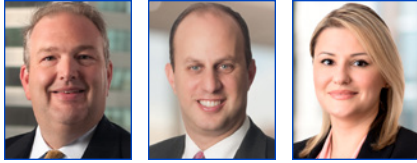


Another Victory for Reliable Science

By Robert E. Johnston, Gregory S. Chernack, and Anna G. Kornilova



Here at Hollingsworth, LLP, we love the state of Maryland. We love watching the Orioles (okay, most of

us prefer the World Champion Nationals), boating on Chesapeake Bay, hiking along the Potomac, and well, living here! So we were thrilled to open our inboxes on August 28, 2020, to find out that Maryland finally adopted *Daubert*. With the Maryland Court of Appeals' opinion in *Rochkind v. Stevenson*, No. 47, Sept. Term, 2019, 2020 WL 5085877 (Md. Aug. 28, 2020), Maryland joins 40 states¹ in adopting the principles governing the admissibility of expert testimony first espoused in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This decision finally leaves behind 6 states which still follow, at least to some extent, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and three that follow neither *Frye* nor *Daubert*.² This is a solid win for reliable science in the courtroom as *Frye* was far too permissive in admitting junk science (although some plaintiffs' lawyers prefer to argue otherwise).

Background on Maryland's Admissibility Standard

Prior to this landmark opinion, Maryland courts admitted expert testimony through two different avenues: (1) Md.

¹ As of the date of this article, *Daubert* has been adopted in the District of Columbia and the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Mississippi, Montana, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

² States that have maintained *Frye* or some form of *Frye* as of the date of this article are: California, Illinois, Minnesota, New York, Pennsylvania, and Washington. Although California has declined to adopt *Daubert*, it finds the factors it laid out for the admissibility of expert testimony persuasive. See *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012) (recognizing the role of judges as gatekeepers and their ability to step outside the *Frye* standard). States that have not adopted *Daubert* or *Frye* are Nevada, North Dakota, and Virginia.

Rule 5-702; and (2) the *Frye-Reed* test. Md. Rule 5-702 governs the admissibility of all expert testimony. The rule provides that in order for expert testimony to be admissible, such testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. To this end, Rule 5-702 requires that a trial court evaluate: (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony. Md. Rule 5-702. The third prong of this analysis—sufficient factual basis— includes two sub-elements: an adequate supply of data and a reliable methodology *Rochkind*, 2020 WL 5085877 at *9. Absent either element, the expert's opinions constitute nothing more than mere speculation or conjecture and are thus inadmissible. *Id.* Although the language does not precisely match Rule 702 of the Federal Rules of Evidence ("FRE"), the Maryland standard closely tracks the federal one. Nonetheless, in promulgating the rule, the Committee noted that Rule 5-702 was not meant to abrogate *Frye-Reed*, and that case law would develop and explain the standard for the admission of novel scientific techniques or principles. See Md. Rule 5-702 (Committee Note stating that "[t]his Rule is not intended to overrule *Reed v. State*, 283 Md. 374 (1978) and other cases adopting the principles enunciated in *Frye*.... The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law.")

The *Frye-Reed* test, on the other hand, dates back to 1978. See *Reed v. State*, 383 Md. 373 (1978). In *Reed*, the court of appeals adopted *Frye* in cases addressing the admissibility of expert witness testimony rooted in novel scientific principles or discoveries. Under the *Frye-Reed* test, "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's relevant scientific community." *Id.* at 381. Put another way, "there must be some assurance that the novel method has gained general acceptance within the relevant scientific community and is not just the view of a dissident minority." *Dixon v. Ford Motor Co.*, 433 Md. 137, 150 (2013). The "relevant scientific community" includes the "full community of scientists with sufficient training and expertise to

permit them to comprehend novel scientific methods, and may not properly be restricted to those who practice or otherwise adhere to the methods at issue.” *Reed v. State* at 444. Maryland courts never defined what would constitute a novel principle or scientific method. *Rochkind*, 2020 WL 5085877 at *9.

In theory, the relationship between the two tests was simple. Evidence rooted in novel principles had to satisfy both Md. Rule 5-702 and *Frye-Reed*. Evidence rooted in established principles had to withstand scrutiny under Md. Rule 5-702 only. The United States Supreme Court’s 1993 decision in *Daubert* upset this simple dichotomy. In *Daubert*, the Court held that FRE 702 superseded *Frye* and made reliability the touchstone of the admissibility analysis (as opposed to general acceptance). The decision listed a number of flexible factors that could be persuasive in making the reliability determination. Most importantly, *Daubert* placed judges in a gatekeeping role, responsible for assessing the reliability of expert opinions, and not merely deferring to the relevant expert community. Since then, most states followed suit and rejected *Frye* in favor of the *Daubert* multi-factor approach. Until last month, Maryland remained in the minority of states that adhered to *Frye* (at least in part) although Maryland courts had started looking towards federal *Daubert* decisions in resolving expert witness evidentiary issues. See e.g., *Rochkind*, 2020 WL 5085877 at *7–8 (citing *Blackwell v. Wyeth*, 408 Md. 575 (2009); *Chesson v. Montgomery Mut. Ins. Co.*, 434 Md. 346 (2013)).

In light of the developing *Daubert* case law in Maryland, the relationship between the tests became anything but simple. Courts struggled with which test to apply when the underlying data and its methods of collection were “generally accepted” in the community, but the conclusions were novel (or vice versa). *Id.* at *5 (citing *Blackwell*, 408 Md. at 596) (relying upon *Daubert* and its progeny and holding that medical expert opinion was not generally accepted in scientific community notwithstanding a basis in generally accepted methods). The *Rochkind* court sought to untangle this confusing relationship between Md. Rule 5-702, *Frye-Reed*, and *Daubert*.

Maryland’s New Admissibility Standard

After reviewing the history of admissibility of expert testimony in Maryland, the court rejected the duplicative analytical process, eliminated the *Frye-Reed* test, and adopted *Daubert* as the “single standard by which courts

evaluate all expert testimony.” *Rochkind*, 2020 WL 5085877 at *11. The court enumerated 10 non-exclusive factors that are germane to interpreting Md. Rule 5-702:

- 1) Whether a theory or technique can be (and has been) tested;
- 2) Whether a theory or technique has been subjected to peer review and publication;
- 3) Whether a particular scientific technique has a known or potential rate of error;
- 4) The existence and maintenance of standards and controls;
- 5) Whether a theory or technique is generally accepted;
- 6) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinion expressly for purposes of testifying;
- 7) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- 8) Whether the expert has adequately accounted for obvious alternative explanations;
- 9) Whether the expert is being as careful as he or she would be in his or her regular professional work outside his or her paid litigation consulting;
- 10) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

See *Rochkind*, 2020 WL 5085877 at *16–17. The court specifically noted that *Daubert* was a flexible approach, and no single factor was dispositive: Courts may apply “some, all or none of the factors depending on the particular expert testimony at issue.” *Rochkind*, 2020 WL 508577 at *17.

Why Now?

The court listed several reasons for why the time to adopt *Daubert* was now. It noted that Maryland’s jurisprudence already “drifted” to *Daubert* by both explicitly and implicitly relying on and adopting principles from *Daubert* and its progeny. The *Daubert* principle most at play in Maryland courts is the “analytical gap” concept first enunciated in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Per this concept, Maryland judges look for a causal link, or the

absence of an “analytical gap,” between the conclusion proffered and the data. In addition, the *Rochkind* court noted that just like in *Daubert* and its progeny, Maryland courts have implicitly recognized the trial judges’ gatekeeping function by requiring judges to consider the reliability of *all* evidence—both new and old.

Further, the court wanted to streamline the process and to stop “perpetuating a process wherein expert testimony must pass through *Frye-Reed* and Rule 5-702.” *Rochkind*, 2020 WL 5085877 at *11. The court noted that this “duplicative analytical process” had “‘muddied’ the water of our approach to expert testimony.” *Id.*

Most importantly, the court reasoned that *Daubert* is the better standard as it “centers on the reliability of the methodology used to reach a particular result,” as opposed to acceptance of that methodology. *Rochkind*, 2020 WL 5085877 at *14. As the Maryland Court of Appeals pointed out, using general acceptance as the only measure of reliability “presents a conundrum.” *Id.* This is because “a generally accepted methodology may produce ‘bad science’ and be admitted, while a methodology not yet accepted may be excluded, even if it produces ‘good science.’” *Id.* The focus on reliability “will lead to better decision-making by juries and trial judges alike.” *Id.* (internal citations omitted).

This Is a Win for Reliable Science

This is a win for reliable science. *Daubert* places clear constraints on trial judges to take charge of the quality of evidence, making them the gatekeepers who determine whether the evidence presented is reliable and hence admissible. They must carefully scrutinize an expert’s opinion and cannot simply defer to the expert. This scrutiny applies to *all* expert testimony. Those sloppy methodologies, principles, and conclusions that have been able to pass by on “general acceptance” alone will meet new scrutiny in Maryland. To be sure, even under *Daubert* many judges abdicate this responsibility as they are unwilling or unable to understand the often-complex science at issue. *Daubert* at least tells them that they *should* be doing this, and at least some judges comply. Further, the failure to apply *Daubert* properly can present a strong argument on appeal.

Given this win, we checked on other states that have clung on to *Frye*. Maryland is the only one in the past few years that has made the transition to *Daubert* from *Frye*.³ We are thrilled that Maryland decided to turn the tide, and join the supermajority of states that have adopted *Daubert*.

³ In 2018, New Jersey accepted *Daubert*, but it was not a *Frye* state previously.

Practical Implications

There are three practical implications for Maryland litigators. First, expert testimony based on novel scientific principles will no longer need to jump through multiple hoops to be admissible. Now, litigants on both sides of the aisle must be prepared to argue *Daubert* factors in order to successfully admit or keep out testimony.

Second, the court provided a standard of review for both appellate courts and litigants. All decisions regarding expert testimony are now reviewable under the abuse of discretion standard. *Rochkind*, 2020 WL 5085877 at *17. Even though this is, in theory, a lenient standard, courts elsewhere have frequently found the failure to properly scrutinize expert testimony under *Daubert* is an abuse of discretion.

Finally, Maryland practitioners should keep an eye out for changes to Md. Rule 5-702. Since the court ruled that *Daubert* is the appropriate interpretation of Md. Rule 5-702, we expect the text of the rule to reflect the change. See e.g. *Rochkind*, 2020 WL 5085877 at *13 (When there is a change in common law, “the Maryland Rules undergo revision to reflect such a change.”)

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