

**THE COURT OF APPEALS OF MARYLAND
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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May 19, 2021

The Honorable Mary Ellen Barbera,
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Your Honors:

The Rules Committee submits this Second Supplement to its Two Hundred Seventh Report. These are all clerical or housekeeping corrections, shown in bolded language, that were brought to our attention after the Report was filed. We apologize for any inconvenience this may have caused the Court. If the Court approves these changes, we will remove the bolding from the text of the Rules to be included in the Rules Order.

Respectfully Submitted,

/s/

Alan M. Wilner
Chair

AMW:sdm

Enclosures

cc: Suzanne C. Johnson, Clerk

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 700 - OPINIONS AND EXPERT TESTIMONY

DELETE current Rule 5-702 and ADD new Rule 5-702, as follows:

RULE 5-702. TESTIMONY BY EXPERTS

(a) Generally

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.

(b) Factors to Consider

~~In~~ ~~Relevant~~ factors for determining the reliability of the expected testimony are flexible and may include but are not limited to:

- (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 litigation, or whether they have developed their opinions expressly for the purpose 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 the expert would be in the expert's regular professional work outside the expert's paid litigation consulting; and

(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.

Committee note: In applying the factors set forth in section (b), courts also should consider the potential impact of these factors on people of color and members of underserved or other disadvantaged communities. See *Rochkind v. Stevenson*, **471 Md. 1** (2020), Watts, J. dissenting.

Cross reference: See *Rochkind v. Stevenson*, **471 Md. 1** (2020).

Source: This Rule is new. It is derived from the 2020 version of Fed. R. Evid. 702 and *Rochkind v. Stevenson*, **471 Md. 1** (2020).

REPORTER'S NOTE

The Rules Committee recommends that current Rule 5-702 be deleted and replaced by proposed revised Rule 5-702, which codifies the holding in *Rochkind v. Stevenson*, **471 Md. 1** (2020). In that case, the Court of Appeals adopted the *Daubert* reliability factors for expert testimony (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) and rejected the previous *Frye-Reed* standard (*Frye v. United States*, 293 U.S. 1003 (D.C. Cir. 1923) and *Reed v. State*, 282 Md. 374 (1978)).

Section (a) is derived from Fed. R. Evid. 702, which states the general principle that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify if certain conditions are met.

Section (b) lists the non-exhaustive factors for the court to consider, if relevant, in determining the reliability of testimony under section (a). Subsections (b)(1) through (5) are derived from the *Daubert* opinion, which emphasized that the factors are neither exclusive nor dispositive. Subsections (b)(6) through (10) are additional factors developed by various courts that the Court of Appeals found persuasive in interpreting the admissibility Rule.

A Committee note following section (b) notes that, in applying the factors set forth in section (b), courts should be mindful of a concern expressed in the dissenting opinion in *Rochkind* regarding the potential impact on people of color and members of underserved or other disadvantaged communities.

MARYLAND RULES OF PROCEDURE
TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT
CHAPTER 800 - REMOTE ELECTRONIC PARTICIPATION IN JUDICIAL
PROCEEDINGS

AMEND Rule 2-801 by adding definitions of "evidentiary proceeding," "judicial proceeding," and "virtual jury trial"; by adding clarifying language to the definition of "remote location" and a Committee Note after the definition; by revising the definition of "video conferencing" to include virtual jury trials; and by making stylistic changes, as follows:

RULE 2-801. DEFINITIONS

In this Chapter, the following definitions apply except as otherwise provided or as necessary implication requires:

(a) Evidentiary Proceeding

"Evidentiary proceeding" means a judicial proceeding at which evidence in any form will be presented.

(b) Judicial Proceeding

"Judicial proceeding" means any evidentiary or non-evidentiary proceeding over which a judge, magistrate, auditor, or examiner presides.

~~(a)~~ (c) Non-evidentiary Proceeding

"Non-evidentiary proceeding" means a judicial proceeding, including a conference, presided over by a judge, magistrate, auditor, or examiner, where neither testimony nor documentary or physical evidence will be presented, other than by stipulation by all parties.

Committee note: Consideration of documents attached to a motion or a response to a motion does not, itself, preclude a hearing on the motion from being deemed a "non-evidentiary proceeding."

~~(b)~~ (d) Participant

"Participant" includes a party, witness, attorney for a party or witness, judge, magistrate, auditor, or examiner, and any other individual entitled to speak or make a presentation at the proceeding.

~~(e)~~ (e) Remote Electronic Participation

"Remote electronic participation" means simultaneous participation in a judicial proceeding or conference from a remote location by means of telephone, video conferencing, or other electronic means approved by the court pursuant to the Rules in this Chapter.

~~(d)~~ (f) Remote Location

"Remote location" means a place other than the courtroom or other physical location where a judicial proceeding or conference is to be conducted. For purposes of this definition, the place where a judicial proceeding or conference is to be

conducted is the place from which the presiding judicial official will be participating.

Committee note: Section (f) of this Rule takes account of the situation in which the presiding judicial official also will be participating from a place other than the court facility.

(e)-(g) Video Conferencing

“Video conferencing” means a method of ~~conducting~~ **conducting** a judicial proceeding ~~conducted~~ by the use of an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors and related audio equipment.

(h) Virtual Jury Trial

“Virtual jury trial” means a jury trial conducted by remote electronic participation.

Source: This Rule is new.

REPORTER’S NOTE

Proposed amendments to Rule 2-801 provide additional definitions for terms of art used throughout Chapter 800.

New sections (a) and (b) define “evidentiary proceeding” and “judicial proceeding,” respectively.

In section (f), clarifying language is added to the definition of “remote location.” A Committee note also is added.

A definition of “virtual jury trial” is added as section (h).

Stylistic changes are also made.

MARYLAND RULES OF PROCEDURE
TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT
CHAPTER 800 - REMOTE ELECTRONIC PARTICIPATION IN JUDICIAL
PROCEEDINGS

ADD new Rule 2-807, as follows:

RULE 2-807. VIRTUAL JURY TRIALS

(a) Applicability

(1) Applicability of this Rule.

This Rule applies to civil actions that the county's case management plan provides are eligible for a virtual jury trial.

Cross reference: See Rule 16-302 (b).

(2) Applicability of Other Rules

Except to the extent of any inconsistency with this Rule, the other applicable Maryland Rules apply. To the extent there is any inconsistency, this Rule prevails.

(b) Circumstances Warranting Virtual Jury Trial

In any case where (1) the parties and the county administrative judge consent to a virtual jury trial or (2) the court orders a virtual trial due to a state of emergency declared by the Governor and the Chief Judge of the Court of

Appeals, the trial shall proceed through remote video conferencing.

Committee note: The need for this Rule was a consequence of the 2020-2021 COVID-19 pandemic. While not limited to pandemics or other natural disasters, the invocation of this Rule should be considered only in the most dire and emergent circumstances. The Rule is not intended to substitute trial processes on virtual platforms for trials conducted in courthouses where participants can be physically present in a designated location. Trial judges are reminded to employ virtual jury trials as a procedure of last resort and to preserve the time-honored process of public trials with full and unfettered opportunity of parties to participate in the proceedings in person, except as otherwise permitted elsewhere in the Rules of Procedure.

(c) Pretrial Proceedings

(1) Scheduling Conference

If the court anticipates conducting a virtual jury trial in an action, or upon motion of a party, the court shall conduct a scheduling conference pursuant to Rule 2-504.1. At the scheduling conference, any party may note an objection to a virtual jury trial and provide reasons for the objection. The court shall consider the objection prior to determining whether a virtual jury trial will be held.

(2) Pretrial Conference

(A) Timing

The court shall conduct a pretrial conference no later than ten days before a virtual jury trial.

(B) Prior to Pretrial Conference

To the extent practicable, all proposed exhibits, other than rebuttal and impeachment exhibits, and requested jury selection questions shall be filed with the court and served on the other parties at least ten days before **the** pretrial conference. To the extent practicable, any objections to the admissibility of an exhibit shall be filed and served within three days after service of the proposed exhibit.

(C) Considerations at Pretrial Conference

In addition to the matters listed in Rule 2-504.2 (b), the court shall consider the following matters in preparation for a virtual jury trial:

(i) an inquiry to confirm that each attorney, party, and witness has the technology required to participate;

Committee note: The court should direct all participants to familiarize themselves with the video conferencing software, exhibit presentation, use of breakout rooms, bench conferences, and other aspects of the virtual trial.

(ii) appropriate virtual backgrounds to be displayed by each attorney, party, and witness at all times;

(iii) resolution of any objections raised pursuant to subsection (c) (2) (B);

(iv) conversion into electronically viewable format of exhibits to be offered into evidence and, as appropriate, made available to jurors and witnesses;

(v) identification and determination of any objections to depositions under Rule 2-419 (d) at the pretrial conference;

(vi) additional instructions that are to be given pertaining to the remote nature of the jury trial;

Committee note: Instructions should include guidelines for participating in the virtual proceedings, such as a requirement that video cameras remain powered on throughout the entirety of the hearing, background noises and other distractions should be minimized, participants may only use their technological device to attend the proceeding, and all other technological devices must be powered off.

(vii) the method for providing jury instructions to jurors, such as through e-mail or via a court-approved secure file sharing service;

(xiii) a trial schedule designed to minimize the fatigue associated with online participation in a virtual trial; and

Committee note: A trial schedule designed to minimize fatigue may include limiting morning and afternoon sessions to three hours and scheduling periodic breaks. The judge and attorneys should make a reasonable effort to agree on the schedule, but if no agreement is reached, the court determines an appropriate trial schedule.

(ix) any other matters that can be resolved prior to trial to minimize sidebar conferences or otherwise expedite the trial proceedings.

(D) Pretrial Conference Order

Following the pretrial conference, the court shall enter a Pretrial Conference Order reciting the actions taken and stipulations made. The Order shall control the subsequent

proceedings and may be modified only to prevent **manifest** injustice.

(d) Subpoenas

(1) Generally

In addition to complying with the content requirements of Rule 2-510, a subpoena issued to require the presence of an individual at a proceeding to be conducted by remote electronic participation shall describe the method by which that presence will be implemented and state that details will be supplied by a court official prior to the court proceeding. The party requesting the subpoena shall provide the court official in writing with an e-mail address for the individual subject to the subpoena **if the individual subject to the subpoena is to appear by remote electronic participation**. Unless impracticable, the court official shall send log-in information **to individuals appearing by remote electronic participation** at least five days before the date of the virtual jury trial. The subpoena shall direct the individual ~~subsect~~ **subject** to the subpoena to contact the party who requested the subpoena within three days if the individual is unable to effect his or her presence by the manner stated in the subpoena.

(2) If Remote Electronic Participation by Witness is Impracticable

If it is impracticable for a witness to appear by remote electronic participation for the proceeding, the subpoena may direct the witness to appear at the courthouse to participate with lawful and appropriate assistance from court personnel. The party requesting the subpoena shall (A) file a return of service and (B) notify the clerk in writing at least three days before the trial if a witness was served with a subpoena pursuant to subsection (d)(2) of this Rule.

Committee note: The party requesting the subpoena should make reasonable efforts to secure an e-mail address for the witness to comply with subsection (d)(1). However, in the instance where remote electronic participation cannot be secured, subsection (d)(2) requires the witness to physically appear at the courthouse for assistance in complying with the ~~subpoeana~~ **subpoena**.

(e) Jurors

(1) Jury Selection

(A) Juror Qualification Forms

A juror qualification form may be used to collect information regarding a juror's ability to participate in a virtual jury trial. The contents of the form shall comply with Rule 16-309 (b). Except as provided in Rule 2-512 (c), responses to juror qualification forms shall remain confidential.

(B) Examination

Jury selection may occur by video conferencing. In advance of the examination, case-specific written questionnaires

may be used to elicit appropriate information. The parties shall have access to the jurors' responses to case-specific written questionnaires in advance of the examination to expedite the selection process.

(C) Additional Jurors

in addition to the alternates ordinarily selected for an in-person jury trial, the court may select up to two additional alternate jurors to serve on the jury panel.

Committee note: The additional alternate jurors permitted by subsection (e)(1)(C) account for jurors who experience technical difficulties that could prevent them from continuing with the trial or who develop a health-related issue that requires them to be excused.

(2) Jury Instructions

(A) The court shall provide empaneled jurors with instructions and training on the use of remote technology and the protocol for informing the court if they experience technical problems during the trial. Designated staff shall be made available to monitor and address technical issues.

Committee note: The Court's instructions for contacting designated court staff to convey technical problems or other issues during trial may include instructions for the jurors to contact staff by phone call, text messaging, email, or through video conferencing.

(B) At the commencement of trial, the court shall provide specific instructions and information to the jury that pertain to the remote format of the trial.

Committee note: The trial judge should provide an enhanced jury charge that emphasizes the need for jurors to give their full attention to the trial and to maintain the secrecy of jury ~~proceedings~~ **deliberations**.

(C) After all evidence has been presented, and pursuant to Rule 2-520, the court shall issue instructions to the jury by video conferencing. At the court's discretion, jury instructions may be made available to jurors during deliberations in a digital viewing format.

(3) Jurors' Notes

Jurors shall be permitted to take notes but shall be instructed to destroy or delete those notes at the conclusion of the trial. A juror's notes may not be reviewed by or relied upon for any purpose by any person other than the author.

Cross reference: See Rule 2-521 (a) regarding jurors' notes during an in-person trial.

(4) Juror Review of ~~Evidence Documents~~ **Evidence Documents**

The court shall arrange for documentary evidence and a verdict sheet to be converted into a digital viewing format that is secure and available for juror access during deliberations.

(5) Deliberations

Jurors shall deliberate using the video conferencing software used to participate during the virtual jury trial. For deliberations, jurors shall be placed in a separate virtual breakout room, and no one other than the jurors shall be allowed access to the virtual deliberation room. Once a verdict has

been reached, the jury foreperson shall notify the designated officer of the court, who will then notify the judge.

(6) Jury Verdict

Once a verdict has been reached, the jury shall be moved from the separate virtual breakout room to the virtual courtroom to return the verdict. The jury shall be polled before it is discharged. If the poll discloses that the jury, **or stated majority**, has not concurred in the verdict, the court may direct the jury to retire for further deliberations or may discharge the jury.

Committee note: Although for in-person jury trials, Rule 2-522 (b) (4) requires polling of the jury "on request of a party or on the court's own initiative," subsection (e) (6) of this Rule requires polling of the jury for all virtual jury trials in which a verdict has been reached.

(7) Communication with Court

All communications by a juror shall be made to the court employee designated by the judge to receive them. Upon receipt of a communication from the jury or a juror, the designated employee shall promptly notify the judge of the communication. If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' positions on any response.

Cross reference: See Rule 2-521 (d) for communications with the jury during an in-person trial.

(f) Use of Electronic Devices

In accordance with the standards and requirements set forth in Rule 2-805, court personnel, parties to a case, and witnesses may use technological equipment and video conferencing software to facilitate a virtual jury trial. A juror may use an electronic device with audio and video capabilities and video conferencing software to participate in the virtual jury trial. A juror may not use the electronic device for any purpose other than participating in the virtual jury trial while the trial is in session. Except during periods specified by the judge or as otherwise permitted by this Rule, other electronic devices shall be turned off or set on silent mode while the trial is in session.

Committee note: An example of a permitted use of an electronic device that otherwise is required to be turned off or set on silent mode is the use of the juror's cell phone to contact designated court staff regarding a technical problem with the video conferencing software.

(g) Recording Proceedings

A person may not record, download, or transmit an audio, audio-video, video, or still image of proceedings under this Rule except as directed by the court for compliance with Rule 2-804 (e) and (f).

Source: This rule is new.

REPORTER'S NOTE

On March 12, 2020, the Chief Judge of the Court of Appeals issued an Administrative Order on the Statewide Suspension of Jury Trials, suspending all civil and criminal jury trials throughout the State due to the outbreak of the novel coronavirus, COVID-19. Jury trials remained suspended until October 5, 2020. On November 12, 2020, after significant increases in COVID-19 infection rates throughout the State, criminal and civil jury trials were again suspended by the Chief Judge's Third Amended Administrative Order Re-Imposing the Statewide Suspension of Jury Trials and Maintaining Grand Jury Trials. The Fifth Amended Administrative Order Re-Imposing the Statewide Suspension of Jury Trials and Maintaining Grand Juries, issued on December 22, 2020, extended the suspension until April 23, 2021.

On February 21, 2021, the Chief Judge issued the Eighth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency. The Eighth Administrative Order provided, "[T]he courts are authorized and shall conduct remote proceedings to the greatest extent possible during the health emergency..." As a result of COVID-19 and the necessary steps taken to suspend many in-person proceedings, all jurisdictions are facing a backlog of civil and criminal jury trials that must be addressed. The technology to conduct virtual civil jury trials is available and may be used to begin clearing the backlog of cases pending in circuit courts. The Rules Committee proposes new Rule 2-807 to establish the requirements for civil virtual jury trials.

The Rules Committee recognizes that virtual jury trials may not be appropriate in every case. Sections (a) and (b) limit the use of virtual jury trials. Section (a) states the applicability of the Rule to civil actions that the county's case management plan provides as eligible. Section (b) sets forth the two circumstances in which a virtual jury trial may be warranted, limited to situations where the parties and the County Administrative Judge consent or where a state of emergency is declared by the Governor and the Chief Judge. A proposed Committee note after section (b) explains that use of virtual jury trials is a procedure of last resort and courts should strive to have appropriate in-person proceedings.

To ensure that a virtual jury trial may be conducted smoothly, participants and the court must work to address unique concerns and issues associated with a virtual jury trial before the proceeding. Section (c) provides an overview of the pretrial proceedings required. Subsection (c)(1) requires that the court conduct a scheduling conference if a virtual jury trial is anticipated and states that any objections to a virtual jury trial may be raised at the scheduling conference. Subsection (c)(2) addresses pretrial conferences, including the timing of the conference, the procedures concerning exhibits and related objections that must be completed prior to the pretrial conference, the considerations for the pretrial conference, and the entry of a signed Order after the pretrial conference. Three committee notes provide guidance on the importance of the enumerated considerations at the pretrial conference.

Section (d) addresses changes to the subpoena process for virtual jury trials. Subsection (d)(1) provides general guidance for use of subpoenas in a virtual jury trial while subsection (d)(2) creates an alternate procedure when remote electronic participation by a subpoenaed witness is impracticable. The Committee note after subsection (d)(2) clarifies that subsection (d)(2) provides a procedure when an e-mail address, required for remote electronic participation in subsection (d)(1), cannot be obtained after reasonable efforts.

Information and procedures pertinent to jurors are addressed in section (e). Subsection (e)(1) concerns jury selection and several facets of the process impacted by the virtual nature of the proceedings. Jury instructions are addressed in subsection (e)(2), including a requirement that specific instructions pertaining to the remote format must be given at the commencement of trial. Subsections (e)(3) and (4) address a juror's ability to take notes and review evidence during deliberations. Subsection (e)(5) explains how deliberations are conducted in a separate virtual breakout room. The verdict of a jury for a virtual trial is addressed in subsection (e)(6), requiring polling of the jury before discharge. Communications between the court and virtual jurors throughout the proceeding are addressed by subsection (e)(7).

Section (f) concerns the use of electronic devices to participate in virtual jury trials and restricts the use of non-approved electronic devices by jurors. A common concern raised when considering virtual jury trials is the potential inability to properly monitor a juror's actions during the trial. Restrictions on the use of other devices during the trial are

included in the Rule to help ensure that a juror's attention is devoted to the proceeding. The requirement that non-approved electronic devices be turned off or set on silent mode mirrors the common requirement imposed on jurors during in-person trials.

Section (g) prohibits the recording of proceedings. The prohibition is broadly drafted to ensure that all forms of recording of a virtual proceeding, such as taking screenshots, are prohibited.