Rule 702: Tricks of the Trade in Domestic Litigation

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This paper is derived from many CLEs, consulting with and observing great lawyers, and, most importantly, trial experience examining experts in genetics, pathology, toxicology, pharmacology, drug recognition, NHTSA training, ballistics, handwriting, psychiatry, psychology, business valuation, custody evaluation, accounting, and more in approximately 100 jury trials ranging from capital murder, personal injury, marital torts, to an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, trafficking, and myriad other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

As a practical matter, there are two types of witnesses at trial: lay and expert witnesses. First, a primer on lay testimony.

Lay Opinion Testimony

I. Rule 701:

a. "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701.

Lay testimony requires two elements: The opinion must be rationally based upon first-hand perception, *and* it must help the fact finder understand the testimony *or* determine the facts.

b. Bars:

1. The witness must have first-hand or personal knowledge. N.C. R. Evid. 602.

2. The witness must have a proper foundation or sufficient life experience to permit making a judgment on the matter involved. *Matheson v. City of Asheville*, 102 N.C. App. 156 (1991); Blakey, Loven, Weissenberger, North Carolina Evidence Courtroom Manual, 451 (2015); *State v. Storm*, 743 S.E. 2d 713 (2013) (clinical social worker may give opinion on mental capacity with

first-hand knowledge but not diagnosis of a mental condition without a foundation showing requisite expertise).

3. The witness may not identify a fungible controlled substance (e.g., powder cocaine). *State v. Llamas-Hernandez*, 363 N.C. 8 (2009) (court addressed case law on drug identification, barring lay opinion on powder cocaine but allowing a witness with sufficient training and experience to identity crack cocaine based on specific characteristics); *See also In re J.D.O.*, 736 S.E.2d 649 (2013) (unpublished) (school principal lacks sufficient training as an expert to identify marijuana).

4. The witness may not invade the province of the judge or jury by rendering an opinion on the issue(s) decided by the fact-finder. *State v. Belk*, 2001 N.C. App. 412 (2009) (lay testimony identifying person on surveillance video inadmissible when witness is in no better position than jury to identify same). *But* c*f.* N.C. R. Evid. 704 (testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact). Judges can parse through the legal gymnastics.

5. The general rule is a witness may not vouch for veracity of another witness, excluding character evidence. *State v. Robinson*, 335 N.C. 320 (2002). This prohibition applies specifically to expert witnesses. N.C. R. Evid. 405(a) ("expert evidence on character or a trait of character is not admissible as circumstantial evidence of behavior").

6. The opinion is confusing, cumulative, or excessively time consuming. N.C. R. Evid. 403 (probative value is substantially outweighed by listed dangers).

c. Bases for admission:

1. It is an area of common knowledge. *State v. Griffin*, 758 S.E.2d. 704 (2014) (unpublished).

2. A party admission. *State v. Poole*, 733 S.E.2d 564 (2012) (defendant's admission he had "dope" and "cocaine" did not require other identification of the controlled substances); N.C. R. Evid. 801(d) (admission by party-opponent); N.C. R. Evid. 804(b)(3) (hearsay exception for a statement against interest when declarant is unavailable).

3. A party "opens the door." *State v. Baker*, 338 N.C. 526 (1994) (when defense asked if another person was a suspect, officer allowed to testify person was eliminated based on alibi).

4. Some case law holds lay opinion goes to weight and not admissibility for close calls. *State v. Davis*, 321 N.C. 52 (1987) (witness offered opinion on insanity); *State v. McDowell*, 215 N.C. App. 184 (2011) (lay opinion an object was hair).

5. Shorthand statements, meaning a witness' instantaneous conclusions of multiple observations presented to the senses at one time. *State v. Williams*, 319 N.C. 73 (1987) (court allowed witness' conclusions on another's appearance, condition, or mental or physical state derived from personal observation of various facts seen and heard at one time).

d. Proper subject matter:

1. Color, estimated speed, identity of a person, health, age, appearance, demeanor, general condition of physical or mental state, whether alive or dead, sanity, and sobriety or intoxication. Blakey, Loven, Weissenberger, North Carolina Evidence Courtroom Manual, 451 (2015); *State v. Collins*, 216 N.C. App. 249 (2011) (lay witness may give opinion on identity of individual when familiar with appearance); *State v. Thorne*, 173 N.C. App. 393 (2005) (officer properly testified to robber's gait as to lay opinion to help identify as perpetrator); *State v. Dickens*, 346 N.C. 26 (1997) (testimony proper on defendant's demeanor based on personal observations at two meetings).

2. Drug identification by party admission, statement against interest by unavailable declarant, or a witness with sufficient training and experience. *Llamas-Hernandez, supra*; *Poole, supra*; N.C. R. Evid. 804(b)(3).

3. Certain forensic evidence based on personal observation and sufficient foundation (e.g., training). *State v. Kandies*, 342 N.C. 419 (1996) (part-time auto body worker allowed to distinguish between blood and red oxide primer without qualification as chemical expert); *State v. Mills*, 221 N.C. App. 409 (2012) (lay witness may testify substance looks like blood); *State v. McDowell*, 215 N.C. App. 184 (2011) (lay opinion an object was hair); *State v. Crandell*, 208 N.C. App. 227 (2010) (officer with sufficient training may identify caliber of weapons and ammunition when personally observed).

4. Interestingly, some case law holds a witness may testify "screams sounded like someone fearing for their life." *State v. Braxton*, 352 N.C. 158 (2000) (presumably speculation, court allowed as shorthand statement of fact based upon instantaneous conclusion); *See also State v. Eason*, 336 N.C. 730 (1994) (witness allowed to testify "he enjoyed what he was doing" based

upon defendant's facial expression of smiling while attacking victim; basis was shorthand statement of fact).

e. Standard of review:

1. Abuse of discretion. *State v. Wilson*, 322 N.C. 117 (1988).

Now for the law on experts.

Expert Testimony

II. History of Rule 702:

A. Rule 702 (before August 21, 2006):

(a)"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."

Previously, Rule 702(a) allowed a qualified person to testify in the form of an opinion "if scientific, technical or other specialized knowledge" would "assist the trier of fact to understand the evidence or determine a fact in issue." At that time our highest court decreed the "North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards or reliability' demanded by the federal approach." *Howerton v. Arai Helmet*, 358 N.C. 440, 464 (2004) (any lingering questions concerning the quality of the expert's conclusions go to weight rather than admissibility) *Id.* at 461. Broadly construed by the courts, a peanut farmer qualified.

B. Rule 702 (from August 21, 2006, to October 1, 2011): Added a new subsection.

(a1)"In an impaired driving action under Chapter 20 of the General Statutes, a witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State

Department of Health and Human Services, shall be qualified to give the testimony under this subdivision."

The new language of amended Rule 702 (a1) specifically allowed two types of expert testimony on impairment: (1) results of a HGN test by a witness who successfully completed such training; and (2) DRE testimony by a witness who has received training and holds a current certification issued by DHHS. For both, testimony is admissible only on the issue of impairment and not a specific alcohol concentration. Training and expertise are based upon standardized curricula developed by the National Highway Transportation Safety Administration (NHTSA).

Allegations of alcohol and substance abuse are rampant in domestic cases. Judges have ordered CAM (Continuous Alcohol Monitoring) as a condition of access. Practitioners need a basic understanding of DRE's (Drug Recognition Experts), SFST's (Standard Field Sobriety Testing), blood and urine testing, masking agents, hair follicle tests, and more. This paper is drafted as a domestic guide on expert evidence and is therefore limited in scope; however, I leave you with a small taste of the universe of problems with impairment testing.

Note: Research on scientific reliability of HGN testing supports both its proponents and detractors. *Cf,* Steven J. Rubenzer and Scott B. Stevenson, *Horizontal Gaze Nystagmus: A Review of Vision Science and Application Issues*, Journal of Forensic Sciences (March 2010) (eye movement literature raises serious questions about use of HGN as a road sobriety test) with Marcelline Burns, *The Robustness of the Horizontal Gaze Nystagmus Test*, National Highway Transportation Safety Administration (September 2007) (concluding HGN used by law enforcement is a robust procedure). Testing bias is problematic. For example, the 1998 San Diego study on SFST's is touted by NHTSA as strong proof of its accuracy when conducted by experienced officers, yet almost one-half (48%) reported appreciable impairment (or false positives) at BAC's less than .04.

C. Rule 702 (since October 1, 2011): The drafters modified subsection (a), the relevant part of the rule. Medical malpractice components are not included.

(a)"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.
(2) The testimony is the product of reliable principles and methods.
(3) The witness has applied the principles and methods reliably to the facts of the case."

Amended Rule 702(a) raises the bar for expert testimony and is substantively similar to its federal corollary, Fed. R. Evid. 702. The rule expressly states, if a qualified witness has specialized knowledge which assists the trier of fact, he may testify in the form of an opinion only if the testimony is based upon sufficient facts, is the product of reliable principles/methods, and the witness applied the principles/methods in a reliable manner to the facts. The rule requires sufficiency, reliability, and application to the facts. The rule governs admissibility, performing four distinct functions: (1) it expressly authorizes expert testimony; (2) establishes standards to be applied in determining whether expert testimony should be admitted; (3) provides criteria to be applied in determining whether an individual qualifies; and (4) governs the form of expert testimony. *Blakey*, *supra* at 325.

When construing a statute, courts are to consider state and federal precedent. *See Howerton*, 358 N.C. at 460 (trial courts are to look to "precedential guidance" in deciding whether to admit expert testimony); *See also* Commentary to N.C. Rule Evid. 102 (trial courts are to look to a body of law construing the rules of evidence for guidance, and uniformity of evidence rulings in state and federal courts should be a goal of our courts).

The current state of the law: State judges are now gatekeepers who, at the outset, hear proffers of expert testimony and determine admissibility. *See State v. McGrady*, 753 S.E.2d 361 (N.C. Ct. App. January 21, 2014) *cert. granted*, 2014 WL 2652419 (N.C. June 11, 2014) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under Fed. R. Evid. 702); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (recognized *Daubert* principles apply to all types of expert testimony under Rule 702). As a threshold, expert testimony must be relevant and reliable. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (judges "make certain that an expert…employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). *Id.* at 152. The judge's gatekeeping obligation includes not only scientific testimony, but all expert testimony, and traditional fields of knowledge may be subject to review as well as novel or unconventional subject matter. *Id* at 137.

The court must preliminarily assess whether (1) the methodology is scientifically valid, and (2) then determine if the methodology can be applied reliably to the facts. Reliability is the touchstone. Judges consider if the expert is testifying about matters "growing naturally and directly out research they have conducted"; there is "too great an analytical gap between the data and the opinion proffered"; there is consideration of other causes or alternative explanations; the expert's opinions are sufficiently supported by the studies or grounded in the scientific methodology upon which they rely; the expert "employs in the court room the same level of intellectual rigor" as practiced in the relevant field; the field of expertise is known to have reliable results consistent with the opinion given; and if the subject matter

has a sufficient logical connection to the facts, requiring more than the *ipse dixit* of the proffered expert. *See Daubert* at 1317; *GE v. Joiner*, 522 U.S. 136, 146 (1997); *Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994); *Joiner* at 144; *Kumho Tire Co*. at 1176; *Id.* at 1175; *Joiner* at 146.

Caution: Pre-amendment appellate cases suggest *Daubert*, or at least the approach post *Howerton*, did not require trial courts to re-determine reliability of a field of specialized knowledge consistently accepted by our courts, absent new evidence calling reliability into question. *State v. Berry*, 143 N.C. App. 187, 546 S.E. 2d 145 (2001); *State v Speight*, 166 N.C. App. 106, 602 S.E. 2d 4 (2004). Response: Would the 2009 report by the National Academy of Sciences, entitled *Strengthening Forensic Science in the United States: A Path Forward*, finding the current forensic science approach nationwide was "seriously wanting," and, with the exception of nuclear DNA analysis, concluding no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source, constitute "new evidence calling reliability [of traditional forensic science disciplines] into question"?

Standard of review: Rulings on expert admissibility are reviewed for "abuse of discretion." *Howerton, supra* at 469; *State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. Sept. 9, 2013); *See also Joiner*, 522 U.S. at 138.

There is no exhaustive or dispositive list of factors. *Daubert* factors may be largely inapplicable to certain expert testimony. A compilation of various case factors is listed below:

A. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993): (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a particular scientific technique; (4) explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance of the theory or technique within the community; and (5) a focus upon principles and methodology, not conclusions that such principles and methodology generate.

B. *Elock v. Kmart Corp.*, 233 F.3d 734, 745-46 (3rd Cir 2000): (1) whether a method consists of a testable hypothesis; (2) the existence and maintenance of standards controlling the technique's operation; (3) the relationship of the technique to methods which have been established to be reliable; (4) the qualifications of the expert to employ the methodology; (5) the non-judicial uses to which the method has been put; and (6) other *Daubert* factors.

C. *State v. McGrady*, 753 S.E.2d 361 (N.C. Ct. App. 2014) *cert. granted*, 2014 WL 2652419 (N.C. June 11, 2014)*:* (1) whether the expert is testifying to scientific knowledge; (2) whether the scientific knowledge will assist the trier of fact to understand or determine a fact in issue; and (3) other *Daubert* and *Elock* factors.

D. *State v. Davis*, 721 S.E.2d 763 (N.C. Ct. App. February 7, 2012) (unpublished opinion): (1) is the proffered method of proof sufficiently reliable as an area for expert testimony; (2) is the witness qualified as an expert in that area of testimony; (3) is the testimony relevant; (4) is there precedential guidance, or is the court faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques; (5) are there "indices of reliability," including the use of established techniques, professional background in the field, use of visual aids, and independent [tests or] research [or verification of same], so the jury is not asked to sacrifice its independence by accepting scientific hypotheses on faith; and (6) relevant statutory requirements for admissibility.

E. An illustration of individualized case factors is found in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). The Supreme Court addressed the following considerations for an engineer's analysis of tire failure: (1) actual inspection of the tire; (2) qualifications in terms of degree(s) and experience; (3) inability to determine precisely the number of miles the tire had been driven; (4) formation of an opinion based on photographs; (5) inspection of the tire on the day of deposition; (6) data the witness relied upon contained errors; (7) subjective nature of the analysis; and (8) reliance upon a theory without evidence any other experts had used this theory or any published articles or papers had relied upon the theory.

The constitutionality of amended Rule 702(a) has yet to be litigated. In *Howerton*, the court expressed concern that sweeping gatekeeping authority may encroach upon North Carolina's constitutionally-mandated function of the jury to decide issues of fact and assess weight of the evidence. *Howerton*, 358 N.C. at 468; *See also* N.C. Const. Art. I, §§ 24, 25 (right to jury trial in criminal and civil cases); *State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. Sept. 3, 2013). However, given our appellate courts have upheld exclusion of expert evidence as a matter of law on polygraph examinations, penile plethysmograph, hypnotically refreshed testimony, NarTest (for controlled substances), visual identification of powder cocaine, and identification of controlled substances by comparison to pills in the Micromedix manual, it appears some standard would be upheld under the rule. *Blakey*, *supra* at 330-331.

III. Effective Date:

Amended N.C. R. Evid. 702 applies to "actions arising on or after" October 1, 2011 in both criminal and civil contexts. N.C. R. Evid. 1101(a); *State v. Meadows*, 752 S.E.2d 256 (N.C. Ct. App. October 1, 2013) (holding amended Rule 702(a) governed admissibility of expert testimony in a criminal case).

A. In civil cases, the filing of the complaint controls. *Pope v. Bridge Broom Inc.*, 770 S.E.2d 702 (2015) @ fn.1.

B. A civil action "arises" when a party has a right to apply to the court for relief (or when the statute of limitations begins). *Swartzberg v. Reserve Life Ins. Co*., 252 N.C. 270, 276 (1960).

IV. Case Law: Cases are cited chronologically by date of opinion.

State v. Pennington, 327 N.C. 89 (1990) (in determining whether an expert's method of proof is sufficiently reliable for expert testimony, the court should focus on indices of reliability including the expert's use of established techniques, professional background in the field, use of visual aids, independent research, and more, so the jury is not asked to sacrifice its independence by accepting scientific hypotheses on faith).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (trial court may consider, among other things, whether a theory can be or has been tested, has been subjected to peer review and publication, is generally accepted as reliable in the relevant scientific community, and the known or potential rate of error).

General Electric Co. v. Joiner, 522 U.S 136 (1997) (refined the judicial gatekeeping process, focusing upon whether the expert's opinions were sufficiently supported by the studies upon which they rely and the logical connection of the subject matter to the facts).

Kumho Tire v. Carmichael, 526 U.S. 137 (1999) (recognized *Daubert* principles apply to all types of expert testimony under Rule 702).

Howerton v. Arai Helmet, 358 N.C. 440, 464 (2004) (North Carolina Supreme Court rejected *Daubert* approach to expert evidence).

Department of Transportation vs. Haywood Co. 167 N.C. App. 55, 604 S.E. 2d 338 (2004) (expert's opinion need not be proven conclusively reliable or indisputably valid before admitted; if evidence is more than mere speculation, the jury decides the weight to be given).

State v. Speight, 166 N.C. App. 106, 602 S.E. 2d 4 (2004) (trial court is to be given flexibility as to what factors to consider when determining reliability of expert testimony; absent new evidence, a trial court need not re-determine in every case reliability of a particular field of knowledge consistently accepted by our courts).

State v. McGrady, 753 S.E.2d 361, 365 (N.C. Ct. App. 2014) *cert. granted*, 2014 WL 2652419 (N.C. June 11, 2014) (holding in light of amended Rule 702(a) the trial court did not abuse its discretion by excluding defendant's expert testimony on the "use of force" doctrine. The court noted the current amended language implements the standards set forth in *Daubert*); *See also Wise v. Alcoa, Inc.*, 752 S.E.2d 172 (N.C. Ct. App. December 3, 2013); *State v. Hudson*, 721 S.E. 2d 763 (N.C. App. 2012) (unpublished opinion).

As of this writing, oral argument in *McGrady* was completed in February 2015, and we await the North Carolina Supreme Court's opinion. Subsequent appellate history reveals it has been followed in one case and cited in a dissenting opinion.

State v. Turbyfill, 2015 N.C. App. LEXIS 742, (Sept. 1, 2015) (court upheld the science of retrograde extrapolation while re-emphasizing the gatekeeping function of the trial judge, the court's discretion in determining admissibility of expert testimony under *Daubert*, and the prior language of *Goode* requiring a qualified witness, relevant testimony, and reliable testimony; court reminded practitioners to use defense experts and object to the application of the tendered expert's math to the facts; and court upheld significant aspects of prior DWI precedent).

Albeit a criminal DWI case, *Turbyfill* is the last significant North Carolina appellate opinion on the new rule interpreting expert evidence as of this writing. Approximately eighty-five percent of our case law originates from criminal cases.

General Expert Witness Tips

V. Expert Witness Qualification:

I recommend you consider moving for a Rule 702(a) hearing to *voir dire* proposed experts. This will allow the judge (and you) to consider the expert's credentials, knowledge of the case facts, application of principles/methods to the case, and validity of the field. The *outline below is designed for a voir dire examination*, both for cross and to tender your expert. Variations may be necessary based on the judge, field of expertise, and stage of the examination.

Background.

Education.

Employment.

Training in related area(s) of expertise? Discipline(s)/Sub-discipline(s)?

Licensed?

Published?

Membership in professional organizations?

Qualified as an expert? Appeared in or consulted with the courts? Plaintiff and/or defense? Denied expert status? Fact witness?

Describe the area of expertise. Explain what you do.

[At trial, tender as an expert]

Do you follow a standard procedure? Describe the process for the jury.

Know client?

Describe your history with client. Did you follow your standard procedure?

- Cover case facts ("sufficient facts or data").
- Discuss principles and methods utilized.
- Discuss the reliability of the principles and methods used. Use "indices of reliability": (e.g., professional background in the field, use of established techniques, relevant studies, independent research, theory(ies) tested, subject to peer review, publications, visual aids, is the theory deemed reliable in the relevant scientific community, what is the known or potential rate of error, etc.).
- Demonstrate how the expert applied the principles and methods reliably to the facts.

Summarize your findings.

Render opinion.

Tender as an expert.

- These sections are required by the new rule.

A copy of the expert witness qualification outline is attached hereto as Exhibit A.

VI. The Basics: The new rule and examination techniques.

The new rule is about relevance and reliability.

The basic premise: If the expert (a) applied reliable methodology (b) to the facts of the case (c) in a reliable manner, it is admissible.

The tension: Junk science makes the proceedings fundamentally unfair violating due process rights versus excluding reliable expert testimony violates due process rights to present one's case. U.S. Const. Amend. V & XIV; N.C. Const. Art. I, §§ 19 & 23.

My cross-examination model: Start well and end well. Use your style. Remember the jury is always watching you and, when you get surprised or skewered, do not react. After you have prepared important topics for cross-examination and know your theory(ies) of the case, consider these fundamentals: (1) know the subject matter by utilizing discovery tools and and consulting with your own expert; (2) use *voir dire* to discern what is important, what is not, and what you are missing; (3) if direct examination yields little to no harm (or you cannot effectively cross), ask no questions; (4) if you elect to cross, disarm the witness initially with a pleasant style; (5) elicit basic, then favorable material, on the subject. Build your position by asking questions the expert cannot refute; (6) lead the witness using short fact questions; (7) loop favorable responses into your next question; (8) listen for unexpected or illogical responses, and consider if further cross would lead the fact-finder to question the witness's common sense. *In voir dire, think like a judge.* Ask if the evidence is understandable and makes sense. Use the lens of your audience; (9) simplify the expert's responses; (10) near the end, impeach the expert about prior inconsistent statements/testimony; (11) quit when you receive concessions or discredit the witness; (12) save the ultimate question for closing argument; and (13) simplify the law and facts for the judge.

Evidentiary methods of impeachment: Those typically applicable to experts are italicized and include: (1) *prior inconsistent statement*; (2) *impeachment (self-contradiction*); (3) *contradiction*; (4) first aggressor (victim); (5) prior bad acts; (6) convictions; (7) character impeachment (lack of truthfulness); (8) specific instances (untruthfulness); (9) mental incapacity; (10) perceptual incapacity; (11) *personal knowledge*; (12) *opinion and/or reputation*; (13) *learned treatises*; and (14) *bias, interest, motive or prejudice*.

Fertile areas of expert impeachment include: (1) lack of knowledge of material case facts; (2) published articles; (3) prior testimony; (4) employment with and history as an expert witness for the prosecution; (5) publications by other experts in the field contrary to the position espoused by the testifying expert; (6) reliability of the principles and methods cited by the expert; and (7) the expert's application of the principles and methods used in a reliable manner to the facts.

Law of cross-examination: *State v. Williams*, 330 N.C. 711 (1992) (a witness may be examined on any matter relevant to any issue in the case, including credibility); *State v. Hunt*, 324 N.C. 343 (1989) (if witness either denies or testifies differently from a prior inconsistent statement, you may impeach the witness with the substance of the prior inconsistent statement).

If you are defending criminal charges related to the civil action, argue persuasive authority holding criminal defendants must be afforded wide latitude to cross-examine witnesses regarding credibility. *State v. Whaley,* 362 N.C. 156 (2008).

Common evidence rules: N.C. R. Evid. 104(b); 106; 201; 401; 402; 403; 404(a)(1), (2), and (3); 404(b); 405; 602; 607; 608(b); 609; 611(b); 613; & 803(18).

VII. General Strategies:

Know the facts. The rule requires knowledge of "sufficient facts." *Experts frequently gloss over case facts*. A fertile area for examination and argument, often highlighting lack of knowledge and bolstering a legal challenge for insufficient factual knowledge.

Craft your motion with precision. Allege specific facts, which if found to be true, support suppression or the relief sought. Distill the law and key facts. Quickly show the judge why you are right.

Do your own research on the subject. Consult with other experts in the field. Get your expert's view of the opposing expert's analysis and opinion. Then frame your cross-examination.

Have your expert listen to relevant pretrial/trial testimony. *State v. Lee,* 154 N.C. App. 410 (2002) (appellate court upheld denial of proffered defense expert as he did not interview witnesses, visit the crime scene, or observe testimony of witnesses).

Consider discovery options for the opponent's expert, whether interrogatories or deposition.

Consult with other experienced attorneys, including the UNC-School of Government, board certified specialists, and great trial lawyers.

Consider the timing of a motion for a Rule 702(a) hearing. Can the expert or opposing party repair the problem? When you *voir dire*, examine the expert's qualifications, obtain answers to risky questions or unclear issues, and test the three prong requirement under the new rule.

Tell the judge why you are asking for a pretrial hearing. Are there issues with the expert, the field of expertise, or the intended use of the expert? Can the expert meet the rigorous requirements of the statute? Is there new evidence challenging reliability of the field of specialized knowledge? The list goes on.

Anticipate your opponent's objection(s) to your expert. Demonstrate conformity to the rule and how your expert's opinion assists the trier of fact.

Critically analyze the expert's report. Limit the expert from testifying beyond the scope of his expert status as well as his report. Expert reports are routinely sparse. Use it. Argue embellishment is a discovery violation infringing confrontation and due process rights. The highest art form.

If the expert takes materials to the stand and either reviews the same while testifying or admits to earlier review to refresh his recollection, ask the court for permission to examine the expert's notes/materials before you begin your cross. The occasional gold mine. N.C. R. Evid. 612(a) and (b).

Consider exploring the basis of the expert's opinion, including identification of all articles, studies, data, testing, methods, or other experts in the field relied upon to form the opinion.

Frame the examination to gain admissions. Lead the witness. Listen to the answers. I repeat: listen to the answers. Nuggets come unexpectedly.

Style your cross-examination using closing argument themes. Craft closing argument with quotes, concessions, and principles gleaned from cross.

Recast the expert's technical terms/esoteric language into plain and simple terms.

If the expert is evasive and nonresponsive, be more patient than with a lay witness. Keep redirecting and simplifying. Judges get it.

If the expert is arrogant, capitalize and contrast. Pause for effect, ask for forgiveness, and ask the expert to help you (and the judge) to understand. But be genuine, not obsequious.

Do not quarrel with the expert. Be humble and gracious. Rule 12 of the General Rules of Practice requires it.

Do not write out your cross-examination. I use bullet-point, topic reminders in the right hand margin. This technique allows you to listen, armed with a master checklist.

Generally, a question that elicits an explanation is too long or too complex.

Stop when you either obtain concessions or discredit the witness. End well.

Ask the judge for a moment to review your materials before ending your examination. Scan your notes. Take a moment with your client. A valuable technique.

Be mindful of opposing expert testimony. Consider keeping your expert around.

Be the most reasonable person in the courtroom.

Consider how expert testimony may infringe upon evidence rules, statutes, and constitutional protections. *See State v. McGrady*, 753 S.E.2d 361 (2014) [the constitutional right to present a defense is not absolute but is constrained by the rules of evidence (citing *Taylor v. Illinois*, 484 U.S. 400 (1988)]; N.C. R. Evid. 405(a) (expert testimony on character is not admissible as circumstantial evidence of behavior); *State v. Kennedy*, 320 N.C. 20 (1987) (expert cannot testify to credibility of a witness).

File a detailed written motion to exclude the opponent's expert. Consider attaching an affidavit from your expert, proffering materials in support of your position (e.g., articles, other expert opinions, etc.), or submitting a memorandum of law.

Use language familiar to the judge. Is the proffered expert's method of proof sufficiently reliable, is the witness qualified, and is the testimony relevant? *State v. Goode*, 341 N.C. 221 (1998) (recites the former standard for admission of expert evidence resurrected in *Turbyfill*).

Argue the specific language and requirements of the rule. There is no discretion to admit without meeting the rule. Practice pointer: The prosecutor may argue *Daubert* says Rule 702 is broad and flexible, and the rules of evidence are designed to admit evidence whenever possible. *Daubert*, 509 U.S. at 489-95. Counter that (a) *Joiner*, a post *Daubert* U.S. Supreme Court case, rejected the view the rules of evidence governing expert testimony preferred admissibility, and (b) if the expert is unclear and you are defending a claim, argue Rule 403, the text of Rule 702, and the *Rule of Lenity* as persuasive authority (ambiguities in criminal statutes defining crimes and punishments shall be interpreted and strictly construed in favor of the accused). *State v. Linton*, 361 N.C. 207 (2007). Rule 702 expresses mandatory prerequisites for admission. Tell the court it is a hot topic for appellate review.

Object to the admission of the opponent's expert evidence. Failure to do so defaults to appellate review under the plain error standard.

Constitutionalize all objections: cite due process, confrontation clause, right to obtain witnesses in the defendant's favor, effective assistance of counsel, fundamental fairness, etc. Always raise comparable state and federal constitutional provisions (e.g., 4th, 5th, and 6th Amendments of the U.S. Constitution applicable to the states under the 14th Amendment and Article 1, Sections 19, 20, and 23 of the North Carolina Constitution). Constitutional objections reverse the standard of appellate review such that error must be "harmless beyond a reasonable doubt."

Remember: (1) educate the judge on the law. Empower the gatekeeper to protect the system; (2) ask the trial judge to hear and rule on the motion pre-trial. This will allow reconsideration of a denial during trial. *State v. Woolridge*, 357 N.C. 544 (2003); (3) the judge must rule on your motion and the order must be entered during the term absent consent for a later ruling. *State v. Collins*, 761 S.E. 2d 914 (2014); (4) request specific findings and conclusions of law in the order. Absent a request, the record is presumed to support the judge's ruling. *Estrada v. Burnham*, 316 N.C. 318 (1986); (5) object to introduction of the evidence during trial. Failure to do so waives appellate review. *State v. Williams*, 355 N.C. 501 (2002); and (6) renew your objections at the close of the opponent's case, end of all the evidence, and post-trial. For a compendium of the law and practical advice on suppression motions, *See* JAMES A. DAVIS, MOTIONS TO SUPPRESS: STATEMENTS, PROPERTY AND IDENTIFICATION, (2010), presented at the 2010 Regional Training for Criminal Defenders I: Trial Preparation, October 8, 2010.

Domestic Tricks of the Trade

VIII. Strategies:

Subpoena the expert's file for trial. N.C. R. Civ. P. 45. Ask for judicial, in-camera, or individual review pretrial. If the expert takes the file to the stand, remember the right to examine the expert's materials if used to refresh memory before or during testimony. N.C. R. Evid. 612.

N.C. R. Civ. P. 26(b)(4) allows discovery on experts. Use interrogatories to identify experts the party expects to call at trial, the subject matter on which the expert is expected to testify, the substance of facts and opinions, and a summary of the grounds for each opinion. Remember: (1) the court may order further discovery by other means; however, the court may allocate fees and expenses as deemed appropriate; (2) the court shall require the party seeking discovery to *pay the expert a reasonable fee for time spent responding to discovery*; (3) a *party may claim work product or trial preparation privilege*; and (4) a party may, for good cause (e.g., unreasonable annoyance, embarrassment, oppression, undue burden or expense, etc.), seek a protective order barring or limiting discovery, but the party moving for a protective order should *be mindful attorney fees may be awarded* if the motion is denied in whole or in part.

Expert evidence in a domestic context is a fertile battleground. Counselors, therapists, psychologists, custody evaluators, psychiatrists, medical doctor, accountants, business valuators, and a host of others are often called to testify and asked to render expert opinions. There are scores of certifications, licenses, and degrees for individuals called to testify. The new rule has *mandatory prerequisites* in an area of the law typically having more relaxed evidence rules.

Therapists called to testify are in a conundrum. Ethical rules conflict with court rules. Essentially, therapists gain their client's trust in a confidential environment only to face forced disclosure in court. Talk with the therapist, opposing counsel, or court in advance to explore alternative methods of gaining answers or introducing evidence.

Child sex abuse continues to be a hot topic. Whether initiated in a pleading, DSS investigation, or criminal charge, one must appreciate the nuances of a CME; the joint investigation effort of law enforcement, DSS, and trained medical providers; and the relationship of the Family Crisis Center, Visitation Station, Terry Hess House, and other collateral players. True victims suffer medical, mental, and emotional disorders and require *quality* medical providers. The practitioner should understand physical evidence exists in approximately five percent of cases, specific (vs. non-specific) physical evidence which suggests child abuse, and the case law holding no expert may testify the victim was sexually abused absent physical evidence. *State v. Stancil*, 355 N.C. 266 (2002).

Remember the Medico-Legal Guidelines, always a fresh reminder: (1) physicians should be given "reasonable notice" of the need for medical records or preparing a report; (2) a subpoena signed by an attorney, without more, is insufficient to allow a physician to produce patient medical information; (3) HIPPA requires that records be produced within thirty days of request or sixty days *if* kept off site; (4) special rules apply for substance abuse and psychotherapy records, and a form is attached in the appendix that applies with federal and state laws regarding release of same; (5) a trial subpoena should not be issued later than *seven days* before trial, and the attorney should reflect the actually time to appear, "will call when needed," or "on stand-by" if the actual time is uncertain; (6) if a subpoena for medical records has written consent of the patient or is accompanied by judicial order, the custodian may bring the records to court and testify to authenticity or the records may be mailed to the judge or designee with an authenticating affidavit signed by the custodian; (7) an attorney should request the medical witness be allowed to testify out of order or at a specific time; and (8) medical witnesses *may charge a fee*, and it is generally accepted they are entitled to reasonable compensation for preparation, discovery requirements, travel, and court. As a practical point, experts sometimes bill the attorney for their time and, at the request of the prevailing party, the court will set a fee for an expert witness testifying pursuant to a subpoena taxed against the losing party as court cost. N.C. Gen. Stat. §7A-314; *See also* N.C. Gen. Stat. §§6-20 & 7A-305.

Various strategies exist to admit statements of a child (for substantive or limited purposes). As a threshold, if the child does not testify, *the evidence analysis is as follows*: (1) hearsay (using proper hearsay exceptions), and (2) constitutional confrontation (using *Crawford* and its progeny). *Proper hearsay exceptions include*: (1) shorthand statements of fact (addressed above). This exception may be remembered as the "res gestae," meaning words considered part of an occurrence; (2) state of mind (or "then existing mental, emotional, or physical condition") under N.C. Gen. Stat.

§803(3). This statement must show the affect it had on the mind of one hearing it, the declarant's immediate state of mind, or to prove events that caused the declarant's state of mind (in criminal homicide cases). *Blakey, supra* at 610. Generally, this exception will explain a present physical condition, future plan, or why someone did what they did; (3) "statements for purposes of medical diagnosis or treatment" under N.C. Gen. Stat. §803(4). The declarant must believe the statement is made in anticipation of treatment or diagnosis and to someone likely to use or transmit the statement for that purpose (e.g., nurse, ambulance attendant, physician, etc.). Statements must be "reasonably pertinent" to treatment or diagnosis, not concerning fault or guilt except perhaps relating to child abuse where the identity of the perpetrator may affect the course of treatment. *Statements may not be made in anticipation of litigation or trial, and the requirement of pertinence to diagnosis and treatment imposes a real limitation. Blakey, supra* at 613. *Almost all statements within this rule are admitted as "non-substantive evidence" to explain the opinion of an expert witness and are admitted if, and only if, the expert uses them as a basis for the opinion rendered. Id.*; (4) "excited utterance" under N.C. Gen. Stat. §803(2) (statement relating to a startling event made while under stress of excitement caused by the event); and (5) for corroboration, impeachment, or other limited purpose.

N.C. R. Evid. 803(6) was amended effective October 1, 2015, which allows the custodian of a business record to submit the same by affidavit showing authenticity of the record in lieu of live testimony. Domestically, this amendment may have limited utility as it is confined to records of non-parties. In addition, the proponent must give advance notice to all parties of intent to offer by affidavit authentication.

Experts in an equitable distribution proceeding commonly include auctioneers, real estate appraisers, accountants, and business valuation experts. Lay opinion is routine for valuation of personal property, and many sources may be used for the basis of an opinion (e.g., photographs, bills of cost, estimates, offers to purchase or sale, etc.). N.C. R. Evid. 701 & 702; N.C. Gen. Stat. §50-20(c)(11) (court may consider "tax consequences to each party").

In a high asset case, the best expert usually wins. Look for the most experienced, credentialed, and smartest expert. In my experience, this is money well spent.

In a long-term marriage with people of means, a good accountant can be very helpful, particularly in an alimony trial. When analyzing one's ability to pay, an accountant can address (1) the amount and sources of earned and unearned income, including dividends, benefits, anticipated retirement, and social security; (2) liabilities and debt service requirements; (3) federal, state, and local tax ramifications of an alimony award; and (4) any other factor relating to economic circumstances of the parties. N.C. Gen. Stat. §50-16.3A(b)(4), (10), (14), & (15).

Medical experts may address age, physical, and mental health of the parties in alimony and equitable distribution trials. A powerful equity tool. N.C. Gen. Stat. §50-16.3A(3) (ages and physical, mental, and emotional conditions of the spouses); N.C. Gen. Stat. §50-20(3) (age and physical and mental health of both parties).

For the opposing expert, object to the tender of the expert, each question asked to the expert, and any opinion(s) rendered; renew your objections at the close of the opposing party's evidence, all the evidence, and post-trial. Constitutionalize your objections. If you are unaware of the exact nature of the objection, cite due process.

If your evidence is excluded and there is any chance of appeal, make an offer of proof. Put all of your evidence in the record. It is preferable to put your witness on the stand and elicit evidence via a question and answer format; at a minimum, put a full statement of the excluded evidence into the record. Remind the judge, on the record, of your need to make an offer of proof until you have completed your offer.

IX. Case in Point:

In a recent Superior Court DWI prosecution, Paul Glover, the leading DWI expert for the State of North Carolina, was excluded as an expert witness. Interestingly, the defendant blew a .30 and was found not guilty by a jury. My preparation included reviewing my prior examination(s) of Mr. Glover, reading transcripts of his testimony, distilling strategies gleaned from various CLEs, preparing a notebook of reliable authorities and articles on retrograde extrapolation, and crafting my cross examination. The order is attached herewith as Exhibit B. A copy of the transcript is available through IDS at *http://www.ncids.com/forensic/motions/motions.shtml*

In your practice, the same rules apply. Now examine that counselor, psychologist, or business valuation expert, or anyone holding themselves out as an expert.

X. Summary:

Prepare, research, consult, and try cases. Be objective about your case and expert(s). Be courageous. Stand up if you believe you are right. Make offers of proof and a complete record. The path to expert status is now considerably steeper.

I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear the message. Go make a difference.

> "A … lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to

jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."

Epilogue: "The day may come when we are unable to muster the courage to keep fighting . . . but it is not this day."

Attributed to: The Lord of the Rings: Return of the King (2003).

Additional Resources:

Gordon Widenhouse, *Changes to Rule 702(a): Has North Carolina Codified Daubert and Does It Matter?*, Trial Briefs, Apr. 2012 at 9-11.

Shea Denning, *Expert Testimony Regarding Impairment*, UNC SOG NC Criminal Law Blog, June 9, 2010.

Judges Robert C. Ervin and Shannon R. Joseph, *Applying North Carolina Rule of Evidence 702(a),* NC Superior Court Judges Conference, October 2013.

Shea Denning, *Daubert and Expert Testimony of Impairment*, UNC SOG NC Criminal Law Blog, July 1, 2014.