

The End of *Frye-Reed* and Maryland's Formal Adoption of the *Daubert* Standard

For anyone who has ever struggled to understand the proper standards for *Frye-Reed* (and Maryland expert testimony generally), significant news came down in a 33 page opinion with three dissents from the Maryland Court of Appeals in *Rochkind v. Stevenson* on August 28, 2020. After years of “drifting” towards the *Daubert* standard, the Court of Appeals finally joined the supermajority of states that use the *Daubert* standard for expert witness testimony. In doing so, the Court retired the *Frye-Reed* test, which had not only become riddled with exceptions, but also evolved into the same “analytical gap” test that courts use when applying the Maryland rules to expert testimony. The change is effective immediately and applies to all “cases that are pending on direct appeal [as of August 28, 2020] ...where the relevant question has been preserved for appellate review.” Case No. 47, September 2019 Term, at 39 (Aug. 28, 2020).

ROCHKIND V. STEVENSON AND FRYE-REED

The *Rochkind* case involved allegations of a 1991 lead paint exposure to Starlena Stevenson who was less than a year old at the time. As Starlena grew older she was diagnosed with the typical lead exposure disorder including ADHD and severe major psychological disorders. Plaintiff filed suit against the property owner in December 2011 for negligence and violations of the Maryland Consumer Protection Act. Plaintiff's medical expert filed a report concluding that Plaintiff was poisoned by lead at that home and that the lead poisoning was a significant contributing factor to her neuropsychological problems, including ADHD.

Defendant sought to exclude the expert's testimony and requested a *Frye-Reed* hearing. The trial court denied those requests which lead to a series of trials, retrials, appeals, and remands as defendant attempted to exclude the expert's specific causation opinions. While the most recent appeal was pending, Plaintiff filed a Petition for Writ of Certiorari to the Maryland Court of Appeals and Defendant filed a Cross-Petition. The Court of Appeals granted both petitions.

One of the issues before the Court of Appeals was whether the Court should adopt the standard for admitting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and retire the *Frye-Reed* test.

Maryland adopted the U.S. Supreme Court *Frye* “general acceptance” test for expert testimony in 1977 for courts to ensure the reliability of novel scientific opinions, thus creating Maryland's *Frye-Reed* test. Although Federal Rule of Evidence 702 was enacted in 1975 and directly tested the reliability of all expert opinions, Federal courts debated whether Rule 702's direct standard was compatible with the *Frye*'s indirect general-acceptance standard. In 1992, the Supreme Court settled the matter in *Daubert*, holding that *Frye* was incompatible with the Federal Rules of Evidence and should not be applied in federal trials. Federal Rule 702 was amended in 2000 to expressly incorporate *Daubert* and its progeny.

Instead of adopting *Daubert*, Maryland courts opted to use two tests – one under *Frye-Reed* and the other under Maryland Rule 5-702. *Frye-Reed* indirectly tested an opinion’s reliability by asking if it was generally accepted in the relevant scientific community and Rule 5-702(3) directly asked if the opinion has a “sufficient factual basis and reliable methodology.” Judges understood generally that Rule 5-702 did not overrule *Frye-Reed*, but judges believed that if the *Frye-Reed* applied, then the Rule 5-702(3) inquiry was not necessary. Others believed that if an opinion satisfies *Frye-Reed*, it also satisfied Rule 5-702(3). Applied correctly, expert testimony would be subjected to both tests.

The principle shortcoming of *Frye-Reed* was that it excused the court from attempting to understand the evidence at issue. A court applying *Frye-Reed* “only had to assure itself that among the people involved in the field, the technique was acceptable as reliable.” If a court ruled a doctrine had attained general acceptance, subsequent courts could easily follow suit and recognize the methodology as generally accepted without a detailed examination of the underpinnings of that methodology.

The Court of Appeals admitted that its “*Frye-Reed* jurisprudence gave trial courts a stated ‘end’—reliable methodology—without providing the ‘means’ to achieve it.” *Daubert* provides the guidance that *Frye-Reed* does not – how to determine if scientific reasoning is sound or if a theory adequately justifies a conclusion.

ROCHKIND FACTORS TO CONSIDER

The Court of Appeals recognized that because of *Daubert*’s flexibility, courts are permitted to include additional factors for determining whether expert testimony is sufficiently reliable. Thus, the following additional factors should also be considered in reviewing testimony:

- 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 opinions expressly for purposes of testifying;
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- Whether the expert has adequately accounted for obvious alternative explanations;
- Whether the expert is being as careful as they would be in their regular professional work outside paid litigation consulting; and
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Going forward, trial courts in Maryland will need to apply the five original *Daubert* factors and the additional five factors when reviewing the admissibility of expert testimony.

TAKEAWAY

Much of what the *Rochkind* Court says is not new; it is more a clarification of existing practice. Maryland courts had already been told to consider the *Daubert* factors. Moreover, the *Frye-Reed* and Rule 5-702(3) tests had merged into *Daubert*’s “analytical gap” test. Only trial courts who have not been following the precedent of Rule 5-702 need to change how they screen experts. The *Rochkind* opinion has not significantly modified the interpretation of Rule 5-702 except the label for judges who have been keeping pace. Nonetheless, the *Rochkind* decision brings clarity and certainty to the standard for admitting expert testimony at trial in Maryland.

In conclusion, the *Rochkind* decision provides a much less convoluted test for trial courts to use in future cases, and a significant upgrade and guidance to judging expert testimony.

[Click here to view a downloadable PDF of the legal update.](#)

[Click here to view the Maryland Court of Appeals opinion in *Rochkind v. Stevenson*.](#)



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