

## **An Analysis of the *Frye* Standard To Determine the Admissibility of Expert Trial Testimony in New York State Courts**

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### **Overview:**

Expert testimony is an important trial tool for many litigants, including in state courts. In order for expert testimony to be admissible at trial in New York State courts, the testimony must satisfy the requirements established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for determining the admissibility of such evidence. *See, e.g., Sean R. ex rel. Debra R. v. BMW of N. Am.*, 26 N.Y.3d 801, 809 (2016) (“The ‘general acceptance’ requirement, also known as the *Frye* test, governs the admissibility of expert testimony in New York.”). The *Frye* test asks “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.” *People v. Wesley*, 83 N.Y.2d 417, 422 (1994).

Even though the federal courts and the courts of several states “have moved away from the *Frye* standard to one embracing a more hands-on gatekeeper function for the trial judge, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), New York continues to follow the *Frye* approach.” *People v. Bullard-Daniel*, 54 Misc. 3d 177, 185 (Sup. Ct. Niagara County 2016); *see also Wesley*, 83 N.Y.2d at 423 n.2 (concluding that the *Daubert* standard is “not applicable” in New York State courts).

Under *Frye*, the only inquiry for the trial court is whether the scientific techniques used are generally accepted by other scientists as reliable. The *Frye* test also is more limited in its application, as it applies only to novel scientific evidence, whereas *Daubert* has been extended to non-scientific evidence such as technical or other specialized knowledge. *Daubert*, also established additional factors the courts can consider above and beyond whether other scientists find the methodology reliable. Under *Daubert*, judges are afforded broad discretion in determining whether an expert's testimony satisfies the *Daubert* standard (and FRE 702) and the test therefore is often viewed as more liberal and flexible in its application. As one New York trial court explained “The role of a judge as gatekeeper is different in the states which have adhered to *Frye*, such as New York, and those jurisdictions which follow *Daubert* . . . trial courts in this state do not determine whether or not a method was reliable, but rather determine whether there is a consensus in the scientific community as to its reliability.” *In re Seventh Judicial Dist. Asbestos Litig.*, 9 Misc. 3d 306, 313 (Sup. Ct. Wayne County 2005)

The issue of whether an expert’s methodologies are generally accepted as reliable by others in the expert’s field of expertise is an important one that arises frequently in commercial cases where scientific evidence is often necessary to prove (or disprove) a party’s case at trial.

### **The *Frye* Standard:**

The *Frye* test is applied to determine the admissibility at trial of expert testimony based on novel scientific evidence, including novel social and behavioral sciences, in both civil and

criminal proceedings in New York State courts. *See, e.g., Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006). Thus, the *Frye* test comes into play only when expert testimony is based on scientific evidence that is “novel.” *See, e.g., In re Seventh Judicial Dist. Asbestos Litig.*, 9 Misc. 3d at 311 (“A court is only required to conduct an inquiry, concerning general acceptance, pursuant to *Frye*, in situations in which a party seeks to rely upon novel scientific, technical or other concepts involving expertise.”); *Krackmalnik v. Maimonides Med. Ctr.*, 142 A.D.3d 1143, 1144 (2d Dep’t 2016) (“Here, the opinion of plaintiff’s expert was not based on novel theories and did not warrant a preliminary *Frye*-type hearing.”).

Accordingly, there is no need for expert testimony to satisfy the *Frye* test if, for instance, the testimony is based on the expert’s personal knowledge, experience, observations or research. *See, e.g., People v. Oddone*, 22 N.Y.3d 369, 376 (2013) (testimony based on personal experience not subject to *Frye*). A *Frye* inquiry also is unnecessary where controlling precedent establishes that a certain scientific procedure or methodology previously has been proven to be reliable. *See People v. LeGrand*, 8 N.Y.3d 449, 458 (2007) (“A court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony.”); *People v. Carter*, 50 Misc. 3d 1210(A), at \*3 (Sup. Ct. Queens County 2016) (“Rulings by other judges finding a technique generally acceptable can obviate the need for a *Frye* hearing.”).

It is also worth noting that “novel scientific evidence may be admitted without any hearing at all by the trial court.” *Wesley*, 83 N.Y.2d at 426. Once the reliability of expert opinion testimony is put before the trial court, however, the proponent of that expert testimony bears the burden of establishing that the testimony passes muster under the *Frye* test – *i.e.*, that the methodologies underlying the expert’s opinion are generally accepted by the relevant scientific community. *See, e.g., In re Seventh Judicial Dist. Asbestos Litig.*, 9 Misc. 3d at 312 (“Once a party has made a prima facie showing that a proposed expert opinion is not reliable, the burden shifts to the proponent of such evidence to establish general acceptance.”).

Universal acceptance by the scientific community is not a prerequisite for admissibility; rather, proof of general acceptance in the relevant scientific community that a technique or procedure generates reliable results is all that is required. *See, e.g., People v. Middleton*, 54 N.Y.2d 42, 49 (1981) (“But the test is not whether a particular procedure is unanimously indorsed [*sic*] by the scientific community, but whether it is generally acceptable as reliable.”); *People v. Felix*, No. 1617-2015, 2017 WL 522981, at \*1 (Sup. Ct. N.Y. County Jan. 27, 2017) (“The acceptance need not be unanimous. Still, the proponent of the evidence must show widespread agreement about those principles in that relevant community.”).

In the *Frye* context, “general acceptance” can be established in various ways, including: (i) by expert testimony demonstrating general acceptance of the methodology in the relevant scientific community; (ii) by authoritative scientific writings showing the methodology is generally accepted by the relevant scientific community; or (iii) by the court taking judicial notice of other judicial opinions finding that the methodology has been generally accepted in the relevant scientific community. *See, e.g., Wesley*, 83 N.Y.2d at 437 (“If no court opinions, texts, laboratory standards or scholarly articles have been issued on the technique – the types of materials relevant to a determination of general acceptability – the court may, as it did here, take the testimony of expert witnesses.” (citations omitted)); *State v. Kareem M.*, 51 Misc. 3d

1205(A), at \*18 (Sup. Ct. N.Y. County 2016) (“General acceptance can be established through ‘texts and scholarly articles,’ expert testimony and judicial opinions.” (citation omitted)); *In re Seventh Judicial Dist. Asbestos Litig.*, 9 Misc. 3d at 315 (same).

### **The Role of New York Trial Courts in the *Frye* Context:**

In New York, the admissibility at trial of expert testimony on a particular issue is within the discretion of the trial court. *See, e.g., People v. Brown*, 97 N.Y.2d 500, 505 (2002). Accordingly, application of the *Frye* test calls for a threshold judicial determination as to whether the challenged expert testimony is based upon scientific methodologies, theories or processes that are generally accepted in the relevant scientific community such that the testimony should be considered to be reliable evidence. *See In re Seventh Judicial Dist. Asbestos Litig.*, 9 Misc. 3d at 310 (in New York, courts make “an initial determination as to whether or not the basis of expert opinion has gained sufficient general acceptance in a particular field in order to be considered reliable, and to justify admission at trial.”).

Specifically, admissibility under *Frye* requires a showing that:

- the expert providing the challenged testimony is sufficiently qualified to testify as an expert witness with respect to the pertinent issue; *see Matott v. Ward*, 48 N.Y.2d 455, 459 (1979) (“[A] predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable.”); *State v. Jason C.*, 51 Misc. 3d 553, 556 (Sup. Ct. N.Y. County 2016) (same);
- “the testimony is based on scientific principles or procedures which have been sufficiently established to have gained general acceptance in the particular field involved,” thereby evidencing the reliability of such expert testimony; *Jason C.*, 51 Misc. 3d at 556; *see also Parker*, 7 N.Y.3d at 446 (“[T]he *Frye* test asks ‘whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.’” (citation omitted)); and
- the expert’s testimony is relevant to the issues in the case. *See, e.g., People v. LeGrand*, 8 N.Y.3d at 456-57, 459; *Jason C.*, 51 Misc. 3d at 557. “Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., if it makes determination of the action more probable or less probable than it would be without the evidence.” *Jason C.*, 51 Misc. 3d at 557.

When a trial court applies the *Frye* test, the purpose is to assess the general acceptance of the methodology used by the expert, not to analyze the soundness of the expert’s ultimate scientific conclusions. *See, e.g., Parker*, 7 N.Y.3d at 447; *People v. Bullard-Daniel*, 54 Misc. 3d at 186 (“At [a *Frye*] hearing, it is not the court’s duty to reach its own conclusion about the

reliability of the proposed scientific procedure, but rather to determine whether most of the relevant scientific community believes the procedure or technique under consideration is reliable.”). Instead, the weight, if any, to be afforded to those conclusions is an issue of credibility for the jury to determine, not an issue of admissibility for the trial court to rule upon. *See, e.g., Wesley*, 83 N.Y.2d at 426-27 (weight to be given to admissible expert testimony is a matter not properly addressed by pretrial *Frye* hearings, but rather presents an issue of credibility “which should be left to the trier of fact”).

Moreover, in New York State courts, “[t]he *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence – whether there is a proper foundation – to determine whether the accepted methods were appropriately employed in a particular case.” *Parker*, 7 N.Y.3d at 447; *see also LeGrand*, 8 N.Y.3d at 457 (“Once the general reliability concerns of *Frye* are satisfied, the court will consider whether there is a proper foundation ‘for the reception of the evidence at trial.’” (citation omitted)); *Wesley*, 83 N.Y.2d at 426 (holding that “matters going to trial foundation or the weight of the evidence [are] both matters not properly addressed in the pretrial *Frye* proceeding”).

### **Recent New York Cases Applying *Frye* Standard:**

In the *Frye* context, defining the appropriate scope of “the relevant scientific community” in which general acceptance must be established often becomes a point of contention among the parties. Recent New York State cases addressing the proper scope of the relevant scientific community often refer to the concurring opinion of then-Chief Judge Kaye in the NY Court of Appeals case *People v. Wesley*, 83 N.Y.2d 417 (1994), and rely upon her analysis to conclude that the proponents of certain novel scientific evidence have failed to satisfy their burden under *Frye* in that they did not demonstrate general acceptance by the relevant scientific community.

For example, the issue presented in *State v. Kareem M.*, 51 Misc. 3d 1205(A) (Sup. Ct. N.Y. County 2016) was “whether the diagnosis proffered by the State here, ‘Other Specified Paraphilic Disorder (“OSPD”), arousal to non-consenting persons’ has gained general acceptance in the relevant scientific community.” *Id.* at \*1. The court concluded that the diagnosis did not satisfy the *Frye* test, among other reasons, because the State did not prove that when the scientists’ votes were counted the diagnosis had obtained general acceptance in the relevant scientific community. *Id.* at \*20. In so holding, the court explained:

The first question which must be asked with respect to the [counting of scientists’ votes] is what community should be considered. There are three reasonable possibilities. The first are psychologists and psychiatrists generally. The second are psychologists or psychiatrists who have as a meaningful part of their practice the diagnosis, evaluation or treatment of sex offenders or perform research in the field. . . . The third possibility would be psychologists and psychiatrists who work in [sex offender civil management programs].

*Id.* at \*25. The court declined to define the relevant community as including psychologists and psychiatrists generally on the ground that such a definition would be overly broad because sex offenders are usually treated by psychologists and psychiatrists who work in sex offender civil management programs and as such a psychologist or psychiatrist “with a general practice would

be unlikely to have an informed view about whether [the diagnosis at issue] was generally accepted because it would be a disorder she would rarely if ever encounter.” *Id.* at \*27. The court also rejected the third possible definition on the grounds that defining the relevant scientific community to include only psychologists and psychiatrists who work in sex offender civil management programs would be too narrow and a conclusion of general acceptance by solely those practitioners could be based on biased results since those who work in sex offender civil management programs have a professional self-interest in concluding that the diagnosis is generally accepted as reliable. *See id.* at \*26. Instead, the court held that the relevant scientific community was composed of psychologists and psychiatrists who have as a meaningful part of their practice the diagnosis, evaluation or treatment of sex offenders or perform research in the field and that the diagnosis proffered by the State failed to satisfy the *Frye* test because the State did not meet its burden of demonstrating that the diagnosis had been generally accepted by the relevant scientific community. *Id.* at \*26-27.

Many other recent cases applying *Frye* have followed suit in concluding that the proponents of other novel scientific techniques, processes or diagnoses failed to satisfy the *Frye* test on the ground that the proponents did not show general acceptance of those methods by peers in the respective relevant scientific communities. *See Jason C.*, 51 Misc. 3d at 558, 581 (concluding that the “State has not convinced the court that the relevant scientific community is just those engaged in [sex offender civil commitment] proceedings or that a greater extended community of psychological or psychiatric practitioners find this diagnosis to be generally accepted” and holding that “the State has not met its burden to prove under *Frye* that the respondent’s specific diagnosis of OSPD (nonconsent) is generally accepted in the relevant scientific community”); *State v. David D.*, 53 Misc. 3d 1041, 1053-54 (Sup. Ct. Albany County 2016) (same); *State v. Ralph P.*, 53 Misc. 3d 496, 532-33 (Sup. Ct. N.Y. County 2016) (same).

The proper scope of the relevant scientific community was addressed by the Court of Appeals in *People v. Wesley*, 83 N.Y.2d 417 (1994). The issue in that case concerned the general acceptance by the relevant scientific community of the reliability of DNA evidence and, in particular, whether the visual matching procedure utilized by the State’s expert was a technique generally accepted by the relevant scientific community as capable of producing reliable results when properly employed. *See Wesley*, 83 N.Y.2d at 436-37. The majority found that the State met its burden of showing that the specific visual matching technique at issue was generally accepted by the relevant scientific community. *See id.* at 425-29. In her concurring opinion, however, then-Chief Judge Kaye did not agree.

Judge Kaye pointed out that the majority's conclusion that the matching technique was generally accepted in the relevant scientific community was based solely upon the “opinions of two scientists, both with commercial interests in the work under consideration and both the primary developers and proponents of the technique,” *id.* at 441, “[n]or had the forensic procedure been subjected to thorough peer review,” *id.* at 440, and concluded that together those facts “were insufficient to establish ‘general acceptance’ in the scientific field.” *Id.* at 441. Judge Kaye further explained:

In defining the relevant scientific field, the court must seek to comply with the *Frye* objective of containing a consensus of the scientific community. If the field is too narrowly defined, the judgment of the scientific community will devolve

into the opinion of a few experts. The field must still include scientists who would be expected to be familiar with the particular use of the evidence at issue, however, whether through actual or theoretical research.

*Id.* at 438. In her opinion, “[b]efore bringing novel evidence to court, proponents of new techniques must subject their methods to the scrutiny of fellow scientists, unimpeded by commercial concerns,” *id.* at 439, and, because that was not done, “[t]he inquiry into forensic analysis of DNA in this case also demonstrates the ‘pitfalls of self-validation by a small group.’” *Id.* (citation omitted).

Another line of recent New York State cases applying the *Frye* test addresses the trend of litigants requesting *Frye* hearings for the purpose of re-evaluating the admissibility of several types of forensic evidence which had in the past been generally accepted. *See Felix*, 2017 WL 522981, at \*2 (“Right now, the admissibility of several types of forensic evidence which were accepted in the past – hair match and bite mark evidence, for example – is undergoing re-evaluation.”); *Bullard-Daniel*, 54 Misc. 3d at 186-87 (“While the issue of admissibility of DNA has long since been resolved, new issues have arisen regarding the interpretation of the results of DNA testing. There are numerous cases in New York regarding software programs that interpret DNA results.”).

For instance, in *People v. Felix*, the defendant attempted to exclude expert testimony regarding Child Sexual Abuse Syndrome on the ground that “the testimony proffered by the People is not, or at least is no longer, generally considered reliable by members of the relevant scientific community.” 2017 WL 522981, at \*1. The *Felix* court considered, but ultimately rejected defendant’s argument because it was based on “a single recent article,” holding that “[i]t would take far more than that article, and older books or articles which precede the cases finding [Child Sexual Abuse Syndrome] evidence admissible in New York, for this court to conclude that the prior consensus is gone.” *Id.* at \*2.

In *People v. Bullard-Daniel*, the court addressed the admissibility of forensic DNA testing results interpreted using a relatively new software program referred to as “STRmix.” 54 Misc. 3d at 178-179. At the defendant’s request, the *Bullard-Daniel* court agreed to conduct a *Frye* hearing to determine whether the STRmix program had been generally accepted as reliable by the relevant scientific community upon finding that, “[a]lthough the scientific principles underlying the STRmix program are similar to the principles if not identical to the programs that have been considered, and almost universally accepted by courts in New York, this case concerns the first judicial review, as far as this court is aware, of STRmix in New York.” *Id.* at 186. “For that reason, the court decided to conduct a *Frye* hearing.” *Id.* While the *Bullard-Daniel* court ultimately concluded that the STRmix program was demonstrated to be generally accepted such that the *Frye* test had been satisfied, the fact that the court agreed to hold a *Frye* hearing on the admissibility of DNA results derived from using the STRmix program lends credence to the potential viability of the recent “re-evaluation” trend.

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As evidenced by recent case law, the *Frye* test (rather than the *Daubert* standard) continues to govern the admissibility of expert testimony in New York State courts. While the

test has been applied by New York trial judges for decades, recent case law suggests that litigants continue to devise new theories to challenge scientific techniques – even ones such as DNA testing which have gained nearly universal acceptance.