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The Law of Evidence in the District of Columbia (Sixth Edition 2020)

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HIGHLIGHTS

- This new, Sixth Edition of *The Law of Evidence in the District of Columbia* has been updated with recent case law, court rule, and legal developments.

This Sixth Edition of the Law of Evidence in the District of Columbia (“Sixth Edition”) contains, among other features, the following:

- annotations to all recent opinions relating to evidentiary matters issued by the U.S. Supreme Court and the D. C. Court of Appeals (“DCCA”), along with selective opinions issued by the D.C. Superior Court, the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the District of Columbia Circuit through November 4, 2020;
- a much-expanded chart comparing the Federal Rules of Evidence (“FREs” or “Rules”) and D.C. evidentiary law (the “Comparison Chart”);
- an updated chart listing all U.S. Supreme Court cases, all DCCA cases, and selected D.C. Superior Court cases citing specific FREs (the “FRE Citation Chart”), with those cases devoting more than cursory treatment of a FRE in bold print;
- updated, more comprehensive Editorial Commentaries; and

- an Appendix with more detailed Legislative Histories of individual FREs.

With respect to the Editorial Commentaries, this Edition discusses in greater detail certain evidentiary issues in D.C. that are developing and / or particularly challenging to apply. For example, one of the DCCA’s most notable, recent decisions is *Motorola, et. al. v. Murray, et. al.*, 147 A.3d 751 (D.C. 2016) (*en banc*). There, the DCCA overruled decades of D.C. caselaw by abolishing the *Frye-Dyas* test for admitting expert testimony, and by adopting Rule 702 (“Testimony by Expert Witnesses”). The Editorial Commentary for Rule 702 discusses the *Motorola* decision at some length, and includes references to the most recent, post-*Motorola* caselaw. See § 702.01[2], *infra*. Further, the Editorial Commentary separately discusses selected *Motorola*-related topics, including the reliability of forensic evidence, and the reliability of eyewitness identification testimony — topics that arise frequently in current federal and D.C. practices. See *id.*

Other Rules with extended Editorial Commentaries include:

Rule 301: discussing the complicated subject of presumptions (see § 301.01[2]);

Rule 403: discussing evidentiary burdens in weighing whether to admit or exclude relevant evidence (see § 403.01[2]; see also § 404.01[3][d]), *infra*);

Rules 404(b), 413–15: discussing the significant differences

between federal and D.C. practices involving the admissibility of other sexual bad acts evidence in sexual offense cases, as well as the particular difficulties that D.C.’s common law presents with respect to other sexual bad acts evidence in sexual offense cases (see § 413.01[2], *infra*);

Rule 501: discussing the developing legal area of peer review privilege (see § 501.01[10]).

Rule 609: discussing and comparing the complexities of federal and D.C. practices regarding the admissibility of prior convictions for impeachment purposes (see § 609.01[3]); and

Rules 101, 803(6), 803(16), 901 and 902: discussing the evidentiary treatment of electronically-stored information, which is now prevalent in litigation (see §§ 101.01[2], 803.01[7], 803.01[17], 901.01[2], 902.01[2], 1001[2], and 1002[2]).

Recent Cases

As usual, this Sixth Edition provides annotations to recent cases decided since the Fifth Edition. Notable cases that may be of interest to practitioners include:

Rule 301 — Presumption — “Weight Consideration” presumption in adoptions abandoned. *In re J.B.S.*, 237 A.3d 131 (D.C. 2020) (*en banc*) (The DCCA “abandon[ed]” the “weighty consideration” presumption in contested adoption proceedings. That presumption had accorded “weighty consideration” to the opin-

ion of even *unfit* biological parents as to which potential adoptive parent(s) the child should be placed with. The DCCA deemed the presumption “inherently illogical” and not serving the “child’s best interest.”) (*see* § 301.01[3]).

Rule 301 — Presumption — “Ordinary meaning” presumption of statutory interpretation. *Facebook, Inc. v. Pepe*, ___ A.3d ___, 2020 D.C. App. LEXIS 125 (D.C. Apr. 14, 2020) (The trial court had held Facebook in civil contempt for not providing subpoenaed information that seemed plainly allowed under the controlling statute. On appeal, Facebook sought to justify its non-disclosure position based, in part, on a strained construction of the statute’s language. In affirming the trial court, the DCCA determined, *inter alia*, that Facebook had failed to rebut the “ordinary meaning” presumption of statutory interpretation.) (*see* § 301.01[3]).

Rule 301 — Presumption that later ceremonial marriage is the valid marriage held applicable to a later ceremonial marriage between a same-sex couple. *Gill v. Van Norstrand*, 206 A.3d 869, 874–84 (D.C. 2019) (The law presumes that a later, ceremonial marriage is the valid marriage relative to an earlier marriage. This case is notable because the DCCA expressly recognized that a same-sex couple can enter into a common law marriage in this jurisdiction, and that the standard presumption favoring a later, ceremonial marriage applied. Here, to overcome

that presumption, the plaintiff had a burden to prove by “clear and convincing” evidence that his alleged, earlier common-law marriage with the defendant was the valid one. Plaintiff did not carry that burden. The subsequent same-sex, ceremonial marriage was ruled the valid one.) (*see* § 301.01[3]).

Rule 404(b) — “Other Crimes” — Defendant’s introduction of “other crimes” evidence made impeachment permissible. *Pitt v. United States*, 220 A.3d 951 (D.C. 2019) (At his trial for sexual assault and burglary, the defendant testified about earlier, lesser criminal acts. His evident purpose was to color himself as a minor criminal who had just acted as a fence for stolen property — not the perpetrator of the rape and burglary for which he was on trial. The prosecution was then properly allowed to impeach the defendant with an uncharged crime that had occurred just a week before the charged crimes here. In that earlier incident, the defendant had allegedly broken into a sleeping woman’s apartment and stolen her cell phone. The prosecution’s impeaching the defendant was an appropriate response to his attempt to cast doubt that he would have committed the crimes for which he was on trial. Additionally, cross-examining him about the earlier incident properly went to his credibility.) (*see* § 404.01[3][d]).

Rule 404(b) — “Other Crimes” — Non-propensity evidence was not “other crimes” evidence. (*Ronald*) *Jackson v. United States*, 210

A.3d. 800 (D.C. 2019) (In an assault prosecution, the government’s introducing evidence of the defendant’s purported use of PCP the night before he attacked the victim was not impermissible “other crimes” evidence because the PCP evidence was not introduced to demonstrate the defendant’s propensity to commit the assault. Rather, since the defendant had alleged self-defense, the PCP evidence was properly useable to explain the circumstances of the attack, including the defendant’s behavior and his perceptions of what had occurred.) (*see* § 404.01[3]).

Rule 602 — Personal Knowledge — No personal knowledge whether property was private property. *Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (The defendant had been barred from the Washington Nationals’ property for reselling game tickets outside the center field gate. Two weeks later, the defendant was arrested for unlawful entry due to his reselling tickets on the sidewalk in front of the Nationals’ will-call window. At trial, the arresting officer was the government’s only witness. He had no personal knowledge as to whether the Nationals actually owned the sidewalk in front of the will-call window. Further, the government did not offer any other evidence that the Nationals owned the sidewalk. Absent proof that the sidewalk was privately owned by the Nationals, the government had not proved unlawful entry. The DCCA reversed.) (*see* § 602.021[3]).

Rule 611 — Recross-examination

— **When redirect-examination brings out new information, recross-examination must be allowed.** (*Kevin*) *Green v. United States*, 209 A.3d 738, 741–44 (D.C. 2019) (During a domestic dispute between the defendant and his girlfriend, she called 911. At the defendant’s assault trial, the girlfriend was admittedly confused about the incident. The defense counsel thus played snippets of the 911 call to refresh her recollection, but did not impeach her. The prosecution then recross-examined the girlfriend, but asked no questions about the 911 call. At the trial court’s suggestion, the prosecution moved the entire 911 call into evidence. The trial court denied defense counsel’s request to recross-examine the girlfriend. The DCCA reversed, holding that when new matters are brought out on redirect examination, the Confrontation Clause requires that the defense be allowed to recross-examine. Here, nearly the entire 911 call had been new.) (*see* § 611.01[4]).

Rule 702 — Expert Testimony —
Crim. Rule 12.2 mental examination of a defendant by the government’s mental health expert. *Bilal v. United States*, ___ A.3d ___, 2020 D.C. App. LEXIS 398 (D.C. Oct. 15, 2020) (Analyzing D.C. Sup. Ct. Crim. Rule 12.2 (“Notice of an Insanity Defense; Mental Examination”) in light of its federal analog, Fed. R. Crim. Pro. 12.2, Supreme Court precedent, and other authority, the DCCA held that the Fifth Amendment posed “no . . . bar against a compelled mental examination [by

the prosecution’s mental health expert] of the defendant if the defendant will rely on testimony of a mental health expert who has examined him, and the compelled examination [by the prosecution’s expert] will be limited to the issue(s) raised by the defense.” The DCCA nevertheless underscored that a trial court is to determine on a “case-by-case basis” whether such an examination by a government expert is warranted, “balancing the needs of the government to rebut the defense case with the liberty interests of the individual defendant.”) (*see* § 702.01[3]).

Rule 702 — Expert Testimony — Autopsy report and Confrontation Clause violation. *Burns v. United States*, 235 A.3d 758 (D.C. 2020) (This is the first case in which the DCCA has addressed whether a Chief Medical Examiner’s recounting statements in the autopsy report violated the Confrontation Clause where he had not conducted the autopsy. Rather, a subordinate — who was no longer with the office but who had not been shown to be unavailable — had conducted the autopsy and written the report. The DCCA held that the subordinate’s statements in the autopsy report transmitted by the Chief Medical Examiner were “testimonial” under *Crawford v. Washington*, 541 U.S. 36 (2004), and progeny. Since defendant had no opportunity to cross-examine the subordinate, the Confrontation Clause was violated.) (Note: While not an evidentiary issue but a Fourth Amendment issue, the DCCA also held in *Burns* that the search and

seizure of defendant’s cell phone’s “digital contents” pursuant to a warrant violated the Warrant Clause of the Fourth Amendment, where that warrant had been significantly overbroad.) (*see* § 702.01[3]).

Rule 702 — Expert Testimony — Defects in testimony went to testimonial weight, not admissibility. *Govan v. Brown*, 228 A.3d 142 (D.C. 2020) (In a will dispute, the decedent’s testamentary capacity was the issue. A defense medical expert was a doctor of internal medicine. However, he had not examined the decedent, had not spoken with certain people who may have had relevant information, and had not examined certain records. The doctor may also have had a bias issue. The doctor testified largely in generalities. Nevertheless, under Rule 702, the doctor’s testimony, upon which the trial court had only limitedly relied, was still admissible. The shortcomings / concerns associated with his expert testimony went to its weight — not admissibility.) (*see* § 702.01[3]).

Rules 702 and 703 — Expert Testimony — Gathering and interpreting of DNA profile evidence by separate experts. *Ruffin v. United States*, 219 A.3d 997 (D.C. 2019) (The government forensics agency had appropriately gathered the DNA profile evidence but had then interpreted and compared the evidence using flawed procedures. Realizing the problem prior to trial, the prosecution retained an accredited private forensics firm to interpret and compare the DNA profile evidence.

Looking to Rules 702 and 703, which the DCCA had adopted in *Motorola*, the DCCA held that the firm’s forensic biologist had been appropriately allowed to provide expert testimony at trial on the interpretation and comparison of the DNA profile evidence gathered by the government agency. The defendant had not shown that the evidence *gathering* by the government forensic agency had been flawed, nor that the firm’s forensic biologist had erroneously interpreted and compared the gathered DNA profile evidence.) (see § 702.01[3], § 703.01[3]).

Rule 702 — Expert Testimony — False expert testimony on hair fiber samples. *United States v. Nelson*, 217 A.3d 717, 720–26 (D.C. 2019) (The DCCA affirmed the vacatur of defendant’s murder conviction from over 30 years before where the FBI’s hair fiber expert had testified falsely at trial. (As later learned, the FBI expert had given similarly false testimony in many cases.) Here, the expert testified that based on his tests — which in fact had no scientific foundation — the compared hair follicles were “completely indistinguishable.” The FBI expert’s testimony had been “critical” to the government’s case, which otherwise was not strong.) (see § 702.01[3]).

Rule 702 — Expert Testimony — “First impression” issue on toolmark / firearms testimony. *United States v. Tibbs*, Case No. 2016 CF1 19431, 2019 D.C. Super. Lexis 9 (Sept. 5, 2019) (Edelman, J.) (The trial court addressed an issue of “first

impression,” in that no D.C. case had yet applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702 (as required by *Motorola*) to toolmark / firearms identification testimony. The trial court applied the five *Daubert* factors relative to tool mark identification and determined that several factors were problematic; the court was particularly concerned about the alleged potential error rate of the methodology employed. Accordingly, the trial court held that the government’s toolmark / firearms expert could testify that the recovered firearm could not be excluded as the source of the cartridge casing found at the crime scene, that is that the firearm “may” have fired the casing; but the trial court barred the expert from stating “an ultimate conclusion in stronger terms” that the recovered firearm was the source of the found cartridge casing.) (emphasis by the trial court) (see § 702.01[3]).

Rule 702 — Expert Testimony — Expert’s certainty that bullets matched seized gun was inadmissible. (*Marlon*) *Williams v. United States*, 210 A.3d 734 (D.C. 2019) (Following *Motorola*, and *Gardner v. United States*, 140 A.3d 1142 (D.C. 2016), the DCCA held that it was plain error to admit a firearm / toolmark expert’s testimony that without “any doubt” the recovered bullets matched the seized gun. Reversal, however, was not warranted because the other evidence against the defendant had been “compelling.”) (see § 702.01[3]).

Rule 803(1) — Present Sense Hearsay Exception — Criteria. *Sims v. United States*, 213 A.3d 1260 (D.C. 2019) (The DCCA reaffirmed its criteria for the admissibility of hearsay under the present sense exception, that is, “spontaneity, contemporaneity, and personal knowl-

edge.” *Id.* at 1271. Notably, the DCCA rejected the government’s effort to include corroboration as an independent factor that could substitute for any or all of this jurisdiction’s recognized criteria.) (*see* § 803.01[2]).

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