

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 684
Judiciary

(Delegate Crutchfield, *et al.*)

Civil Actions - Health Care Malpractice Claims - Expert Witnesses

This bill, for health care malpractice claims, specifies that 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 only if (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. In doing so, the bill codifies Federal Rule of Evidence 702, which uses the *Daubert* standard in determining reliability for expert testimony.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State finances or operations.

Local Effect: The bill is not anticipated to affect local government finances or operations.

Small Business Effect: Minimal, as discussed below.

Analysis

Current Law/Background:

Maryland Rule 5-702 (Rule of Evidence)

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 must 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.

Federal Rule 702 (Rule of Evidence)

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 (1) 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; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

Daubert Standard

The *Daubert* standard is used by a trial judge to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that can properly be applied to the facts at issue. This standard comes from the Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

Under the *Daubert* standard, the factors that may be considered in determining whether the methodology is reliable under Federal Rule of Evidence 702 are (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

In the federal court system, the *Daubert* standard replaced the *Frye-Reed* standard, which is still used in some states.

Maryland Frye-Reed Standard

The *Frye-Reed* standard of general acceptance is still nominally used in Maryland. However, the Maryland Court of Appeals has described itself as "drifting" toward *Daubert*. Also, the 66-page opinion in *Sissoko v. State*, 182 A.3d 874 (Md. Ct. Spec. App. 2018) explains the evolution of *Frye-Reed* law, compares the *Frye-Reed* standard to Maryland Rule 5-702(3), and applies a type of *Daubert* analysis. Thus, Maryland is already close to using the *Daubert* standard.

Small Business Effect: Since the bill moves Maryland toward using the *Daubert* standard, which it is already close to using, it is unlikely significant resources will be required for small businesses, such as law firms, to comply.

Additional Information

Prior Introductions: SB 784 of 2019, a bill containing a similar provision, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1323 of 2019, received a hearing in the House Judiciary Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Health Care Alternative Dispute Resolution Office; Department of Legislative Services

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Analysis by: Hillary J. Cleckler

Direct Inquiries to:
(410) 946-5510
(301) 970-5510