

**PRACTICE KIT #3 Common
Objections & Hearsay
July 2018**

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COMMON OBJECTIONS

To questions

- Calls for irrelevant answer
- Calls for a conclusion
- Calls for an opinion [by a lay witness]
- Calls for a narrative
- Calls for hearsay
- Calls for privileged communication
- Witness incompetent
- Violates best evidence rule
- Leading
- Asked and answered
- Beyond scope [of direct or cross]
- Assumes facts not in evidence
- Confusing/misleading/ambiguous/vague/unintelligible
- Speculative
- Compound question
- Argumentative
- Misstates evidence
- Cumulative
- Improper impeachment

To answers

- Irrelevant
- Privileged
- Conclusion
- Hearsay
- Narrative
- Improper lay opinion
- Improper character evidence
- Lack of personal knowledge
- Speculation / conjecture
- Violates parol evidence rule
- Unresponsive/volunteered

To exhibits

- Irrelevant
- No foundation
- No authentication
- Contains hearsay / double hearsay
- Prejudice outweighs probative value
- Contains inadmissible matter
- Violates best evidence rule

COMMON OBJECTIONS CHART
(excluding Hearsay, covered in next section)

This chart was prepared by Children's Law Center as a practice aid for attorneys representing children, parents, family members and others in the neglect system. This chart does not constitute or substitute for legal advice. Attorneys should always do their own independent research and analysis before deciding how or whether to use the information in this chart. A complete list of all evidentiary objections and related supports in D.C. and Federal law is beyond the scope of this chart, which includes common objections and a sampling of related supports in D.C. and Federal law. This chart is intended as a practice aid and is not necessarily comprehensive. Also, please note that the Federal Rules of Evidence (FRE) have not been formally adopted or incorporated by the D.C. Superior Court and the D.C. Court of Appeals, although D.C.'s controlling case law and statutes on evidence largely model the Federal Rules. In addition, many of the cases listed below are criminal cases, and attorneys should conduct their own analysis as to whether they can be applied to the civil context. Cases which apply the rule at issue to proceedings in Family Court have been provided in some cases, if available. Additional resources on the law of evidence include The Law of Evidence in the District of Columbia (5th Ed.) by Hon. Steffen W. Graae, Hon. Henry F. Greene, and Brian T. Fitzpatrick (which includes numerous relevant case citations) and Trial Techniques by Thomas A. Mauet.

Common Objection	Statute/Case/Rule	Notes:
Improper Character Evidence	<u>Generally:</u> <u>Borum v. U.S.</u>, 56 F.2d 301 (D.C. 1932) <u>Preston v. U.S.</u>, 80 F.2d 702 (D.C. Cir. 1935) <u>Morris v. D.C.</u>, 124 F.2d 284 (D.C. Cir. 1941) <u>Other crimes, wrongs, acts:</u> <u>Johnson v. U.S.</u>, 610 A.2d 729 (D.C. 1992) <u>Drew v. U.S.</u>, 331 F.2d 85 (D.C. Cir. 1964) <u>U.S. v. Carter</u>, 482 F.2d 738 (D.C. Cir. 1973) See also FRE 404(a), (b)	<u>Character evidence generally.</u> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) character of accused; (2) character of victim; and (3) character of witness. [See also Impeachment, below] <u>Note:</u> The scope of admissible material may be broader in Family Court proceedings. [See, e.g., <u>In re S.K.</u>, 564 A.2d 1382 (D.C. 1989)] <u>Other crimes, wrongs, or acts.</u> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. [<u>U.S. v. Carter</u>; see also FRE 404(b)] Evidence of other crimes is admissible where relevant to: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. [<u>Drew v. U.S.</u>] <u>Sex crimes:</u> Evidence of a defendant's past sexual misconduct with persons other than persons involved in the sexual misconduct for which he is being tried is admissible to show an unusual sexual preference for similar acts. [<u>Johnson v. U.S.</u>]
Cumulative Evidence	<u>Yeager v. Greene</u>, 502 A.2d 980 (D.C. 1985) <u>Henderson v. George Wash. Univ.</u>, 449 F.3d 127 (D.C. Cir. 2006) See also FRE 403, 611	The court has discretion to control repetitive evidence introduced during trial.
Assumes Facts Not in Evidence	<u>Simmons v. U.S.</u> , 940 A.2d 1014 (D.C. 2008)	It is improper for an attorney to make an argument to the jury based on facts not in evidence or not reasonably inferable from the evidence.

Lack of Foundation (including Authentication)	Super. Ct. Civ. R. 43-I, 44 <u>Campbell v. Willis</u>, 290 F. 271 (D.C. 1923) <u>Anderson v. D.C.</u>, 48 A.2d 710 (D.C. 1946) <u>Giles v. D.C.</u>, 548 A.2d 48 (D.C. 1988) <u>Taylor v. U.S.</u>, 759 A.2d 604 (D.C. 2000) See <i>also</i> FRE 901-902, 1000-1004	All exhibits and testimony must have necessary foundations established before they can be admitted in evidence. [See <i>also</i> Relevance below] Lay and expert opinion testimony must have a proper factual basis on which the opinion is based. [See <i>also</i> Improper Opinions below] Writings and conversations must be authenticated or identified to be admissible at trial. [Campbell v. Willis] D.C. has a list of self-authenticating documents. [Giles v. D.C.] Courts must make a thorough foundational inquiry before admitting demonstrative evidence to ensure its reliability. [Taylor v. U.S.] <u>Note:</u> The “Best Evidence Rule” has largely been abrogated by changes in the law, including the court rules, and can only be raised if there is a dispute about authenticity or accuracy. A duplicate is admissible to the same extent as the original unless: (1) there is a question of authenticity of the original or (2) it would be unfair to admit the duplicate. The original is not required if: (1) the originals are lost or destroyed, (2) the original is not obtainable, or (3) the writing, recording, or photograph is not closely related to a controlling issue.
Hearsay		See Hearsay, covered in separate chart
Improper Impeachment	D.C. Code §§14-102, -305 See <i>also</i> FRE 607, 608, 609, 613	The credibility of a witness may be attacked by any party, including the party calling the witness. [D.C. Code §14-102(a)] Basis for impeachment 1. bias, interest, and motive [D.C. Code § 14-102(b)] 2. prior convictions [D.C. Code § 14-305, <u>Ross v. U.S.</u>, 520 A.2d 1064 (D.C. 1987); see <i>also</i> FRE 609] 3. prior bad acts [<u>Lee v. U.S.</u>, 454 A.2d 770 (D.C. 1982); see <i>also</i> FRE 608(b)] 4. prior inconsistent statements [D.C. Code § 14-102(b)] 5. contradictory facts [<u>Cooper v. Safeway Stores</u>, 629 A.2d 31 (D.C. 1993)] 6. bad reputation for truth and veracity [<u>Bassil v. U.S.</u>, 517 A.2d 714 (D.C. 1986); see <i>also</i> FRE 608(a)]

Improper Opinion (including experts)	<u>Motorola Inc., v. Murray</u>, 147 A.3d 751 (D.C. 2016) <u>Daubert v. Merrell Dow Pharmaceuticals</u>, 509 U.S. 579 (1993) <u>In re Melton</u>, 597 A.2d 892 (D.C. 1991) <u>In re L.L.</u>, 653 A.2d 873 (D.C. 1995) <u>In re Ca.S.</u>, 828 A.2d 184 (D.C. 2003) <u>Jones v. U.S.</u>, 990 A.2d 970 (D.C. 2010) <u>Gardner v. U.S.</u>, 999 A.2d 55 (D.C. 2010) <u>In re A.B.</u>, 999 A.2d 36 (D.C. 2010) <u>U.S. v. Williams</u>, 212 F.3d 1305 (D.C. Cir. 2000) See also FRE 701-702	In November of 2015, the DC Court of Appeals heard oral argument en banc in <u>Motorola Inc. v. Murray</u>. This marked the first time the DC Court of Appeals has re-considered its use of the <u>Dyas/Frye</u> test. The court considered whether to abandon the <u>Dyas/Frye</u> test in favor of adopting standards for admissibility of expert evidence codified in FRE 702. As a focal point of the opinion, the court discussed the standard for admissibility of expert witness testimony as set forth in <u>Daubert v. Merrell Dow Pharmaceuticals</u>, 509 U.S. 579 (1993), and mirrored in FRE 702. The court examined the vast application and use of the <u>Daubert</u> standard in other jurisdictions, clarity, and simplicity as reasons for adopting FRE 702 as the standard for assessing admissibility of expert testimony. <u>Expert opinions.</u> Criteria for admitting expert testimony pursuant to FRE 702 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. <u>Note:</u> Statements relied on by experts may be admissible (even if hearsay) but only to show basis of experts' opinion (not for the truth of the matter asserted). [<u>In re Ca.S.</u>; <u>Gardner v. U.S.</u>] <u>Note:</u> Experts are permitted to rely on the opinion of another expert in formulating their opinion when such reliance is reasonable in the experts' particular field. [<u>In re A.B.</u>] <u>Note:</u> A witness may be qualified as an expert even in the absence of academic training as expertise may be predicated on experience. However, there must be a fit between the experience and the testimony. The witness should be able to explain how that experience leads to the conclusion reached, as well as why the experience is a sufficient basis for the opinion and how the experience is reliably applied to the facts. [Jones v. U.S.] <u>Lay witnesses</u> can give opinions/inferences only where the opinion is based on the witness' perception of an event and is helpful to the jury in understanding the facts. Trial judges are given broad discretion in admitting testimony of lay witnesses. [<u>U.S. v. Williams</u>] To distinguish between lay and expert testimony, a court must look at the reasoning process by which the witness reached his proffered opinion. [<u>King v. U.S.</u>, 74 A.3d 678 (D.C. 2013)]
Parol Evidence Rule	<u>Fistere, Inc. v. Helz</u>, 226 A.2d 578 (D.C. 1967)	The Parol Evidence Rule bars admission of extrinsic oral evidence that modifies/contradicts a contract. Exceptions include: mistakes, incompleteness, ambiguities, and other uncertainties on the contract.

Lack of Personal Knowledge (Competency)	D.C. Code §§ 14-301, -306 See also FRE 601-606	Competency depends upon the witness' capacity to observe, remember, narrate, and understand the duty to tell the truth. [See <i>generally</i> FRE 601] Every person is competent to be a witness except if there is a statutory disqualification: • Lack of personal knowledge • Uncorroborated testimony against deceased/incapable person • Judge/jury as witness [See also FRE 605-606] Competency questions not governed by statute are left to the court's discretion [See <i>generally</i> FRE 601]: • Age: [Johnson v. U.S., 364 A.2d 1198 (D.C. 1976), Barnes v. U.S., 600 A.2d 821 (D.C. 1991), Galindo v. U.S., 630 A.2d 202 (D.C. 1993); Beausoleil v. U.S., 107 F.2d 292 (D.C. Cir. 1939)] • Intoxication: [Fowel v. Continental Ins. Co., 55 A.2d 205 (D.C. 1947)] • Unsound Mind: [Mitchell v. U.S., 609 A.2d 1099 (D.C. 1992)] • Intellectual Disability: [U.S. v. Benn, 476 F.2d 1127 (D.C. Cir. 1972) (stating that it is in the trial judge's sound discretion whether to order a psychiatric evaluation for a witness)] • Drug Addiction: [U.S. v. Kearney, 420 F.2d 170 (D.C. Cir. 1969)]
Prejudice Outweighs Probativeness	<u>Henderson v. George Wash. Univ.</u>, 449 F.3d 127 (D.C. Cir. 2006) See also FRE 403	A trial court may prevent the introduction of evidence "if its probative value 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." In considering a trial judge's application of Rule 403, the Supreme Court has stated the standard of review as "abuse of discretion." [<u>Henderson v. George Wash. Univ.</u>]
Privileged Communication	D.C. Code §§ 14-300, -306, -307, 22-4124 <u>In re N.H.</u>, 569 A.2d 1179 (D.C. 1990) <u>In re O.L.</u>, 584 A.2d 1230 (D.C. 1990) <u>In re N.P.</u>, 882 A.2d 241 (D.C. 2005) See also FRE 501	Communications made in confidence between parties having certain relationships are barred from disclosure upon objection. • husband-wife [D.C. Code §§14-306, 22-4124. <i>But see</i> D.C. Code §§ 4-1321.05, 16-2359 (waiving the privilege under certain circumstances)] • physician-patient [D.C. Code §14-307. <i>But see</i> D.C. Code §§ 4-1321.05, 16-2359 (waiving the privilege under certain circumstances)] • attorney-client [common law privilege not governed by D.C. statute] • clergy-penitent [D.C. Code §14-300] But see <u>In re M.L.</u>, 28 A.3d 520 (D.C. 2011) (Results of court-ordered mental health evaluations are not protected by doctor-patient privilege)

Lack of Relevance	<u>Silverfarb v. U.S.</u>, 40 A.2d 82 (D.C. 1944) <u>Reavis v. U.S.</u>, 395 A.2d 75 (D.C. 1978) <u>In re L.C.</u>, 92 A.3d 290 (D.C. 2014) See also FRE 401-403	One fact is relevant to another when the existence of the one, taken alone or in connection with other facts, renders the existence of the other more certain or more probable. [<u>Silverfarb v. U.S.</u>] First, the evidence must relate logically to the fact it is offered to prove. Second, the fact sought to be established by the evidence must be material. Finally, the evidence must be adequately probative of the fact it tends to establish. It must tend to make the existence or nonexistence of a fact more or less probable than would be the case without that evidence. [<u>Reavis v. U.S.</u>] <u>Note</u>: The scope of relevant material may be broader in Family Court proceedings. See, e.g., <u>In re M.D.</u>, 758 A.2d 27 (D.C. 2000), <u>In re J.A.</u>, 601 A.2d 69 (D.C. 1991) (a determination of best interests places a responsibility on the judge to know as much as possible about the situation).
Common Objections Related to the Form of the Question		
Argumentative	See generally FRE 403, 611(a)	This is a question that is essentially an argument to the jury. The question elicits no new information. It states a conclusion and asks the witness to agree.
Beyond the Scope of Direct Examination Beyond the Scope of Cross Examination	Super. Ct. Civ. R. 43(b) <u>Arnstein v. U.S.</u>, 296 F. 946 (D.C. 1924) See also FRE 611	Cross-examination must be limited “only upon the subject matter of the examination in chief” and matters affecting the credibility of the witness. [Super. Ct. Civ. R. 43(b)] Redirect must similarly be limited to the subject matter of the cross-examination that came before it.
Compound Question	See generally FRE 403, 611(a)	This is a question that brings up two separate facts within a single question.
Confusing, Misleading, Ambiguous, Vague, Unintelligible	See generally FRE 403, 611(a)	A question must be posed in a reasonably clear and specific manner so that the witness can reasonably know what information the examiner is eliciting.
Leading Question	Super. Ct. Civ. R. 43(b) <u>Green v. U.S.</u>, 348 F.2d 340 (D.C. Cir. 1965) See also FRE 611	A leading question suggests the desired answer to the witness. Generally improper during direct examination, unless the witness is considered hostile or adverse. [Super. Ct. Civ. R. 43(b)] Leading questions on direct may be proper if necessary to develop the witness’ testimony.
Misstates Evidence or Misquotes Witness	See generally FRE 403, 611(a)	This is a question that misstates and distorts evidence or misquotes a witness.
Speculative Question	See generally FRE 403, 611(a)	Any question that asks the witness to speculate or guess is improper. Witnesses are permitted to give estimates and approximations [e.g. distance, time, speed, and age].

Asked and Answered	<u>Yeager v. Greene</u>, 502 A.2d 980 (D.C. 1985) <u>Henderson v. George Wash. Univ.</u>, 449 F.3d 127 (D.C. Cir. 2006) See also FRE 403, 611	Questions and answers previously elicited and made by the same party should not be repeated to avoid needless consumption of time.
Common Objections Related to the Form of the Answer		
Conclusions	<u>Deloach v. U.S.</u>, 307 F.2d 653 (D.C. 1962) See also FRE 701	A conclusion is a deduction drawn from a fact or series of facts. Witnesses should testify only to facts.
Narrative Answer	<u>Yeager v. Greene</u>, 502 A.2d 980 (D.C. 1985) See also FRE 611	A long narrative answer is objectionable because it does not give opposing counsel a reasonable opportunity to make a timely objection.
Unresponsive Muttered Statements by Witnesses and other Extrinsic Evidence	<u>Garrett v. U.S.</u> , 20 A.3d 745 (D.C. 2011)	Extrinsic evidence, such as muttered comments by a witness, is not necessarily properly included for jury determination. The judge should inquire at least a limited amount into the jury's perception of the utterance and any potential exposure to extrinsic evidence.
Unresponsive, Volunteered	See generally FRE 403, 611(a)	An answer that does not directly respond to a question is objectionable. Portions of an answer that go beyond what is necessary to answer the question are objectionable.
Other		
Failure to Object	<u>Eldridge v. U.S.</u>, 492 A.2d 879 (D.C. 1985) <u>Rose v. U.S.</u>, 629 A.2d 526 (D.C. 1993) <u>In re S.C.M.</u>, 653 A.2d 398 (D.C. 1995) <u>In re N.P.</u>, 882 A.2d 241 (D.C. 2005)	Once evidence is admitted without objection, it may be properly considered by the trier of fact and given its full probative value, and reversal will not be obtained absent plain error.

HEARSAY CHART

This chart was prepared by Children's Law Center as a practice aid for attorneys representing children, parents, family members and others in the neglect system. This chart does not constitute or substitute for legal advice. Attorneys should always do their own independent research and analysis before deciding how or whether to use the information in this chart. A complete discussion of all Hearsay-related issues in D.C. and Federal law is beyond the scope of this chart, which includes common hearsay issues and a sampling of related supports in D.C. and Federal law. This chart is intended as a practice aid and is not necessarily comprehensive. Instead, it aims to provide information on a number of the most common hearsay issues. Also, please note that the Federal Rules of Evidence (FRE) have not been formally adopted or incorporated by the D.C. Superior Court and the D.C. Court of Appeals, although D.C.'s controlling case law and statutes on evidence largely model the Federal Rules. In addition, many of the cases listed below are criminal cases, and attorneys should conduct their own analysis as to whether they can be applied to the civil context. Cases which apply the rule at issue to proceedings in Family Court have been provided in some cases, if available. Additional resources on the law of evidence include The Law of Evidence in the District of Columbia (5th Ed.) by Hon. Steffen W. Graae, Hon. Henry F. Greene, and Brian T. Fitzpatrick (which includes numerous relevant case citations) and Trial Techniques by Thomas A. Mauet.

Introduction: Hearsay is generally defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay statements are subject to proper objection¹ unless they are 'non-hearsay' or fall into one of the enumerated exceptions to the hearsay rule, some of which are discussed below.²

¹ Jones v. U.S., 17 A.3d 628 (D.C. 2011) (On proper objection, the party seeking admission of the out-of-court statement has the burden to identify the appropriate exception and to explain how it is applicable).

² Hearsay statements may also be admitted if they are being offered for a purpose other than to prove the truth of the matter asserted. Further discussion of this issue and analysis is beyond the scope of this Practice Kit.

NON-HEARSAY		
Type	Elements	Statute/Case/Rule
Admission by a Party Opponent	Statement of a party is admissible if offered by an adverse party	<u>Harris v. U.S.</u>, 834 A.2d 106 (D.C. 2003); see <i>also</i> FRE 801(d)(2) <u>Wilson v. U.S.</u>, 995 A.2d 174 (D.C. 2010) (considering what constitutes an “adoptive admission”) <u>In re K.J.</u>, 11 A.3d 273 (D.C. 2011) (although the respondent was a party to the proceedings, her statements were not against interest, and thus were properly excluded as hearsay) <u>Bridges v. Clark</u>, 59 A.3d 978 (D.C. 2013) (an affidavit attached to a pretrial motion is admissible as an admission of a party-opponent)
Prior Identification	▪ Prior statement of identification made after perceiving person identified ▪ Identifying witness must be available for cross-examination ▪ The exception applies to statements of identification, but not to detailed accounts of the actual crime	D.C. Code §14-102(b)(3); see <i>also</i> <u>Brown v. U.S.</u>, 840 A.2d 82 (D.C. 2004), FRE 801(d)(1) <u>Sparks v. U.S.</u>, 755 A.2d 394 (D.C. 2000) (prior identifications are admissible even when, at trial, the witness recants or is uncertain of identity)
Prior Consistent Statement by Witness	▪ Statement consistent with witness’ testimony ▪ Prior statement being used to rebut express or implied charge of recent fabrication of witness or improper motive ▪ Declarant testifies, subject to cross-examination	D.C. Code §14-102(b)(2); see <i>also</i> FRE 801(d)(1)
Prior Inconsistent Statement by Witness	▪ Statement inconsistent with witness’ testimony ▪ Prior statement given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ▪ Declarant testifies, subject to cross-examination	D.C. Code §14-102(b)(1); see <i>also</i> FRE 801(d)(1) <u>Diggs v. U.S.</u>, 28 A.3d 585 (D.C. 2011) (witness’s memory loss at trial is sufficient basis to admit his grand jury testimony) <u>Ford v. U.S.</u>, 487 A.2d 580 (D.C. 1984) (omission of a material circumstance is an inconsistency that can open the door to impeachment)

HEARSAY EXCEPTIONS

Type	Elements	Statute/Case/Rule
Business records	- Recorded writing or record made as memorandum or record of any act, transaction, occurrence, or event - Report must have been made at or near time of the regularly conducted business activity - Report was prepared in the regular course of business - Either the original maker of the business record must have personal knowledge of the information in the record or must have received the information from someone with such personal knowledge and who is acting in the regular course of business	D.C. Super. Ct. Civ. R. 43-I; D.C. Family Ct. R. Q; <u>Clyburn v. D.C.</u>, 741 A.2d 395 (D.C. 1999) (with important clarification of personal knowledge requirement in Rule 43-I and Family Court Rule Q); see <i>also</i> FRE 803(6) <u>Dutch v. U.S.</u>, 997 A.2d 685 (D.C. 2010) (Under the business records exception to the hearsay rule, it is the data, not the particular format in which the data are stored or presented, that constitutes a business record) <u>Note:</u> Be aware of hearsay within hearsay and remember that the record still needs to meet the authenticity requirement.
Excited Utterance	- Presence of a serious occurrence which causes a state of nervous excitement or physical shock in the declarant - Declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it - Presence of circumstances which in their totality suggest spontaneity and sincerity of the remark	<u>Nicholson v. U.S.</u>, 368 A.2d 561 (D.C. 1977) (sets out three-part test); see <i>also</i> FRE 803(2) <u>Melendez v. U.S.</u>, 26 A.3d 234 (D.C. 2011) (when a declarant is a child, statements need not be as contemporaneous as in the case of an adult) <u>Brown v. U.S.</u>, 27 A.3d 127 (D.C. 2011) (declarant was conscious and able to deliberate after the attack and before he was found, but evidence supported inference that utterances were not likely deliberative) <u>Mayhand v. U.S.</u>, 2015 WL 4113379 (D.C. July 9, 2015) (recent case applying the <i>Nicholson</i> three-part test, and concluding that declarant's accusatory statements about the defendant during a seventeen-minute 911 call are inadmissible as excited utterances because none of the three <i>Nicholson</i> factors are met)
Statements Made for Purposes of Medical Diagnosis or Treatment	- Statement made by a patient, family member, or person with special relationship to declarant - Statement made to medical personnel - Statement reasonably related to medical diagnosis, and not merely made to elicit evidence for use at trial	<u>Sullivan v. U.S.</u>, 404 A.2d 153 (D.C. 1979) (statement may include cause of injury) <u>Galindo v. U.S.</u>, 630 A.2d 202 (D.C. 1993) (statement may include child's report of sexual abuse) <u>Jones v. U.S.</u>, 813 A.2d 220 (D.C. 2002) (statement may refer to psychological and emotional consequences of abuse) <u>In re Kya.B.</u>, 857 A.2d 465 (D.C. 2004) (statements made to medical workers about the cause of injuries fall within the medical diagnosis exception to the hearsay rule because explaining the cause of injuries may facilitate treatment)

HEARSAY EXCEPTIONS

Type	Elements	Statute/Case/Rule
		<i>But see In re Ca.S.</i>, 828 A.2d 184 (D.C. 2003) (limiting application when physician secured by the Gov't for litigation); <i>In re N.P.</i>, 882 A.2d 241 (D.C. 2005) (limiting application when statements made at Children's Advocacy Center during court-ordered examination) See <i>also</i> FRE 803(4); Improper Opinion (including Expert) in Common Objections chart
Recorded Recollection	- Witness had first-hand knowledge of event - Statement made at or near the time of the event while declarant had clear and accurate memory of event - Witness lacks present recollection of the event - Witness must adopt the statement and attest to accuracy	<i>Mitchell v. U.S.</i>, 368 A.2d 514 (D.C. 1977) <i>Isler v. U.S.</i>, 824 A.2d 957 (D.C. 2003) See <i>also</i> FRE 803(5) <i>Note:</i> This is contrasted with refreshing the recollection of a witness on the stand. <i>Wilkins v. U.S.</i>, 582 A.2d 939 (D.C. 1990); <i>Jones v. U.S.</i>, 579 A.2d 250 (D.C. 1990)]
Present Sense Impression	- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter - Declarant need not be available for cross examination - Important that the statement was truly spontaneous and not subject to conscious reflection or recall from memory	<i>Hallums v. U.S.</i>, 841 A.2d 1270 (D.C. 2004); see <i>also</i> FRE 803(1) <i>Note:</i> Narrower in scope and subject to fewer infirmities than the exception for excited utterances.
State of Mind	Statement concerns the declarant's state of mind and declarant's state of mind is at issue. Types: - then-existing emotional state - declarant relates to past bad act of defendant - statement conveys intent of declarant to perform an act in the future <i>Note:</i> The factfinder is not permitted to consider these statements for their truth, but only to show the state of mind of the declarant	<i>Clark v. U.S.</i>, 412 A.2d 21 (D.C. 1980); see <i>also</i> FRE 803(3) <i>Evans-Reid v. D.C.</i>, 930 A.2d 930 (D.C. 2007) <i>Jones v. U.S.</i>, 17 A.3d 628 (D.C. 2011)
Statement Against Interest	Statement which at the time it was made was against the declarant's pecuniary, proprietary or penal interest such that a reasonable declarant would not have made the statement unless he believed it to be true available only when declarant is unavailable	<i>U.S. v. Hammond</i>, 681 A.2d 1140 (D.C. 1996); see <i>also</i> FRE 804(b)(3)

A Child's Voice

Navigating the presentation of child witness testimony in Child Abuse and Neglect Proceedings

Child Witness Competency

Prior to preparing a child to testify, it is critical to assess whether the child is competent to do so. The test for competency of a child witness is set forth in Galindo v. United States, 630 A.2d 202, 207 (D.C. 1993). In Galindo, the court addressed a challenge to the lower court's determination that a three year old complainant was competent to testify. Id. In addressing the appellant's argument that the trial court erred in finding the child competent to testify, the reviewing court opined that a child is a competent witness if the child is able to 1) recall the events which are the subject of the testimony, 2) understand the difference between truth and falsehood, and 3) appreciate the duty to tell the truth. Id. (citing Barnes v. United States, 600 A.2d 821, 823 (D.C. 1991)). Noting that the determination of a witness's competence to testify lies within the sound discretion of the trial judge, the court held that absent a factual finding that is plainly deficient, the reviewing court will not disturb the judge's factual determination. Id. (citing Vereen v. United States, 587 A.2d 456, 457 (D.C. 1991)).

In reviewing the court's factual findings with respect to the competency of the child witness, the Galindo court highlighted that evidence of the child's ability to recount events, the child's spontaneous statements that she tells the truth and does not tell lies, coupled with her statements that it is important to tell the truth rather than lies was factually sufficient for the court to conclude the child was competent to testify at trial. See id. Although the child was not accurate in her responses to some of the judge's questions, the inaccuracy as to recounting numbers did not render the trial court's factual determination plainly deficient. Id.

The take away from Galindo, is that the child's responses to the trial judge's colloquy do not need to be perfect. However, the answers do need to demonstrate that the witness can recall events, has an understanding of the distinction between truth and falsehood, and recognizes that it is important to be truthful. The court's determination of competency of a child witness does not rest on the age of the child, rather the court is guided by the other factors set forth in Galindo and its progeny.

Child Witness Testimony in Abuse and Neglect Proceeding

As a Guardian *ad litem*, one of the first issues that arises in the context of trial preparation is whether a child will have to testify in the course of the litigation. Whether it is the parent or the government who seeks to elicit testimony from a child in a neglect trial, if an objection is raised to the testimony, the court is required to engage in a detailed balancing test to determine whether the child must be compelled to testify. For purposes of this discussion, the moving party seeking to elicit the child's testimony is identified as the parent. However, it is important to be mindful that government counsel may seek to have the child testify over the objection of the Guardian *ad litem*.

Guiding Legal Authority

The D.C. Court of Appeals has clearly addressed the question of whether the trial court can preclude the parent from calling their child to testify in the context of a child protection proceeding. In In re. Jam. J., 825 A.2d 902 (D.C. 2003), the court addressed appellant's claim that the trial court abused its discretion by precluding her from cross-examining her two children after their hearsay statements were introduced as primary evidence at trial. In re. Jam. J., 825 A.2d at 906. The court ultimately determined that in the absence of factual findings with support in the record that the probable harm to the children from having to testify substantially outweighed the parent's need for their testimony, the trial court erred by preventing the parent from calling the children to testify. Id. The reviewing court, noting that this was an issue of first impression in the context of neglect proceedings, examined controlling case law related to mechanisms for eliciting a child's opinion in the course of a termination of parental rights trial as well as legal authority from other jurisdictions. Ultimately, the reviewing court highlighted the need for the trial court to strike a balance between the fundamental liberty interest of a parent in the care and control of their child and the best interests of the child. See id. at 914-17. The Jam. J. court held that the trial court has the power to protect a child from the harmful effects of forced testimony. Id. at 916-917. The court further noted that in most cases, the court can exercise this power by imposing reasonable conditions and restrictions on the scope and conduct of the child's examination. Id. However, the court expressed that if there is demonstrated risk of serious psychological or emotional harm to the child, that cannot be mitigated by other means and substantially outweighs the parent's need for the child's testimony, the trial court has the discretion to exclude the child as a witness. Id.

The three part Jam. J. test is as follows:

- 1) Does the act of testifying create a risk of serious harm to the child?
- 2) If the child is at risk of serious harm from having to testify, can the risk be alleviated with procedural modifications?
- 3) Is the value of the child's testimony, and the parent's need for the testimony, required in the interests of justice?

See id. at 918.

In terms of providing direction as to the first prong of the balancing test set forth above, the court emphasized that a finding of serious risk of harm must be supported by concrete evidence individualized to the child. Id. at 917 (citing Johnson v. United States, 398 A.2d 354, 364 (D.C. 1979)). The finding cannot be based solely on generic concerns. Id. The court noted that although expert testimony may not always be required, it will often serve as best evidence of risk. Id.

With respect to the second prong, the Jam. J. court opined that "in neglect proceedings in particular, "[t]he judges of the trial court have broad authority to take whatever steps are necessary to protect the wellbeing of neglected and abused children." Id. at 918 (citing In re. S.L.E., 677 A.2d. at 522). The court suggested consideration of the use of technology to protect a child witness from the negative effects of testimony, referencing use of close-circuit cameras to capture the child's testimony outside the physical presence of the parents. Id. (citing Maryland v. Craig, 497 U.S. 853-854, 110 S.Ct. 3157, 111L.Ed.2d 666 (1990)).

Upon reaching the third prong of the test, the Jam. J. court directs the trial court to consider the materiality of the testimony in light of the allegations of neglect, as well as the degree to which the allegations are grounded in the out of court statements of the child. In re. Jam. J., 825 A.2d 902, 918 (D.C. 2003). The court also directs the trial court to consider the reliability of the statements and the totality of the evidence in its analysis as to the probative value of the testimony and the parent's need for it. Id. Further, the court suggests that in an appropriate case, the court may require the parent to proffer the testimony he/she hopes to elicit from the child and the basis for the proffer. Id. Failure to provide good faith proffer of relevant testimony may result in the court exercising careful control over the testimony to prevent undue trauma to the child. Id. According to the court, the trial judge can also explore alternatives to taking testimony from the child such as admitting out of court statements made by the child or stipulations. Id. Additionally, the court may be able to assess the probative value of the child's testimony by means of an informal *in camera* interview. Id.

Practical Considerations and Practice Tips

Prevailing on a Jam. J. motion requires careful planning and timely filing of pleadings. A motion in limine (also referred to specifically as a Jam. J. motion), should be filed prior to the pretrial hearing requesting an evidentiary hearing. Additionally, it is often imperative to secure a mental health professional, such as the child's treating therapist or an independent evaluator, who is able to provide an expert opinion as to harm the child would suffer if required to testify. Efforts to secure a proffer of the child's testimony should be expended, so an assessment can be made as to the probative value of the anticipated testimony and the parent's need for the testimony. It is also important to attempt to secure alternative sources for the information, as it is possible that the other parties and the court may agree to admit out of court statements or stipulated facts in lieu of the child's testimony. Lastly, it is critical to properly prepare your client for any testimony, even in an alternative setting, to minimize the child's anxiety and apprehension. Arranging a visit to the courthouse in advance of the scheduled proceeding, so that the child is familiar with the environment prior to providing testimony, may be helpful for the child.

Admissibility of Expert Testimony

Abandonment of *Dyas/Frye* and Application of FRE 702

Motorola Inc., v. Murray, 147 A.3d 751 (D.C. 2016)

Procedural History

Murray came before the Court after Motorola appealed a D.C. Superior Court decision holding that only a small portion of plaintiffs' proffered expert testimony was admissible under the *Dyas/Frye* evidentiary standard, but most of the testimony was inadmissible under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The *Daubert* Standard is similar to Federal Rule of Evidence 702 in that it gives the trial court discretion to determine the applicability of an expert's principles and methods to the facts at issue in a particular case.

Facts

Plaintiffs in thirteen cases sued various cell phone manufacturers, service providers, and trade associations, alleging that long-term exposure to cell phone radiation caused brain tumors. The trial court held evidentiary hearings to determine the admissibility of plaintiffs' expert testimony. The trial court then concluded that some of the expert testimony would be admissible under the *Dyas/Frye* test but that most of it would be excluded under Rule 702 of the Federal Rules of Evidence. Finally, the trial court certified a question of law for interlocutory appeal asking "whether the District of Columbia should adopt Federal Rule of Evidence 702 (or a revised *Frye* standard) for the admissibility of expert evidence." *Murray*, 147 A.3d at 752.

Issue

Should the Court abandon the *Dyas/Frye* test in favor of adopting the standards codified in Rule 702 of the Federal Rules of Evidence?

Analysis

A. *Dyas/Frye* test

In *Frye v. U.S.*, 293 F. 1013 (D.C. Cir 1923), the Court of Appeals of the District of Columbia articulated a test for admitting expert testimony. The court held that the theory from which scientific testimony was deduced must be sufficiently established and have gained general acceptance in the particular field it belongs to be deemed admissible. Later, in *Dyas v. U.S.*, 407 A.2d 626 (1979), the Court expanded on *Frye* by implementing the following 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, 376 A.2d at 832. The *Frye/Dyas* test focuses on whether the scientific methodology has been generally accepted, meaning “[t]he answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case.” *Nathaniel Jones v. United States*, 548 A.2d 35, 40 (D.C. 1988).

B. *Daubert*

Most jurisdictions apply the *Daubert* standard when determining whether to admit a witness as an expert. *Daubert* emphasizes the trial court’s “robust gatekeeper function.” See generally *Daubert*, 509 U.S. 579. Like *Frye* and *Dyas*, *Daubert* focuses on scientific methodology but also adds a focus on the application of the methodology in a particular case. The *Daubert* court found that the *Frye/Dyas* test was too restrictive on expert opinions and was inconsistent with the Federal Rules and its approach of relaxing the barriers to opinion testimony from experts. *Daubert* requires the following test for expert admissibility:

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))

Is the testimony reliable?

- Based on sufficient facts or data? (Rule 702(b))
- The product of reliable principles and methods? (Rule 702 (c))
- The product of reliable application of principles and methods to the facts of the case? (Rule 702(d))

C. FRE 702

Federal Rule of Evidence 702 was amended in response to the Supreme Court’s ruling in *Daubert*. Like *Daubert*, it focuses on applying scientific methods and principles to a particular case, instead of determining admissibility solely based on general acceptance in a particular field. Rule 702 of the Federal Rules of Evidence provides:

“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:

- (a) 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;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

Fed. R. Evid. 702. The court in *Murray* listed clarity, simplicity, and being able to use opinions from the many jurisdictions that apply the FRE 702 standard as reasons for adopting the FRE 702 standard.

a. Court’s Gatekeeping Role

The court in *Murray* reaffirmed its role as gatekeeper in determining an expert’s reliability. The court’s gatekeeping role is not intended to be a replacement for the adversarial system. *Murray*, 147 A.3d at 757. The gatekeeper’s role is a discretionary one, meaning as long as the court recognizes that it has discretion and exercises it by

reference to proper criteria used to assess reliability, the decision to admit or exclude expert opinion testimony is reviewable only for abuse of discretion. *Id.* at 756. Additionally, “the trial judge has the discretion ‘both to avoid unnecessary “reliability” proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.’” Fed. R. Evid. 702 Advisory Committee's notes to 2000 Amendments (quoting *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999)). The court cannot automatically admit expert testimony just because it has become accustomed to doing so under the *Dyas/Frye* test. *Murray*, 147 A.3d at 758.

Holding

The Court of Appeals for the District of Columbia held that it would apply FRE 702 to this case and any other civil or criminal cases. The court also held that it would decide at a later time whether the FRE 702 standard would apply to cases that have already been tried but are not yet final on direct appeal. *Murray*, 147 A.3d at 758.

What Does This Mean For Practitioners?

The Court of Appeals for the District of Columbia held that it would replace the *Frye* test with the FRE 702/*Daubert* standard in determining the admissibility of expert opinion. Applying FRE 702, means that practitioners must prepare their witnesses differently before attempting to qualify the witness as an expert. As opposed to preparing a witness to testify to whether methods and principles are generally accepted in their particular field, practitioners will now have to prepare witnesses to testify to the reliability of their methods and principles used to form their opinion and to whether these methods and principles apply to the specific facts at issue in the case at hand. For example, witnesses should be prepared to answer whether they have used a particular set of methods and principles in the past and whether that past experience helped guide their opinions in the case at hand. Additionally, the adoption of FRE 702 allows practitioners to look to more jurisdictions to see how courts apply FRE 702 for witnesses particularly relevant in abuse, neglect, custody, and adoption cases.

Federal Rules of Evidence and Important D.C. Case Law on Common Objections and Hearsay

- [Federal Rules of Evidence](#)

- Case Law

- o Hearsay

- [Nicholson v. U.S., 368 A.2d 561 \(D.C. 1977\)](#) (*excited utterance*)
- [Galindo v. U.S., 630 A.2d 202 \(D.C. 1993\)](#) (*medical diagnosis*)
- [Clyburn v. D.C., 741 A.2d 395 \(D.C. 1999\)](#) (*business records*)
- [In re Ca.S., 828 A.2d 184 \(D.C. 2003\)](#) (*medical diagnosis; opinion*)
- [In re Kya. B., 857 A.2d 465 \(D.C. 2004\)](#) (*medical diagnosis*)
- [Wilson v. U.S., 995 A.2d 174 \(D.C. 2010\)](#) (*statement of a party opponent*)
- [In re K.J., 11 A.3d 273 \(D.C. 2011\)](#) (*admission of a party opponent*)
- [Melendez v. U.S., 26 A.3d 234 \(D.C. 2011\)](#) (*excited utterance*)
- [Jones v. U.S., 17 A.3d 628 \(D.C. 2011\)](#) (*state of mind*)
- [Brown v. U.S., 27 A.3d 127 \(D.C. 2011\)](#) (*excited utterance*)
- [Castillo v. U.S., 75 A.3d 157 \(D.C. 2013\)](#) (*excited utterance*)
- [Bridges v. Clark, 59 A.3d 978 \(D.C. 2013\)](#) (*admission of party opponent*)
- [Holmes v. U.S., 92 A.3d 328 \(D.C. 2014\)](#) (*definition of “statement” for hearsay purposes*)
- [Mayhand v. U.S., 127 A.3d 1198 \(D.C. 2015\)](#) (*excited utterance*)

- o Opinion

- [In re Melton, 597 A.2d 892 \(D.C. 1991\)](#) (*opinion*)
- [Jones v. U.S., 990 A.2d 970 \(D.C. 2010\)](#) (*expert opinion*)
- [In re A.B., 999 A.2d 36 \(D.C. 2010\)](#) (*expert opinion*)
- [In re M.L., 28 A.3d 520 \(D.C. 2011\)](#) (*expert opinion; physician-patient privilege*)
- [Nelson v. U.S., 55 A.3d 389 \(D.C. 2012\)](#) (*opinion of a lay witness*)
- [King v. U.S., 74 A.3d 678 \(D.C. 2013\)](#) (*expert opinion*)
- [In re L.C., 92 A.3d 290 \(D.C. 2014\)](#) (*expert testimony; relevance*)

- o Other Evidentiary Issues

- [Drew v. U.S., 331 F.2d 85 \(D.C. 1964\)](#) (*character evidence*)
- [Giles v. U.S., 548 A.2d 48 \(D.C. 1988\)](#) (*foundation/authentication*)
- [Henderson v. George Wash. Univ., 449 F.3d 127 \(D.C. 2006\)](#) (*prejudice outweighs probative value*)
- [Motorola Inc., v. Murray, 147 A.3d 751 \(D.C. 2016\)](#) (*qualifying expert witnesses*)