

# Children's Law Center Fact Sheet

## Changes to the Law on Expert Witnesses

In 2016, the D.C. Court of Appeals issued *Motorola Inc. v. Murray*, changing the legal standard in D.C. for qualifying expert witnesses. This fact sheet will provide an overview of what assessment the court should be making and will provide guidance around how to effectively voir dire and argue for the qualification of expert witnesses.

### **Previous standard under *Dyas v. United States*, 376 A.2d 827 (D.C. 1977)**

Prior to *Murray*, D.C. used the Frye/Dyas test as articulated in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir 1923) and expanded upon in *Dyas v. United States*. This standard focused on whether the scientific methodology has been generally accepted and laid out a three-part test for the admission of expert testimony:

1. The subject matter “must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman”;
2. “the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth”; and
3. Expert testimony is inadmissible if “the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.”

*Dyas v. United States*, 376 A.2d at 832.

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### *In Practice*

Under the Frye/Dyas test, *voir dire* was focused on eliciting information about qualifications, methodology in the field, generalized information about the area of expertise, and the number of times a witness has been qualified as an expert. Only after the witness was qualified as an expert did the direct examination turn to the application of methods to the facts at hand.

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### **Current Standard under *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016)**

Under *Murray*, D.C. abandoned the Frye/Dyas test in favor of the *Daubert* standard as articulated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The *Daubert* standard closely tracks the Federal Rule of Evidence 702 and emphasizes the trial court’s “robust gatekeeper function” and sets out a four-part test:

**1. Is the expert qualified to help the finder of fact understand technical or scientific evidence or to determine a technical or scientific fact in issue? (Rule 702 (a))**

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*In Practice*

Expertise can now be based on scientific or medical training or education but can also be **based solely on specialized experience**.

If the testimony is based solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts

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**2. Is the opinion based on sufficient facts or data? (Rule 702 (b))**

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*In Practice*

The testimony may be based on undisputed, disputed, or hypothetical facts that are supported by the evidence.

If facts are disputed, the expert may base testimony on one version of the facts in evidence, and the court should not exclude the testimony on the ground that it finds the alternate version of facts more convincing.

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**3. Is the opinion the product of reliable principles and methods? (Rule 702 (c))**

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*In Practice*

The inquiry around methodology is now expressly about **reliability, not general acceptance**. If an expert uses a new methodology and offers a reliable opinion, it should be admitted.

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**4. Is the opinion the product of reliable application of principles and methods to the facts of the case? (Rule 702 (d))**

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*In Practice*

If an expert conducts a particular experiment in the laboratory under controlled conditions and has produced a particular result, but the conditions in the lab bear no relationship to the facts of the case, the expert may not have reliably applied those principles and methods to the facts of the case and that testimony may be excluded.

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## SELECTING THE RIGHT EXPERT

Under the *Daubert* standard, the field of possible experts expands because their testimony may be based solely on specialized experience.

- ✓ Are there people already involved with the case who can be an expert for you?
  - Social worker
  - Therapist
  - Doctor
- ✓ Do you need to hire an expert?
- ✓ If you need to hire an expert, what qualifications do they need?

## PREPPING YOUR EXPERT

Rather than focusing on the general acceptance of methods and principles in a specific field, your witness must be prepared to:

- ✓ Detail the specific processes, modalities, methods, and principles they used;
- ✓ Explain how they applied these processes, modalities, methods, and principles to **the specific facts at issue in the case at hand**; and
- ✓ Explain whether they applied the processes etc. reliably- in the way they typically apply them or in the way they are meant to be applied- to form their opinion.

If the witness is **relying solely or primarily on experience**, then the witness must explain how:

- ✓ That experience leads to the conclusion reached;
- ✓ Why that experience is a sufficient basis for the opinion; and
- ✓ How that experience is reliably applied to the facts.

## VOIR DIRE

- ✓ 702(a)
  - General foundational background questions
  - Specific questions around training and experience
- ✓ 702(b)
  - Questions that establish sufficient data and knowledge of facts at hand
    - These are questions that might have come after voir dire under Frye/Dyas
- ✓ 702 (c)
  - Questions that provide judge with principles and methods and the reliability of those principles and methods
- ✓ 702(d)
  - Elicit specific testimony about reliably applying process described above to this specific case.