent of *Daubert* and their gatekeeping role as has been observed in the federal courts. A full review of all Michigan opinions since *Daubert* regarding the admission of expert witnesses is beyond the scope of this Report[45], and it may be that different elements of the bar (*e.g.,* plaintiff and defense medical malpractice attorneys) have different anecdotal perceptions of the issue. Several members of the Workgroup observed that busy trial courts often allow experts to testify without an exacting

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[42] MRE 104(a) initially mirrored FRE 104(a), but FRE 104(a) was amended in 2011 as part of the stylistic overhaul, and Michigan's remains the same as the prior version.

[43] *People v Hendrickson*, 459 Mich 229, 241–242, 586 NW2d 906 (BOYLE J., concurring) ("Under MRE 104(a), preliminary factual questions of admissibility are determined by the trial court utilizing a preponderance-of-the-evidence standard."), citing *Bourjaily v United States,* 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 790; 685 NW2d 391, 413 (2004).

[44] E.g., *Ketterman v City of Detroit*, unpublished opinion of the Court of Appeals, issued May 16, 2006 (Docket No. 258323), 2006 WL 1328846, p *5 ("Our Supreme Court in *Gilbert* spoke of "analytical gap[s]" between data and opinions given by experts, warning that insufficient inquiry into an expert's qualification to testify based on reliable application of reliable methods to the specific facts of a case might let in testimony that could "serve as a Trojan horse that facilitates the surreptitious advance of ... spurious, unreliable opinions." *Gilbert, supra,* p. 783. The trial court must vigilantly play the gatekeeper role to prevent just this from happening…").

[45] A study at the federal level by one public commentator on FRE 703 can be reviewed at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_public_comment_on_rule_702_amendment_sept_1_2021.pdf .

Daubert analysis (and often without a hearing as sometimes occurs in federal court[46]) and courts will often justify their decisions by claiming that the challenge goes to "weight" rather than admissibility and thus for the jury to sort out. In the appellate courts, there are cases that arguably get the Rule wrong.[47] But whether this evidences a broader trend or problem is unclear; there does not appear to have been any recent law review articles or academic study of these issues in Michigan courts.[48] On the other hand, there is no reason to believe the same problems affecting federal courts would not also affect state courts; arguably, given less resources, busier dockets and many cases involving lesser financial stakes, one might hypothesize that the problem would be worse in state courts.

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[46] This seems to occur somewhat more frequently in the business courts; see, e.g., https://www.courts.michigan.gov/4a47f4/siteassets/business-court-opinions/c20-2017-4997-cb-(april-6,-2020)2-of-2.pdf (which also contains a particularly thorough analysis of the *Daubert* standard).

[47] A particularly interesting opinion is *B&L Dev LLC v City of Norton Shores*, unpublished Court of Appeals opinion Case No. 311183, 2014 WL 3973296 (2014), where a party questioned the trial court's admission of an expert opinion regarding valuation by challenging the methods (or lack thereof) of the expert. Appellant's key argument was that, while the expert was qualified and relied upon acceptable facts, his method of applying those facts was "junk" and could not satisfy the rule. The trial court and the Court of Appeals both rejected the challenge, but without taking on its gatekeeping function as to methodology, essentially finding that since he was qualified as an expert, everything else went to weight. In so doing, the Court of Appeals cited to and misapplied *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007), and *Lenawee Co v Wagley*, 301 Mich App 134; 836 NW2d 193 (2013). *Surman* dealt only with the qualifications of the expert, yet the Court of Appeals cited it to apply to the methodology argument which was not at issue in *Surman*. *Wagley* contained no substantive analysis and simply cited to *Surman*. There are also examples of the Court of Appeals reversing a trial court which neglected its gatekeeping obligation where a party raised issues as to both qualifications as an expert and the methodology but the trial court only addressed the former. *MacKenzie v Koziarski*, unpublished Court of Appeals opinion, Case No. 289234, 2011 WL 1004174 (2011).

[48] There are instances of elements of the MSC questioning whether some particular area needs to be re-examined under *Daubert* instead of continuing to be accepted as reliable based upon precedent. See, e.g., *People v Mejia*, 505 Mich 963; 937 NW2d 121, 122 (2020) (MCCORMACK, CJ, dissenting) (addressing the court's continued acceptance of the validity and reliability of child sexual abuse accommodation syndrome in light of questions raised in other states).

The lengthy advisory committee note on FRE 702 (proposed 2023 amendments) indicates a dual purpose: both to signal to judges that they should take note of this rule and also to guide those decisions. Even if the Michigan judiciary does not require the same extent of flag-waving, the guiding role of the amendment, through a comment to the revised rule, may nonetheless be useful to judges on which decisions should be addressed by weight and which are an issue of admissibility. Additionally, given the MSC's decision to 'catch up' the MREs based upon the FREs stylistically, it likely makes sense to incorporate the 2023 amendments in to MRE 702.

Another consideration is the opportunity for judicial education presented by the newly implemented Mandatory Continuing Judicial Education Program. While the federal bar does not require judicial officers to undertake continued education, Michigan will begin a mandatory continuing judicial education program, effective 2024.[49] This may present additional opportunities for judicial education that are absent at the federal level.[50]

3. Proposed text

If a change is to be made, what should it be? Of course, one solution is simply adopt FRE 702. Another option would be to keep the format and structure of the existing rule, but add language to reflect the 2023 FRE changes. The Workgroup was relatively agnostic on this issue. While adopting the language of FRE 702 has the potential benefit of directly mirroring the federal rule and thus suggesting the relevance of federal cases applying the rule, the intent to capture the 2023 FRE change can also be conveyed in a comment. The Workgroup also believed there was something to be said for committing the least amount of violence necessary to a long-standing rule of evidence lest unintended consequences follow and to ease digestion amongst bench and bar.

[49] See Michigan Supreme Court, Administrative Order No. 2021-7 (Adopted October 20, 2021).
[50] Nonetheless, both the state and federal judiciary have long had other educational institutes, e.g., Michigan Judicial Institute; Federal Judicial Center.

Attached as Attachment A is a clean and redline proposal for a revised MRE 702 which preserves the existing structure and language as much as possible.

MRE 703

Rule 703 prescribes the facts or data on which experts may base their opinion testimony. Under FRE 703, the bases need not be admissible as long as experts in the particular field would "reasonably rely" on them. Under MRE 703, the bases must be in evidence.

While the Workgroup does not recommend any changes to MRE 703, the following background and commentary is provided so as to share with the Court the bases for the Committee's recommendation.

C. FRE 703

The Federal Rules Committee originally drafted FRE 703 as a liberal standard, prioritizing efficiency and practicality.[51] The Committee reasoned that if other experts rely on particular information in their day-to-day practice, it should be reliable enough for in-court testimony.[52] In its pre-2000 form, FRE 703 did not clarify whether the relied-upon documents were themselves viewable by the jury.[53] This controversy led to a conflict between courts, with some allowing all underlying facts and data to be admitted, in addition to the opinion itself.[54] In 2000, FRE 703 was

[51] 29 Wright & Miller, Federal Practice and Procedure §6267 (2d ed.).
[52] FRE 703 advisory committee's note to 1972 proposed rules; Levine, *Locking the Backdoor: Revised MRE 703 and Its Realized Impact on Bases of Expert Testimony*, 87 U Det Mercy L Rev 505, 522 (2010); McCormick, *Evidence*, p. 38 (6th ed 1992) ("The rationale for this view is that an expert in a science is competent to judge the reliability of statements made to her by other investigators or technicians.").
[53] Benner & Carlson, *Should Michigan Rule of Evidence 703 be Revised?*, 70 Mich B J 572 (June 1991).
[54] See, e.g., Federal Trial Evidence, p. 129 (James Publishing Co., 1992 ed) (urging practitioners to "consider whether by giving [inadmissible evidence] to your expert you will be able to have it presented to the jury".).

amended to exclude inadmissible facts or data used as the basis for expert testimony unless the probative value substantially outweighs its prejudicial effect.[55]

Courts and commentators have addressed two main issues under FRE 703. The first is the perception that FRE 703 is a giant hearsay loophole in derogation of the rest of the rules of evidence and common law. The second is unique to criminal law and involves the Confrontation Clause. A leading law review article after the 2000 revision suggested that the balance struck by the revised FRE 703 largely worked as to the hearsay concerns but that the rule sometimes raised concerns in the criminal context.[56] This debate has also played out in state courts following the federal rule formulation.[57]

D. MRE 703

1. Adoption in 2003

Prior to 2003, MRE 703 (1978) departed from the then-existent Federal Rule, but more in style than substance. Whereas FRE 703 expressly sanctioned the bases of expert testimony not being in evidence, MRE 703 took a different tactic and gave the trial court discretion to require that such bases be in evidence. While this garnered some attention,[58] by the time it was addressed in 2000, at least some members of the Committee felt it was a relatively inconsequential difference (if not an improvement over the federal rule).

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[55] FRE 703 advisory committee's note to 2000 amendment ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.").

[56] Volek, *Federal Rule of Evidence 703: The Backdoor and the Confrontation Clause, Ten Years Later*, 80 Fordham L Rev 959, 996-997 (2011).

[57] See, e.g., Hamilton, *The End of Smuggling Hearsay: How People v Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond*, 21 Chap L Rev 509 (2018).

[58] See Benner & Carlson, *supra* note 52.

The Advisory Committee on the Rules of Evidence generated a report to the MSC in August 2000. In a rare split, the majority of the committee favored a version of the rule requiring the bases of the expert be in evidence, a departure from the then-existing version of the rule.[59] The reason provided for this formulation was a concern that the then-existing Michigan rule, let alone the Federal rule, provided an untrammeled back door for the admission of what would otherwise be inadmissible hearsay.

> The contradictions presented by the federal amendment exist, we submit, because it does not reach the fundamental flaw that inheres in both the federal and Michigan versions of Rule 703, i.e., the grant of authority to decide disputed issues and the substantive rights of parties on the basis of facts that are never proved. We believe that it is time to frankly acknowledge that the well-intentioned innovation of Rule 703 has proved to be unworkable and that we should return to the former practice, which required nothing more than that litigants who make assertions in court be required to prove them.[60]

Two of the eleven members dissented. Judge Tahvonen and Professor John Reed opined in favor of the federal rule (or at least the existing Michigan rule), noting that "if it be thought that Michigan's trial judges are not prepared to exercise their discretion to prevent abuse, there may be a role for the Michigan Judicial Institute."[61]

After submission of the report and an opportunity for public comment, various elements of the bench and bar opposed the proposed amendment. Judge William Giovan, who chaired the Committee and favored the majority opinion,[62] filed lengthy written comments dated January 28, 2003 to the MSC, strongly advocating the adoption of the proposed rule and attempting to rebut

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[59] See August 2000 Report of the Advisory Committee on the Rules of Evidence, p. 7.
[60] *Id.* at 12.
[61] *Id.* at 15.
[62] Judge Giovan had, even prior to the appointment of the Committee, argued for this position to the MSC, as noted in the Committee minutes.

the dissenting opinions expressed at the public hearing and in written comments. The MSC adopted his view.

2. Other States

Like FRE 703, 46 states allow expert opinion testimony even where the bases of the opinion are not admissible.[63] Of these, 9 states have an identical rule to FRE 703. Nineteen have not yet adopted the probative/prejudicial value balancing test reflecting the 2003 FRE amendments. Other states have mildly different wording, but in each of the 46, an expert may base testimony on out-of-court statements as long as there is reasonable reliance.

Only four states, then, diverge significantly from FRE 703. Massachusetts Rule of Evidence 703 requires that facts or data used as the basis of an expert opinion or inference be "independently admissible in evidence and [be] a permissible basis for an expert to consider in formulating an opinion." New York does not have codified rules of evidence, but current law allows reliance on out-of-court material only where it is reasonably relied upon, there is other evidence establishing the material's reliability, and it is not exclusively relied upon for the expert's opinion.[64]

Michigan and Ohio are the other two minority jurisdictions. Both require external bases to be in evidence.[65]

3. MRE 703: pros and cons

[63] See table attached as Attachment B. The exceptions are Massachusetts, Michigan, New York, and Ohio.

[64] However, as of 2022, the courts have created a guide which compiles statutes and case law making up evidentiary practices. See *Guide to New York Evidence*, Chapter 7.01(5)(b) (accessed June 7, 2022) https://nycourts.gov/Judges Opinion (defining when an expert may rely on out-of-court material).

[65] MRE 703; Ohio R Evid 703.

Since the adoption of MRE 703, it has not been subject to study or commentary as to whether the reasons justifying the departure from FRE 703 proved out in practice. The one exception is a 2010 law review comment[66] which summarized the history of the federal and state rules and analyzed a handful of cases citing the rule.

Within the courts, the different formulations have been noted on occasion. In *People v Inge*, unpublished opinion of the Court of Appeals, issued October 23, 2018 (Docket No. 337346), 2018 WL 5276413, the Court of Appeals noted that the trial court incorrectly allowed an expert to opine based upon another report which was not in evidence, noting that a different result might result under FRE 703. And there is not much discussion of the Confrontation Clause issue in Michigan since a strict reading of MRE 703 tends to also support the Confrontation Clause argument.[67] There are, however, examples of the Court of Appeals arguably wrongly relying upon the pre-2003 version of the rule in allowing inadmissible hearsay.[68]

What does not exist is a comprehensive review of the issues. For example, the MRE 703 formulation was thought to increase costs and trial time, especially regarding routine testimony. The classic example is that of a physician testifying to a simple diagnosis: all underlying scans and tests that the physician used for his diagnosis would first need to be admitted, thus necessarily

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[66] Levine, *supra* note 51.

[67] *Id.* See also *People v Fackelman*, 489 Mich 515, 535; 802 NW2d 552, 562 (2011).

[68] In *People v Bundy*, unpublished opinion of the Court of Appeals, issued February 1, 2022 (Docket No. 349072), 2022 WL 303327, p *13, the court allowed an expert to rely upon inadmissible hearsay, stating, "It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." (quoting *People v Lonsby*, 268 Mich App 375, 382-383; 707 NW2d 610 (2005)). *Lonsby*, however, cited a 1992 opinion for that proposition, which relied upon the pre-2003 version of MRE 703.

increasing costs and court time.[69] Additionally, it was also hoped that the conservative approach would "curtail erroneous use of experts at trial," ultimately offsetting litigation costs.[70]

Nor has there been systematic study of the main issue driving the MRE 703 formulation – the concern that the federal version regularly allowed in hearsay. Given that the federal courts and those of 46 states (to varying degrees) follow the federal formulation, one might think that if an avalanche of offensive hearsay was being permitted it would garner some attention. Yet, the Workgroup found no recent article analyzing the issue nor detailed lament by a federal court. Moreover, the Workgroup can find no record of the issue coming before the Rules Advisory Committee; that body regularly attracts proposed rule changes where issues are perceived to exist.

4. Should a change be made?

The Workgroup was evenly split on this issue but tilted toward no change. Most agreed that existing MRE 703 can cause unnecessary burdening of the trial process and trial evidence with "bases" of the expert's opinion which will never, in trial, be reviewed or discussed. Moreover, the rule is a trap for the unwary, who may be more familiar with the FRE version. On the other hand, some Workgroup members expressed concern about hearsay issues should the FRE version be adopted, and the FRE version would also unsettle the Confrontational Clause jurisprudence in Michigan. Moreover, while the strict wording of MRE 703 provides opportunities to make the trial process more burdensome, there was no overwhelming sense that this is such a pervasive problem without other potential solutions such that a rule change was justified. The Workgroup also considered the pre-2003 version of MRE 703 (which granted discretion to the trial court) but

[69] See, e.g., Levine, *supra* note 51, at 522–523 (discussing concerns that experts will have to consult more closely with attorneys to ensure that the underlying basis of each intended statement is in evidence).
[70] *Id.* at 523.

some Workgroup members were concerned about judges letting in too much hearsay and that appellate review might not be sufficient to address abuses.

FRE 704(b)

The Committee briefly considered whether this rule should be adopted in Michigan. In brief, this rule was added in the wake of the John Hinckley trial by some who thought his insanity defense to be spurious. Since its adoption it has caused some confusion in the courts and has not been adopted in the vast majority of states. The Workgroup saw no good reason to adopt the rule.

ATTACHMENT A

Potential revision of MRE 702

EXISTING MRE 702:

If the court determines that scientific, technical, or other specialized knowledge will 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 thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

2023 REVISION TO FRE 702:

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 has demonstrated by a preponderance of the evidence 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's opinion reflects a reliable application of the principles and methods to the facts of the case.

POTENTIAL REVISION TO MRE 702

If the court determines that scientific, technical, or other specialized knowledge will 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 ~~thereto~~ in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the ~~witness~~ expert's opinion reflects a reliable application of ~~has applied~~ the principles and methods ~~reliably~~ to the facts of the case. The proponent bears the burden of demonstrating to the court that it is more likely than not that the expert opinion testimony satisfies this rule.

Attachment B

Cross-jurisdictional Survey on FRE 703 and its Counterparts

Current as of June 1, 2022

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Massachusetts	Mass R Evid 703 Mass Guide to Evidence Section 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.
Michigan	MRE 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.
Ohio	Ohio R Evid 703	Minority	Bases of opinion must be in evidence	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.
New York	NY CPLR 4515 Guide to NY Evid 7.01(5)[2]	Minority	If relying on out-of-court material, must provide evidence of reliability	CPLR 4515 (b) An expert also may rely on out-of-court material if: (i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material; or the out-of-court material comes from a witness in the proceeding who was subject to full cross-examination by the opposing party; and (ii) it is a link in the chain of data and accordingly not exclusively relied upon for the expert's opinion.
Colorado	Colo R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Delaware	Del R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. Upon objection, if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Florida	Fla Stat Ann § 90.704	Majority	Different in form only	The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Georgia	Ga Code Ann § 24-7-703	Majority	Different in form only	The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Kansas	Kan Stat Ann § 60-458	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of such facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs any prejudicial effect.
Maryland	Md R 5-703	Majority	Different in form only	(a) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Vermont	Vt R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
Virginia	Va Code Ann § 8.01-401.1	Majority	Different in form only	In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
Wisconsin	Wis Stat Ann § 907.03	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.
North Carolina	NC R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Alaska	Alas R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.
Oklahoma	Okla Stat tit xii, § 2703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Tennessee	Tenn R Evid 703	Majority	Different in form only	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Idaho	Idaho R Evid 703	Majority	Different in form only	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Hawaii	Hawaii Rev Stat § 626-1, Rule 703	Majority	Different in form only; adds trustworthiness clause	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Kentucky	Ky R Evid 703	Majority	Different in form only; adds trustworthiness clause	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
Arizona	Ariz R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Hampshire	NH R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
South Dakota	SD Codified Laws § 19-19-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Utah	Utah R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
West Virginia	W Va R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Wyoming	Wy R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
New Mexico	NM R Evid 11-703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
North Dakota	ND R Evid 703	Majority	Identical	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Missouri	Mo Rev Stat § 490.065.2(2)	Majority	Identical; Only applies in civil rules here	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;
Arkansas	Ark R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
California	Cal Evid Code § 801	Majority	Omits probative value test	If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
Connecticut	Conn Code of Evid § 7-4(b)	Majority	Omits probative value test	(b) Bases of Opinion Testimony by Experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.
Illinois	Ill R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Indiana	Ind R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.
Iowa	Iowa R Evid 5.703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Louisiana	La Code Evid Ann art. 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Maine	Me R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or has personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, the facts or data need not be admissible for the opinion to be admitted.
Mississippi	Miss R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.
Montana	Mont R Evid 703	Majority	Omits probative value test	The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nebraska	Neb Rev Stat § 27-703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nevada	Nev Rev Stat 50.285	Majority	Omits probative value test	1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
New Jersey	NJ R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Oregon	Or Rev Stat § 40.415 Or R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Pennsylvania	Pa R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
South Carolina	SC R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence
Texas	Tex R Evid 703	Majority	Omits probative value test	An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
Washington	Wash R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATE	RULE	MAJ/MIN[1]	DIFFERENCES	TEXT
Alabama	Ala R Evid 703	Majority	Omits probative value test	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect
Minnesota	Minn R Evid 703	Majority	Similar rule	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.
Rhode Island	RI R Evid 703	Majority	Underlying facts are admissible if reasonably relied upon	An expert's opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.

[1] Rule categorized as "Majority" if it allows expert testimony where the bases of opinion are not in evidence

[2] New York does not have a comprehensive code of evidence. As of 2022, the *Guide to NY Evidence* compiles statutory and case law on evidentiary

Public Policy Position
MRE 702/703 Workgroup

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Civil Procedure & Courts Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan did not adopt a position on this item and has authorized this Committee to submit its position.

The Civil Procedure & Courts Committee has a public policy decision-making body with 33 members. On November 5, 2022, the Committee adopted its position after a discussion and vote at a scheduled meeting. 22 members voted in favor of the Committee's position, 3 members voted against this position, 2 members abstained, 6 members did not vote due to absence.

Support Amendment of MRE 702 and MRE 703

Explanation

The Committee voted 22 in favor, 3 opposed, with 2 abstentions to support amending MRE 702 to align with the "2023 Revision to FRE 702," as presented on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

The Committee voted 22 in favor, 3 opposed, with 2 abstentions to recommend that MRE 703 be amended to reinstate the language of MRE 703 that was in use prior to 2003.

Contact Person:

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Public Policy Position
MRE 702/703 Workgroup

The Criminal Jurisprudence & Practice Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Criminal Jurisprudence & Practice Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar of Michigan did not adopt a position on this item and has authorized this Committee to submit its position.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 27 members. On November 4, 2022, the Committee adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Committee's position, 0 members voted against this position, 3 members abstained, 8 members did not vote due to absence.

Support Workgroup Recommendation

Explanation:
The Committee voted 16 in favor with 3 abstentions to support the proposed amendments to MRE 702, as set forth as "Potential Revision to MRE 702" on page 23 of the Final Report of the MRE 702/703 Review Workgroup.

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