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Codifying the Rule on Expert Testimony: Why Traditional Analysis Should be Generally Acceptable

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NOTES ON THE NEW MARYLAND RULES OF EVIDENCE

A. Codifying the Rule on Expert Testimony: Why Traditional Analysis Should Be Generally Acceptable

Although based on the Federal Rules of Evidence, the new Maryland Rules in some instances differ substantively and linguistically from their federal counterparts.[1] Maryland Rules 5-702[2] and 5-703,[3] which respectively address the admissibility of expert testimony and the facts or data on which those experts may rely in forming their opinions, are noteworthy in how their language both follows and differs from the corresponding federal rule. As a result, both rules will effect a substantial evolution in the use of expert testimony in Maryland trial practice.

On the one hand, Maryland Rule 5-702, which mirrors the language of Federal Rule of Evidence 702 and the Supreme Court's re-

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1. LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 1.1, at 2 (1994). Opponents of codification argue that linguistic differences between the federal and Maryland rules will create new and problematic issues of construction. Proponents, however, contend that incorporating substantive improvements into the Maryland Rules will allow for the reasoned reform of Maryland's evidentiary law. *Id.* § 1.2.

2. Maryland Rule 5-702 states:

Testimony by Experts.

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (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. R. 5-702.

3. Maryland Rule 5-703 states:

Bases of Opinion Testimony by Experts.

> (a) In General.—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.
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> (b) Disclosure to Jury.—If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
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> (c) Right to Challenge Expert.—This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.

MD. R. 5-703.

cent decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[4] should influence Maryland courts to jettison the old *Frye* standard of "general acceptance"[5] for the admissibility of scientific evidence in favor of a more self-contained, traditional relevancy analysis. On the other hand, improvements in Maryland Rule 5-703 over the language of the Federal Rule should prevent its operation as an automatic exception to the hearsay rule, and thus avoid a major pitfall of Federal Rule of Evidence 703.[6]

1. Summary and Comparison of the Maryland and Federal Rules.—

a. Maryland Rule 5-702.—To determine the admissibility of expert testimony under new Maryland Rule 5-702, the court must initially make three findings: first, "the witness is qualified as an expert by knowledge, skill, experience, training, or education"; second, expert testimony is appropriate on the particular subject under consideration; and third, the expert testimony is supported by a sufficient factual basis.[7] These three threshold findings enable the court to determine whether the expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."[8] Once the court has determined that the proffered testimony will be helpful to the trier of fact,[9] the expert may testify "in the form of an opinion or otherwise."[10]

The first prong under Maryland Rule 5-702, the requirement that a witness be qualified as an expert "by knowledge, skill, experience, training, or education," is identical to the language of Federal Rule of Evidence 702.[11] The Federal Rule, however, possesses no equivalent

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4. 113 S. Ct. 2786 (1993).

5. *See infra* notes 15-18 and accompanying text.

6. *See infra* notes 57-60 and accompanying text.

7. MD. R. 5-702.

8. *Id.*

9. As a matter of general admissibility, the finding of helpfulness is a preliminary question made by the court under Maryland Rule 5-104(a), which states in pertinent part:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . . In making its determination, the court may, in the interest of justice, decline to require the strict application of the rules of evidence, except those relating to privilege and competency of witnesses.

MD. R. 5-104(a).

10. MD. R. 5-702.

11. Federal Rule of Evidence 702 states: "If 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." FED. R. EVID. 702.

language to the second and third prongs of the Maryland Rule.[12] Thus, Maryland Rule 5-702's three-pronged test demands a more detailed preliminary inquiry than Federal Rule of Evidence 702. The Maryland Rule and its federal counterpart also differ linguistically.[13] The differences in the level of detail and language appear to have been made purely as matters of style and clarity to provide Maryland courts with maximum guidance on the admissibility of expert testimony.[14]

Although Maryland Rule 5-702 and Federal Rule of Evidence 702 are linguistically reconcilable, their substantive application poses more difficult questions. Specifically, the Maryland Rule has left open the matter of the proper standard for admitting scientific evidence. In *Frye v. United States*,[15] the United States Court of Appeals for the District of Columbia Circuit held that novel scientific evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[16] In 1978, in *Reed v. State*,[17] the Maryland Court of Appeals expressly adopted the *Frye* standard.[18]

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12. *Id.* Although textually silent, federal courts have long since construed and adopted these requirements into the federal rule. *See infra* notes 45-53 and accompanying text.

13. *Compare* MD. R. 5-702 ("expert testimony") *with* FED. R. EVID. 702 ("[s]cientific, technical, or other specialized knowledge").

14. *See* McLain, *supra* note 1, § 2.702.3.

15. 293 F. 1013 (D.C. Cir. 1923) (rejecting admissibility of "systolic blood pressure deception test" because it had not yet gained requisite "standing and scientific recognition among physiological and psychological authorities").

16. *Id.* at 1014.

17. 283 Md. 374, 391 A.2d 364 (1978) (holding that basis of expert's scientific opinion must be generally accepted as reliable within expert's particular scientific field).

18. *Id.* at 389, 391 A.2d at 372. Since *Reed*, Maryland courts have consistently applied *Frye*. *See, e.g.*, Sabatier v. State Farm Mut. Auto. Ins. Co., 323 Md. 232, 249, 592 A.2d 1098, 1106 (1991) (explaining that *Frye* was "deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence in criminal cases based upon new scientific principles"); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983) (confirming *Frye-Reed* as applicable standard in Maryland); Haines v. Shanholtz, 57 Md. App. 92, 468 A.2d 1365 (applying *Frye-Reed* in civil case), *cert. denied*, 300 Md. 90, 475 A.2d 1201 (1984); Akonom v. State, 40 Md. App. 676, 394 A.2d 1213 (1978) (ruling stipulation by parties is not basis for admissibility where scientific evidence fails *Frye-Reed* test).

The *Reed* court, however, also recognized that some scientific tests and techniques are so widely accepted in the scientific community that a trial court may take judicial notice of their reliability. *Reed*, 283 Md. at 380, 391 A.2d at 367. Such widely accepted tests include fingerprint identification, ballistic tests and blood tests. JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1406(A), at 728 (2d ed. 1993).

The legislature may also provide the appropriate standard for the admissibility of scientific evidence. *Id.* § 1406(C); *see, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-915 (Supp. 1994) (DNA profile test); *id.* § 10-302 (breathalyzer test for intoxication); *id.* § 10-301 (1980) (radar test to establish speed).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[19] however, the Supreme Court held that the Federal Rules of Evidence superseded *Frye*'s general acceptance test for the admissibility of scientific evidence.[20] In its place, *Daubert* offered a flexible, non-inclusive inquiry under Federal Rule of Evidence 702 that required trial judges to consider: (1) a technique's known or potential error rate; (2) whether the theory or technique can be or has been tested; (3) whether it has been subject to peer review and publication; and (4) its general acceptance.[21]

Only three days after *Daubert* was decided, the Maryland Court of Special Appeals, nevertheless, reaffirmed the *Frye-Reed* test as the law of Maryland.[22] Given the persuasive logic of *Daubert* and its forceful impact on the Federal Rules of Evidence, the future of the *Frye-Reed* doctrine in light of Maryland's adoption of a code of evidence based on the federal rules remains uncertain.[23]

b. Maryland Rule 5-703.—An expert opinion may be based on first-hand knowledge, facts related in other testimony, or hearsay information learned before trial.[24] Although the facts or data upon which the opinion or inference is based need not be admissible in evidence, they must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[25]

Facts or data "reasonably relied upon by experts" may be disclosed to the jury, if the court finds the facts or data trustworthy, necessary to illuminate testimony, and unprivileged.[26] Yet, the court also

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19. 113 S. Ct. 2786 (1993).

20. *Id.* at 2794. Although *Frye* focused only on "novel" scientific techniques, the requirements of Rule 702 do not apply exclusively to unconventional evidence. *Id.* at 2796 n.11. However, well-established propositions are less likely to be challenged than novel ones and are more easily defended. *Id.*

21. *Id.* at 2796-97. A technique's general acceptance still has a bearing on the admissibility of expert testimony, but the primary focus has shifted to the scientific validity of the principles and methodology that underpin the expert's opinion. *Id.* at 2797.

22. *See* Keene Corp. v. Hall, 96 Md. App. 644, 626 A.2d 997, *cert. granted*, 332 Md. 741, 633 A.2d 102 (1993) (No. 109, Sept. term 1993, placed on inactive status Dec. 12, 1994). Although the Maryland Court of Appeals granted certiorari in *Keene*, the *Keene* case is currently on inactive status pending the bankruptcy proceedings of Keene Corporation, and will probably not be revived. Interview with Office of the Maryland Court of Appeals (Oct. 31, 1994); Interview with Joseph A. Vansant, counsel for Hall (Oct. 31, 1994).

23. *See infra* Part 3.

24. *See* MD. R. 5-703(a).

25. *Id.* Like the finding of helpfulness, the determination of whether an otherwise inadmissible hearsay basis meets this test is a preliminary question under Maryland Rule 5-104(a). *See supra* note 9.

26. MD. R. 5-703(b).

retains discretion to prevent such jury disclosure.[27] The court must, upon request, instruct the jury that it may only consider those facts or data to evaluate "the validity and probative value of the expert's opinion or inference."[28] Finally, Maryland Rule 5-703 preserves the opposing party's right to cross-examine an expert or test the basis of the expert's opinion or inference.[29]

Subsection (a) of Maryland Rule 5-703 is identical to Federal Rule of Evidence 703.[30] Subsections (b) and (c) of the Maryland Rule, however, have "no parallel in the federal rule."[31] Maryland Rule 5-703 thus possesses greater textual detail than its federal equivalent, which not only improves Rule 5-703's style and clarity but also avoids a significant hearsay problem associated with the Federal Rule.[32]

2. *Federal and State Sources of the New Rules.—*

a. Rule 5-702.—The first prong of Rule 5-702, qualification of the expert, is consistent with the wide discretion exercised by Maryland trial judges in qualifying experts.[33] The second prong, appropriateness of expert testimony, is also well-supported by Maryland case law.[34] In *Globe Security Systems v. Sterling*,[35] the plaintiff sought to introduce expert testimony solely related to the truthfulness of the plaintiff in a case where plaintiff's credibility was at issue.[36] Out of disbelief in

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27. *Id.*

28. *Id.*

29. MD. R. 5-703(c).

30. Federal Rule of Evidence 703 states:

> Bases of Opinion Testimony by Experts.
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> 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.

FED. R. EVID. 703.

31. *See* MCLAIN, *supra* note 1, § 2.703.3.

32. *See infra* notes 58-62 and accompanying text.

33. *See, e.g.*, Radman v. Harold, 279 Md. 167, 367 A.2d 472 (1977) (allowing qualification of medical expert based on her experience and knowledge of abdominal hysterectomies, despite the fact that she had never performed the procedure); Consolidated Mechanical Contractors, Inc. v. Ball, 263 Md. 328, 283 A.2d 154 (1971) (requiring expert witnesses to be qualified by skill, knowledge or experience, and allowing trial judge wide discretion in this determination).

34. *See* Oken v. State, 327 Md. 628, 612 A.2d 258 (1992) (admitting expert testimony in area beyond juror's everyday experience based on its potential to assist jury in its decision-making), *cert. denied*, 113 S. Ct. 1312 (1993); *Consolidated Mechanical Contractors*, 263 Md. at 328, 283 A.2d at 154 (emphasizing that test for admissibility of expert testimony is whether expert's opinion will aid trier of fact).

35. 79 Md. App. 303, 556 A.2d 731 (1989).

36. *Id.* at 306-07, 556 A.2d at 733.

a psychologist's ability to determine whether a person's falsehood was made with the intent to deceive, the Court of Special Appeals concluded that such testimony invaded the province of the jury, whose duty it was to evaluate the credibility of witnesses.[37]

The third prong of Maryland Rule 5-702, factual basis for expert testimony, also follows Maryland case law.[38] In *Beatty v. Trailmaster Products, Inc.*,[39] the plaintiff sued the designer, manufacturer, and seller of a "Lift Kit" designed to raise the suspension of a vehicle.[40] Based on his background, training and experience in automobile accident reconstruction, plaintiff's expert witness stated that the Lift Kit was foreseeably unsafe and unreasonably dangerous because it raised a vehicle too high, "even though it was approximately 4 inches below the statutory maximum set by the legislature."[41]

Plaintiff's expert offered no additional scientific or other evidentiary support for his opinion and during a deposition stated that the statutory standard was simply too high.[42] The Court of Appeals held that the expert's opinion was insufficient evidence to survive summary judgment, particularly as the expert had cited "neither developing consensus nor sound data to buttress his opinion."[43] The court declared that an " 'expert's judgment has no probative force unless there is a sufficient basis upon which to support his conclusions.' "[44]

The second and third prongs of new Maryland Rule 5-702 also find support in federal case law. In *Persinger v. Norfolk & Western Railway Co.*,[45] the plaintiff sued his former employer for injuries sustained while lifting a 75-pound motor during the course of his employment. The trial court allowed plaintiff's expert to testify that the weight plaintiff had to lift to perform his job was unreasonable.[46] The Fourth Circuit held that the expert testimony should have been excluded,

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37. *Id.* at 308-09, 556 A.2d at 734.

38. *See, e.g.*, Evans v. State, 322 Md. 24, 585 A.2d 204 (1991) (concluding expert's opinion that defendant suffered from mental disorder was not sufficiently supported by foundation facts and reasons); *Globe Security Sys.*, 79 Md. App. at 307, 556 A.2d at 733 (an "expert's opinion . . . is admissible only if it is based upon a legally sufficient factual foundation").

39. 330 Md. 726, 625 A.2d 1005 (1993).

40. *Id.* at 730, 625 A.2d at 1007.

41. *Id.* at 739-40, 625 A.2d at 1012.

42. *Id.* at 740, 625 A.2d at 1012.

43. *Id.*

44. *Id.* at 741, 625 A.2d at 1012 (quoting Bohnert v. State, 312 Md. 266, 275, 539 A.2d 657, 661 (1988)).

45. 920 F.2d 1185 (4th Cir. 1990).

46. *See id.* at 1188.

because the subject in question, the amount of weight that it is safe to lift, was within the common knowledge of jurors.[47]

In *Sparks v. Gilley Trucking Co.*,[48] the plaintiff brought a negligence action for injuries sustained in an automobile accident. The trial court admitted the testimony of the defendant's expert, a policeman experienced in accident investigation and reconstruction, who opined that the plaintiff had been speeding based upon the length and direction of the skid marks, the highway surface, the condition of the car, and the tree that was hit.[49] The Fourth Circuit acknowledged that expert testimony not supported by a sufficient factual basis may be excluded but held that the policeman's factual assumptions were supported by the evidence.[50] Thus, although Federal Rule of Evidence 702 does not contain the explicit language of Maryland Rule 5-702, federal courts have construed both "appropriateness"[51] and "sufficient factual basis"[52] requirements into the federal rule as essential to its operation as a gatekeeper to admit only helpful expert testimony.[53]

b. Rule 5-703.—The notion that expert opinions may be based on first-hand knowledge, facts related in other testimony, or hearsay information, as long as experts in the particular field reasonably rely on such facts or data in forming their opinions, is not foreign to Maryland case law.[54] As the Committee Note to Maryland Rule 5-703 indicates, subsections (b) and (c) are derived from Kentucky Rule of Evidence 703,[55] which is derived from an ABA committee proposal

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47. *Id.*

48. 992 F.2d 50 (4th Cir. 1993).

49. *Id.* at 53-54.

50. *Id.* at 54.

51. *See also* United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) (finding expert testimony about defendant's confused state of mind inadmissible because juries regularly decide such factual inquiries); United States v. Cecil, 836 F.2d 1431 (4th Cir.) (finding expert testimony about co-conspirator's ability to tell truth inadmissible because issue of credibility is strictly for jury), *cert. denied*, 487 U.S. 1205 (1988).

52. *See Fowler*, 932 F.2d at 312 (acknowledging that expert testimony must be supported by adequate foundation).

53. *Id.* at 315.

54. *See, e.g.*, Consolidated Mechanical Contractors, Inc. v. Ball, 263 Md. 328, 335-36, 283 A.2d 154, 158 (1971) (supporting admissibility of expert testimony based on hearsay where such reports are relied on by expert in practice of her profession); *cf.* Hartless v. State, 327 Md. 558, 611 A.2d 581 (1992) (explaining if expert opinion is entirely unsupported by substantive evidence, then the opinion is inadmissible).

55. Sections (b) and (c) of Kentucky Rule 703 state:

> (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

to amend the federal rule.[56] In large part, the ABA's proposed amendments[57] were designed to "settle the question of whether Rule 703 creates a giant automatic exception to the hearsay rule for otherwise inadmissible hearsay reports and opinions."[58] Essentially, the ABA's goal was to prohibit the potential abuse of the Rule by practitioners who used it to present evidence otherwise inadmissible.[59] To allow experts to go beyond the simple identification of the source of their conclusions to an extensive recitation from another's report re-

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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.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

KY. R. EVID. 703.

56. *See* MCLAIN, *supra* note 1, § 2.703.3. Professor McLain characterizes the Kentucky Rule as "an abbreviated version of an ABA Committee's proposal . . . to amend the federal rule." *Id.*

57. The pertinent proposed amendment to Federal Rule 703 is section (b):

(b) Admissibility of Underlying Facts and Data.

Except as provided hereinafter in this rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.

(1) Exception.

Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.

(2) Discretion Whether or Not Independently Admissible.

Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.

(3) Opposing Party Unrestricted.

Nothing in this rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

ABA Comm. on Rules of Crim. Pro. and Evid., Crim. Just. Sec., *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 369-70 (1987) [hereinafter *Fresh Review*].

58. *Id.* at 371.

59. Peter J. Rescorl, Comment, *Fed. R. Evid. 703: A Back Door Entrance for Hearsay and Other Inadmissible Evidence: A Time for Change?*, 63 TEMP. L. REV. 543, 556 (1990); *see also* Edward B. Arnolds, *Federal Rule of Evidence 703: The Back Door is Wide Open*, 20 FORUM 1, 18 (1984) (explaining that such abuse of the Federal Rule is an increasingly common trial tactic).

sults in the "back door" introduction of a nontestifying expert's report which may impinge on the defendant's Sixth Amendment rights.[60]

The ABA Committee's Comment to Proposed Rule 703 also makes clear that the court's discretion to admit the independently inadmissible basis of an expert's opinion is subject to Rule 403.[61] Not surprisingly the Committee Note to Maryland Rule 5-703 also recognizes the Confrontation Clause and Maryland Rule 5-403 as limitations to the court's discretion to disclose the basis of an expert's opinion to the jury.[62]

To the extent that substantively inadmissible hearsay may be admitted for the sole purpose of explaining the factual basis of an expert's opinion, Maryland Rule 5-703(b) codifies Maryland case law. In *Maryland Department of Human Resources v. Bo Peep Day Nursery*,[63] the Department revoked the defendant's license based on findings that several preschool age children had been subject to physical and sexual abuse at defendant's child care center.[64] The Department's expert, a clinical psychologist, opined that two of the children she treated had been sexually abused at Bo Peep, based in part on parental statements and statements made by the children in therapy sessions.[65] The Court of Appeals held that statements of history related by the patient to a nontreating medical practitioner, who was engaged only to render an expert opinion, were admissible for the limited purpose of explaining the basis of the expert's opinion.[66]

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60. *Fresh Review*, *supra* note 57, at 371. The Sixth Amendment states in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

61. *Fresh Review*, *supra* note 57, at 372. Rule 403 requires the court to determine if the probative value of the proffered evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

62. The text of the Committee Note to Maryland Rule 5-703 states:

> Subject to Rule 5-403, and in criminal cases the confrontation clause, experts who rely on information from others may relate that information in their testimony if it is of a type reasonably relied upon by experts in the field. If it is inadmissible as substantive proof, it comes in merely to explain the factual basis for the expert opinion. The opposing party then is entitled to an instruction to the jury that it may consider the evidence only for that limited purpose.

MD. R. 5-703, committee note.

63. 317 Md. 573, 565 A.2d 1015 (1989), *cert. denied*, 494 U.S. 1067 (1990).

64. *Id.* at 577, 565 A.2d at 1017.

65. *Id.* at 588, 565 A.2d at 1022-23.

66. *Id.* at 589, 565 A.2d at 1023; *see also* Attorney Grievance Comm'n v. Nothstein, 300 Md. 667, 679, 480 A.2d 807, 813 (1984) (recognizing that substantively inadmissible hearsay is only admissible to explain the basis of the expert's opinion).

Maryland Rule 5-703 is in harmony with Maryland case law which also provides for an appropriate limiting instruction to the jury.[67] Under Maryland Rule 5-703, however, the admission of hearsay to explain the basis of the opinion hinges on whether the underlying facts are "trustworthy, necessary to illuminate testimony, and unprivileged."[68] Given these three qualifications, derived from the Kentucky Rule and the ABA's proposed amendment, Maryland Rule 5-703(b) should operate to prevent the type of abuses that have plagued the Federal Rule. In this respect, the textual differences between the Maryland and federal rules cannot simply be explained away by considerations of style and clarity, but reflect a carefully reasoned strategy to ensure the proper substantive application of the Maryland Rule, in light of identifiable problems experienced under the Federal Rule.

3. Reconciling Maryland Rule 5-702 with the Frye-Reed *Doctrine.*— The question remains whether, under the new code of evidence, Maryland courts will continue to require that the proponent of scientific tests or findings show general acceptance of the underlying principles or techniques under the *Frye-Reed* standard in lieu of the traditional requirements of relevancy and helpfulness to the trier of fact.[69] The silence of the Rule on the appropriate standard[70] for admitting scientific evidence conjures the same interpretive differences that afflicted Federal Rule 702 prior to the *Daubert* decision in 1993.[71] In view of this history, Maryland's codification of its rules of evidence counsels in favor of the re-examination of the general acceptance standard.

a. The Benefits of Frye-Reed.—Proponents of the *Frye-Reed* general acceptance standard argue that: (1) it provides a "*method* by

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67. *See, e.g.*, Beahm v. Shortall, 279 Md. 321, 368 A.2d 1005 (1977) (requiring that jury be instructed to evaluate inadmissible hearsay statement only to explain the basis of expert's conclusions and not as proof of the truth of statement).

68. MD. R. 5-703(b).

69. *See* 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 203, at 873-74 (John W. Strong ed., 4th ed. 1992).

70. As an historical parallel, *Frye* was also the dominant standard for admissibility in the federal courts when the Federal Rules of Evidence were adopted. United States v. Downing, 753 F.2d 1224, 1234 (3d Cir. 1985). As with Maryland Rule 5-702, neither the text of Federal Rule of Evidence 702, nor the accompanying notes of the Advisory Committee, indicated the proper admissibility standard for novel scientific evidence. *Id.*

71. Proponents of the "general acceptance standard" argued that *Frye* was a judicial creation, and that nothing in the language of the rules suggested a disapproval of such interstitial judicial rule-making. *Id.* at 1235. Opponents contended that the Rule's silence should be regarded as tantamount to abandonment of the general acceptance standard. *Id.* at 1234.

which courts can assess the reliability of novel scientific expert testimony" by permitting experts who know the most about a procedure to assess its status;[72] (2) it promotes uniformity of decisions by guaranteeing the existence of a coterie of experts qualified to testify about the status of a particular procedure;[73] (3) it avoids "complex, expensive, and time-consuming courtroom dramas";[74] and (4) it safeguards against the possible prejudicial effects of testimony based upon an unproven hypothesis in an isolated experiment and shields juries from any tendency to treat scientific evidence as infallible.[75]

In *Reed v. State*[76] the Court of Appeals invoked each of these arguments to justify its adoption of the *Frye* standard in Maryland.[77] The court stated that fairness to the litigant required that a scientific judgment be rendered on the reliability of a particular scientific process, before the result of that process could be used against her.[78] The court expressed concern that to allow scientific techniques not generally accepted into evidence would cause the proceedings to "degenerate into trials of the technique itself" and distract the fact finder from rendering judgment on the merits of the case.[79] The court's most "compelling reasons" to adopt *Frye* were a belief that juries are incompetent to evaluate expert testimony and the perception that only the *Frye* test would ensure the availability of a minimum reserve of experts to examine a particular scientific technique in a given case.[80]

b. The Disadvantages of Frye-Reed.—Opponents of *Frye-Reed* argue that: (1) its vague terms allow courts "to manipulate the parameters of the relevant 'scientific community' and the level of agreement needed for 'general acceptance'";[81] (2) it may require courts "to exclude much probative and reliable information from the jury's consideration,"[82] and, conversely, it may "admit into evidence expert testimony that derives from inaccurate or unreliable principles or

72. *Id.* at 1235.

73. *Id.*; *see also* BROUN ET AL., *supra* note 69, § 203, at 873.

74. BROUN ET AL., *supra* note 69, § 203, at 873.

75. *See Downing*, 753 F.2d at 1235-36; BROUN ET AL., *supra* note 69, § 203, at 873.

76. 283 Md. 374, 391 A.2d 364 (1978).

77. *See id.* at 381-89, 391 A.2d at 368-72.

78. *Id.* at 385, 391 A.2d at 369-70.

79. *Id.* at 388, 391 A.2d at 371-72.

80. *Id.* at 496, 391 A.2d at 424 (Smith, J., dissenting).

81. United States v. Downing, 753 F.2d 1224, 1236 (3d Cir. 1985).

82. *Id.*

techniques";[83] and (3) it has historically proven to be "too malleable to provide the method for orderly and uniform decision-making."[84]

Judge Smith's dissent in *Reed* relied primarily on *Frye*'s lack of definitive criteria to determine "'who and how large the pertinent scientific community must be.'"[85] The existence of "'[a]bsolute certainty of result or unanimity of scientific opinion is not required for admissibility because every useful new development must have its first day in court.'"[86] Judge Smith's dissent also remarked on the fundamental inconsistency between the Federal Rules of Evidence, or a state evidence code patterned after the federal rules, which favors the admissibility of expert testimony whenever it is relevant and assists the trier of fact, and the *Frye* rule, which imposes "'an additional, *independently controlling* standard.'"[87]

c. Proposed Solution.—Convinced that *Frye*'s objectives can be met with less drastic constraints on the admissibility of scientific evidence, a substantial consensus of both courts and commentators[88] opposed to *Frye* has offered numerous alternatives including: a substantial acceptance test;[89] an evaluation of reliability or validity, rather than the extent of acceptance;[90] use of a panel of experts, rather than the courts, to screen new developments for acceptance;[91] and the observance of traditional standards of relevancy.[92]

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83. *Id.* at 1236 n.14.

84. *Id.* at 1237.

85. Reed v. State, 283 Md. 374, 406, 391 A.2d 364, 380 (Smith, J., dissenting) (quoting John F. Decker & Joel Handler, *Voiceprint Identification Evidence—Out of the* Frye *Pan and Into Admissibility*, 26 AM. U. L. REV. 314, 361-62 (1977)).

86. *Reed*, 283 Md. at 462, 391 A.2d at 408 (internal quotation marks omitted) (quoting United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975)).

87. *Id.* at 467, 391 A.2d at 411 (quoting MCCORMICK ON EVIDENCE § 203, at 491 (2d ed. 1972)).

88. *See, e.g.*, BROUN ET AL., *supra* note 69, § 203, at 873.

89. *See Baller*, 519 F.2d at 463 (applying more relaxed standard than *Frye*, requiring only that theory be sufficiently proven to allow jury to give evidence whatever weight it sees fit).

90. *See* Fredric I. Lederer, *Resolving the* Frye *Dilemma—A Reliability Approach*, 115 F.R.D. 84, 85 (1987) (suggesting that proffered evidence merely satisfy relevance requirements of Federal Rule of Evidence 401, which demands evaluation of evidence's probative worth, and the helpfulness requirement of Federal Rule of Evidence 702).

91. *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1231 (1980) (discussing approach that requires independent body of experts to review novel scientific techniques before they could be used in court).

92. *See, e.g.*, Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993) (explaining that Federal Rule of Evidence 702's requirement that expert testimony "assist the trier of fact" goes primarily to relevance); Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 115 F.R.D. 89, 89-91 (1987) (explaining that courts should balance probative value against countervailing considerations to admissibility specified in Federal

As a threshold matter, the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* acknowledged that *Frye*'s rigid and exclusive general acceptance test was at odds with the liberal thrust of the federal rules and their general approach that relaxes traditional barriers to opinion testimony.[93] An exclusive *Frye* standard is also inherently inconsistent with a state code of evidence patterned after the federal rules.[94] Given this logic and Maryland's recent adoption of a code of evidence based on the federal model, *Frye-Reed* simply should not endure as an independent and exclusive admissibility test for novel scientific evidence in Maryland.

To resolve the dilemma of *Frye-Reed* and new Rule 5-702, Maryland courts should exercise and apply Rule 5-702 consistent with its foundational sources in order to reconcile conflicts with the common law. Traditional relevancy analysis under the new Maryland Rules, tempered by application of the rules governing expert testimony, is clearly the most appealing resolution to the *Frye* dilemma.

Maryland Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[95] Maryland Rule 5-402 states, moreover, that "[e]xcept as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules,[96] all relevant evidence is admissible."[97] The mere relevance of scientific evidence does not hinge on general acceptance of a theory.

Rule of Evidence 403 to decide whether expert may testify about novel scientific theory); Giannelli, *supra* note 91, at 1235 (outlining three-step process under the rules to require that a court: determine probative value of evidence; identify dangers such as potential for misleading jury; and balance probative value against identified dangers); Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911-12 (1982) (proposing new model of traditional analysis and foreshadowing several factors recommended by Court in *Daubert* to determine admissibility of scientific evidence).

93. *Daubert*, 113 S. Ct. at 2794. The Court stated that *Frye*'s "austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials." *Id.*

94. *Cf.* State v. Williams, 388 A.2d 500 (Me. 1978) (holding that *Frye* was inconsistent with and not incorporated into Maine rules of evidence, which were patterned after federal rules). Judge Smith's dissent in *Reed* drew upon the reasoning of *Williams* to attack the requirement of "general acceptance" as an unnecessarily stringent condition for establishing relevancy. Reed v. State, 283 Md. 374, 500, 391 A.2d 364, 426 (1978) (Smith, J., dissenting).

95. MD. R. 5-401.

96. This provision could form the basis to overrule the *Frye-Reed* doctrine as inconsistent with the Maryland rules. *See supra* notes 93-94 and accompanying text.

97. MD. R. 5-402.

However, Maryland Rule 5-402 is limited by Maryland Rule 5-702. The crux of Maryland Rule 5-702, like its federal equivalent, is whether expert testimony will be helpful to the trier of fact. In order to characterize this helpfulness requirement as a counterweight to a simple relevance analysis, the Third Circuit in *United States v. Downing*[98] surmised:

> Although . . . "helpfulness" necessarily implies a quantum of reliability beyond that required to meet a standard of bare logical relevance, . . . it also seems clear . . . that some scientific evidence can assist the trier of fact in reaching an accurate determination of facts in issue even though the principles underlying the evidence have not become "generally accepted" in the field to which they belong.[99]

While general acceptance should have a bearing on the inquiry, it is neither a necessary nor a sufficient condition for admissibility.[100] In fact, many factors may bear on the inquiry.[101] Maryland's underlying goals of codification militate in favor of adopting an analysis that tracks *Daubert*.

Professor McLain identifies, among several others, the following goals of codification: (1) to facilitate analysis of federal case law construing analogous federal rules; (2) to expand the role that Maryland decisions play in the national discourse and facilitate the Maryland courts' influence of federal jurisprudence; (3) to promote in national scholarly works the inclusion of the Maryland Code and case law that construes it, perhaps informing other jurisdictions' construction of their own evidence rules.[102] Maryland's ability to accomplish each of these goals is diminished by its observance of the increasingly minority position of *Frye-Reed*. The utility of federal case law to Maryland case law, and vice versa, increases as a function of the analytical uniformity between the two.[103]

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98. 753 F.2d 1224 (3d Cir. 1985).

99. *Id.* at 1235.

100. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2797 (1993); *Downing*, 753 F.2d at 1237. Notably, the Supreme Court in *Daubert* relied heavily upon, and closely tracked the reasoning of *Downing* in developing its opinion.

101. *See Daubert*, 113 S. Ct. at 2796; *Downing*, 753 F.2d at 1239.

102. MCLAIN, *supra* note 1, § 1.2, at 3.

103. *Id.* § 1.2, at 2-3. The Kentucky Evidence Rules Study Committee also strived for uniformity between the Kentucky Rules and the Federal Rules and reasoned that uniformity "would minimize the possibility of forum shopping and promote judicial efficiency." John M. Dosker, *The Kentucky Rules of Evidence: Trojan Horse or Improvement Over Common Law?*, 20 N. KY. L. REV. 701, 702 (1993).

In her review of the goals of codifying the Federal Rules of Evidence, Professor Berger characterized the rules on expert testimony as an area in which the flexible, case-by-case

If Maryland were to adopt the *Daubert* analysis, Rule 5-702 would continue to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."[104] Under a *Daubert* analysis, "Rule 702 governs all aspects of the general explanatory theory while [Rule] 703 controls the manner in which the specific facts of the pending case are factored into the expert's reasoning."[105] In effect, the *Daubert* decision has solved two problems at once: It rejects the *Frye* standard and it resolves the confusion over which rule properly validates the standard for the admissibility of expert testimony in favor of Federal Rule of Evidence 702.[106] The validation analysis under Federal Rule of Evidence 702, together with a narrow interpretation of Federal Rule of Evidence 703, will ensure coherent interaction among the rules as a whole, while it guarantees that "expert testimony law rests on sound evidentiary policy."[107] Interestingly, by framing the issue of the proper standard for the admissibility of expert testimony in the Committee Note to Maryland Rule 5-702,[108] Maryland's drafters may be preparing to recognize *Daubert*'s persuasive reasoning, with respect to both the proper admissibility standard and the rule under which it should be applied.

4. Conclusion.—Maryland Rule 5-702 enjoys stylistic and clarifying improvements over its federal counterpart, but is otherwise textually reconcilable. Maryland Rule 5-703 also improves on its federal equivalent through language designed to prevent the use of the rule as a "back door" exception to the hearsay rule. With respect to the admissibility of scientific evidence, Maryland Rule 5-702's substantive

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approach mandated by the federal rules was working well, and "where rigid rules excluding entire categories of evidence[, like the *Frye* rule,] should not be allowed to develop." Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 271 (1984).

104. *Daubert*, 113 S. Ct. at 2795.

105. Edward J. Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703: The Significance of the Supreme Court's Decision to Rely on Federal Rule 702 in* Daubert v. Merrell Dow Pharmaceuticals, Inc., 54 MD. L. REV. 352, 368 (1995).

106. *See* Michael C. McCarthy, Note, *"Helpful" or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 387 (1992) (highlighting need for clear exposition of Rules 702 and 703 in light of confusion among courts and commentators concerning proper application of these rules).

107. Imwinkelried, *supra* note 105, at 375.

108. The Committee Note to Maryland Rule 5-702 reads:

> This Rule is not intended to overrule *Reed v. State*, 283 Md. 374 (1978) and other cases adopting the principles enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law. Compare *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

MD. R. 5-702, committee note.

language conflicts with Maryland's judicially created *Frye-Reed* standard. Nevertheless, proper application of Maryland's new rules of evidence, consideration of the underlying goals of codification, and judicial deference to the sources of the Maryland rules, dictate that this conflict should be resolved by resort to the traditional relevancy analysis contained within the rules themselves.

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