WALK THROUGH AN EXPERT TENDER AND EXCLUSION

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HIGHLIGHTS:

About James A. Davis

Mr. Davis is a North Carolina Board Certified Specialist in Federal and State Criminal Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the North Carolina State Bar Specialization Criminal Law Committee, the North Carolina State Bar Board of Continuing Legal Education, the North Carolina State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice continuing legal education (CLE) programs, and is regularly designated by the Capital Defender as lead counsel in capital murders.

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EXPLORING EXPERT WITNESS ISSUES

This paper is derived from nearly 200 CLEs, consulting with and observing great lawyers, and—most importantly—trial experience examining prosecution experts, DRE's, officers trained in SFST's, chemical analysts, pharmacologists, medical examiners, DNA geneticists, ballistics and handwriting experts, pediatricians, psychiatrists, psychologists, therapists, counselors, sexual assault nurse examiners, and more in approximately 100 jury trials ranging from capital murder, personal injury, torts, and various civil actions as well as countless bench trials. While I have had a number of experts excluded in an array of criminal and civil 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. This presentation provides a step-by-step approach for expert qualification and exclusion. Common expert tender and exclusion scenarios in family law settings are covered, such as tendering and challenging pediatricians, psychologists, counselors, SANE nurses, and social workers.

As a practical matter, there are two types of witnesses at trial: lay and expert witnesses. A lay witness is one who has first-hand knowledge of relevant facts, and an expert witness has special expertise which will assist the trier of fact in interpreting facts of the case. N.C. R. Evid. 701 governs admissibility of opinion testimony from a lay witness, requiring first-hand perception

which facilitates understanding of the testimony. Common subject matter includes: identity of a person (rationally based upon a witness's knowledge); a person's health, age, or appearance; distance and speed of a vehicle; a person's mental or emotional state, including opining the aggressor; the meaning of phrases based on experience (such as criminal lingo); sanity or intoxication; and an opinion on shorthand statements of fact. Now for the law on experts.

I. EXAMINATION OF EXPERT WITNESSES:

Few moments in the practice of law evoke more fear, fuzziness, and brain fog than the daunting cross-examination of a geneticist on nuclear DNA in a capital murder . . . or a therapist in a custody case . . . or just an expert in any case. The law has changed, the factors are fluid, and the rules are restrictive. How does one simplify cross-examination of an expert?

The succeeding information includes the history and current state of the rule, relevant case law, common expert issues, and guidelines for introducing and barring expert testimony.

Skillful cross-examination begins with the rule itself. Rule 702(a) is the focal point for the family law practitioner.

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). Broadly construed by the courts, a peanut farmer qualified.

B. Rule 702 (amended August 21, 2006): Added a new subsection (a1).

> (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 language of amended Rule 702 (a1) specifically allows 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).

C. Rule 702 (since October 1, 2011): Modified subsection (a).

> (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 sufficient facts and reliable methods applied 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. *See* BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2014 COURTROOM MANUAL 325 (Matthew Bender 2014).

The current state of the law: State judges are now gatekeepers who, at the outset, hear proffers of expert testimony and determine admissibility. *State v. Hunt*, 250 N.C. App. 238 (2016) (holding the court's gatekeeping role is subject to plain error review). Amended Rule 702(a) implements *Daubert*, meaning expert testimony is inadmissible unless it meets all requisites of Rule 702(a). *State v. McGrady*, 368 N.C. 880 (2016); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (defining judge's gatekeeping role under Fed. R. Evid. 702); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (holding *Daubert* applies to all types of expert testimony under Rule 702, not just scientific testimony). As a threshold, the expert must be qualified, and his testimony must be relevant and reliable. *McGrady*, 368 N.C. at 889 (the relevance requirement of Rule 702(a) exceeds that of Rule 401, requiring insight beyond ordinary experience); *Kumho Tire*, 526 U.S. at 152 (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"). 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.

Courts 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, including reliability of the method generally and its specific application to the case. In other words, does the state of the art in a particular discipline—using *Daubert* and *McGrady* factors—permit a reliable opinion to be asserted? If so, then does the expert apply the discipline reliably to the facts? *See* BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2014 COURTROOM MANUAL 541 (Matthew Bender 2014). 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 sufficiency of the subject matter's logical connection to the facts requires more than the *ipse dixit* of the proffered expert. *See Daubert*, 509 U.S. at 1317; *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144, 146 (1997); *Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994); *Kumho Tire*, 526 U.S. at 1175–76.

"Fit" Test: Another aspect of the subject matter's nexus or "logical connection" to the facts—in essence, relevancy—is the "fit" of the expert testimony to the facts of the case. *Daubert*, 509 U.S. at 591–92. The fit test ensures that proffered "expert testimony . . . is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *State v. Babich*, 252 N.C. App. 165 (2017) (quoting *Daubert*). Thus for example, the North Carolina Court of Appeals held that expert testimony on retrograde extrapolation that assumed, with no evidence, that the defendant was in a post-absorptive state failed the fit test and was inadmissible. *Id.*

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 (2001); *State v Speight*, 166 N.C. App. 106 (2004). **Query:** 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"? In that report, questions were raised about fingerprint, shoe print, tire track, toolmark, and firearm, hair fiber, paint and coating, explosive, and bite mark analysis. **Answer:** Combined with the 2016 *Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, which raised serious questions about mixed DNA samples, bite marks, latent fingerprints, firearm marks, footwear, and hair analysis, I submit it does—as do the authors of the *North Carolina Evidence 2019 Courtroom Manual*. *See* BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2019 COURTROOM MANUAL 646 (Matthew Bender 2019). *A fortiori*, *Kumho Tire* held traditional subjects of knowledge are subject to review. *Kumho Tire*, 526 U.S. at 137. In a recent capital murder case, I advised the court of my intent to conduct a voir dire to contest every field of specialized knowledge. The case was thereafter tried non-capital based, at least in part, upon the defense agreement not to challenge traditional forensic science disciplines at trial or on appeal.

Standard of review: Rulings on expert admissibility are generally reviewed for "abuse of discretion." *State v. Walston*, 369 N.C. 547 (2017) (holding exclusion of expert testimony post-hearing is reviewed for an abuse of discretion). *But see N.C. DOT v. Mission Battleground Park DST*, 370 N.C. 477 (2018) (holding exclusion of an expert testimony based on statutory interpretation is reviewed *de novo*).

D. Effective Date:

Amended N.C. R. Evid. 702 applies to "actions arising on or after" October 1, 2011, in both civil and criminal contexts. *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365 (2015) at fn.1 (in civil cases, the filing of the complaint controls); *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 270,(1960) (a civil action "arises" when a party has a right to apply to the court for relief (or when the statute of limitations begins)); N.C. R. Evid. 1101(a) (evidence rules apply to all court proceedings unless excepted in 1101(b)).

II. TYPES OF EXPERTS:

Think in terms of two types of experts: consulting and testifying. Generally, you are not required to disclose or provide information about a consulting expert. Conversely, if an expert is hired either for or in anticipation of litigation, you should disclose a testifying expert in accord with statutes or discovery rules. *See infra* Section VI.

As more studies are completed, more fields of knowledge will be accepted to include soft social sciences (e.g., psychology, sociology, economics, etc.) as well as hard sciences (e.g., natural

sciences like biology, chemistry, physics, etc.). There is a perceived difference in the rigor, exactitude, objectivity, and methodology between the two. Features cited as characteristic of hard sciences include a higher degree of accuracy, greater replicability, application of a purer form of the scientific method, and more. Regardless of the science, focus your examination upon the dearth of studies, mixed findings, reliable authorities in the field, rules restricting evidence, and ultimate admission or exclusion based upon sound policy underlying the rules.

Appreciate that experts in domestic cases often serve dually as science and fact witnesses, often reciting particulars of the child's behavior and statements. Remain vigilant for the unanticipated question constituting a foray into expert evidence.

III. ANCILLARY RULES ON EXPERTS:

Several rules address additional procedures on experts. For instance, (1) N.C. R. Evid. 703 allows the use of facts or data normally inadmissible in evidence if of a type reasonably relied upon by experts in their particular field. The facts or data may be known prior to or learned at trial, including witness testimony, reports prepared by others, or data from other experts—in or out of court. BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2019 COURTROOM MANUAL 715-18 (Matthew Bender 2019); (2) an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, absent an opinion inherently misleading or unfairly prejudicial. *Id.*; N.C. R. Evid. 704; (3) N.C. R. Evid. 705 requires, upon request, the expert's disclosure of the underlying facts or data before stating the opinion. The process occurs typically through voir dire but may be part of direct examination. No hypothetical question is required; (4) N.C. R. Evid. 706 allows the Court, or any party, to move for a court-appointed expert. No expert shall be appointed absent his consent to act, and he shall be informed of his duties either in writing (a copy shall be filed with the clerk) or at a conference in which the parties have opportunity to participate. The expert shall advise the parties of his findings, his deposition may be taken, and he may be called to testify. Experts so appointed are entitled to reasonable compensation at a sum fixed by the court. Disclosure of the appointment to a jury may be authorized by the court. The rule does not limit a party from calling other expert witnesses.

IV. LIMITATIONS ON EXPERTS:

A. Proper foundation:

1. *State v. Godwin*, 369 N.C. 605 (2017) (holding the trial court implicitly found the testifying officer was qualified as an expert, confirming Rule 702(a1) requires a witness to be qualified before he may testify as to impairment based on HGN test results).

2. *State v. White*, 340 N.C. 264 (1995) (holding while the better practice is to tender a witness as an expert, a tender is not required; the finding that a witness is an expert can be implicit in the admission of the testimony).

B. Bar on bolstering credibility:

1. N.C. R. Evid. 405(a) (expert testimony on character or trait of character is inadmissible as circumstantial evidence of behavior); *see also* Rule 608(a) (Evidence of Character and Conduct of Witness).

C. Psychologists:

1. *Martin v. Benson*, 125 N.C. App. 330 (1997) (holding a psychologist, including a neuropsychologist, may opine on mental disorders but may not testify as an expert on medical issues as their licensure prohibits the practice of medicine without a license, excluding diagnosis of medical causation in general), *rev. on other grounds*, 348 N.C. 684 (1998).

2. *State v. Clark*, 324 N.C. 146 (1989) (holding where testimony of psychologist was laced with disclaimers and speculation and his conclusions were conjectural, such evidence did not assist the trier of fact to understand facts in issue).

D. Sex crimes:

1. *State v. Stancil*, 355 N.C. 266 (2002) (holding an expert cannot testify sexual abuse occurred absent physical evidence supporting such a diagnosis; however, the expert may testify as to the profile of a sexually abused child and whether complainant exhibits such symptoms).

2. *State v. Towe*, 366 N.C. 56 (2012) (holding that absent physical evidence supporting child abuse, plain error occurred with admission of expert's statement that she would place alleged victim into the statistical group of sexually abused children who show no clear signs of abuse).

3. *State v. Gamez*, 228 N.C. App. 329 (2013) (holding expert's testimony that victim "suffers from PTSD" required a limiting instruction that it is corroborative testimony (as to victim's substantive actions) and is not substantive evidence that a rape or assault occurred).

4. *State v. King*, 366 N.C. 68 (2012) (holding testimony of "dissociative amnesia" was properly excluded in a child sex abuse case under Rule 403).

5. *State v. Purcell*, 242 N.C. App. 222 (2015) (holding no error permitting an expert medical witness in a child sexual assault case to testify the victim's delay in reporting anal penetration was "consistent with" the general behavior of children who have been sexually abused in that manner).

6. *State v. Chavez*, 241 N.C. App. 562 (2015) (holding State's expert, a medical doctor, was properly allowed to explain the victim's normal physical examination, stating 95% of children examined for sex abuse have normal exams, "it's more of a surprise when we do find something," no signs of injury could be explained by the "stretchy" nature of the hymen tissue and its ability to heal quickly, and that "cutting behavior" was significant because "cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused").

   Case law is conflicting, but the more recent cases allow doctors, SANE nurses, and even DSS workers to testify about characteristics, traits, symptoms, and profiles of sexually abused children, including reasons for lack of physical evidence (e.g., healing, etc.) and reactions of abused victims (e.g., delay in reporting, etc.). *See generally State v. Purcell*, 242 N.C. App. 222 (2015) (allowing traits of sexually abused children); *State v. Davis*, 239 N.C. App. 522 (2015) (allowing evidence the victim improved after treatment); *State v. King*, 235 N.C. App. 187 (2014) (holding DSS workers are implicitly experts on characteristics of sexually abused children).

E. Impermissible vouching (review in tandem with Rules 405 and 608):

1. *State v. Gobal*, 186 N.C. App. 308 (2007) (holding, even for lay opinion, "[w]hen one witness vouches for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded.")

2. *State v. Aguallo*, 318 N.C. 590 (1986) (holding trial court erred in allowing a pediatrician to testify that a rape victim was "believable").

3. *State v. Boyd*, 200 N.C. App. 97 (2009) (holding expert's opinion that a witness is credible, believable, or truthful is inadmissible).

4. *State v. McLean*, 251 N.C. App. 850 (2017) (holding admission improper when a law enforcement officer testified that the victim "seemed truthful").

5. *State v. Heath*, 316 N.C. 337 (1986) (holding improper a prosecutor's question regarding a victim's medical condition and whether it "might have caused her to make up a story" against the defendant; that the court disapproved reference to the specific crime charged—a sexual assault—rather than sexual assaults in general).

6. *State v. Mendoza-Mejia*, 244 N.C. App. 345 (2015) (unpublished) (holding admission improper when a psychologist testified that, after speaking with the victim, she placed the victim into therapy for sexually abused children; that the foregoing communicated her belief the child was sexually abused).

7. *State v. Crabtree*, 249 N.C. App. 395 (2016) (holding expert's description of a five tier system to evaluate sex abuse based on detail given was improper vouching where the top category is a "clear description of abuse," and the victim "fell within this category").

8. *State v. Harris*, 243 N.C. App. 728 (2015) (holding testimony from victim's therapist did not constitute impermissible vouching for victim's credibility; the therapist in a child sexual assault case was properly allowed to state she recommended the victim for therapy, used a "trauma narrative" describing what occurred, and used the term "non-offending caregiver"; the narrative was corroborative and the terminology was an organizational term; that the above, while supporting the victim's credibility, did not render it inadmissible by impermissibly bolstering the victim's credibility and constituting opinion evidence as to guilt).

   Although beyond the scope of this paper, case law addresses the use of "victim," "disclose," and related terms, suggesting the better practice is use neutral terms such as "alleged victim." *See State v. McCarroll*, 336 N.C. 559 (1994) (holding, in a child sex abuse case, trial court did not commit plain error in its use of the word "victim").

F. Boundaries of testimony:

1. Experts may not testify beyond the scope of their accepted area of expertise. Use the expert's report as a blueprint for the limits of their testimony. Conduct a voir dire to determine their mastery of the facts, basis of their opinion, reliable authorities, and admissible and inadmissible content. N.C. R. Evid. 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible); N.C. R. Civ. Pro. 26(b)(4)a.2.

G. Balancing test:

1. N.C. R. Evid. 403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence). Accordingly, if evidence arouses the jury's emotional sympathies, evokes a sense of horror, appeals to an instinct to punish, or appeals to the jury's emotions rather than intellect, the evidence may be unfairly prejudicial under Rule 403. BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2019 COURTROOM MANUAL 218 (Matthew Bender 2019).

The current state of the law in sex abuse cases is fraught with danger. Consider my summary of an esteemed authority: Expert opinions are frequently presented in child sexual assault cases, often

without supporting physical evidence. BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2019 COURTROOM MANUAL 649 (Matthew Bender 2019). Any child victim of sex abuse may—or may not— exhibit behavioral symptoms of abuse. *Id.* The manner in which an interview is conducted, honesty or dishonesty of a child, and biases of the interviewer all lead to the subjectivity of the expert's opinion. *Id.* Nevertheless, an expert may testify that symptoms presented—including the lack thereof—are consistent with sexual abuse. *Id.* Courts prefer the veracity of such evidence to be tested in the crucible of cross-examination before the fact-finder. *Id.* This presumes a level playing field. *Id.* While one party may have the burden of proof, the stable of experts employed in sex abuse cases—including law enforcement, DSS investigators, physicians, child advocacy forensic specialists, and more—may undermine the fairness of the adversarial process. *See id.*

VI. SAMPLING OF CASES:

A. Valuation:

Real and Personal Property:

1. *Abdeljabar v. Khalil*, ____ N.C. App. ____, 812 S.E.2d 914 (2018) (unpublished) (holding lay opinion as to value of property—in this case, real property—is admissible if the witness can show knowledge of the property and some basis for his opinion).

2. *Hill v. Hill*, 244 N.C. App. 219 (2015) (holding a property owner is competent to testify as to value of his property "[u]nless it affirmatively appears that the owner does not know the market value of his property.").

3. *Wade v. Wade*, 72 N.C. App. 372 (1985) (holding expert valuation of property deemed appropriate after reviewing photographs if other party made examination difficult).

4. *Zurosky v. Shaffer*, 236 N.C. App. 219 (2014) (holding trial court has authority to reject findings of experts).

5. *Peltzer v. Peltzer*, 222 N.C. App. 784 (2012) (holding, when trial court bases valuation on an expert called by a party, any error on appeal by that party is invited error).

Business Valuation:

6. *Sharp v. Sharp*, 116 N.C. App. 513 (1994) (holding "there is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used"; that combining or averaging methodologies has been upheld) (emphasis added).

7. *Christensen v. Christensen*, 101 N.C. App. 47 (1990) (holding post-separation property tax values are post-separation occurrences and thus incompetent for valuing marital property).

Distributional factors:

8. *Gum v. Gum*, 107 N.C. App. 734 (1992) (holding N.C. Gen. Stat. § 50-20(c) contains no language "which would indicate that the trial court is required to place a monetary value on any distributional factor"; that it was not required to value wife's contribution to husband's legal education and career development before using the same as a basis for an unequal distribution).

B. Custody:

1. *Smith v. Smith*, 247 N.C. App. 135 (2016) (allowing scientific research on shared-parenting, adolescent psychology, father-daughter relationships, etc.).

VII. DISCOVERY PROTECTIONS (RULE 26(B)(4) (PROCEDURE FOR EXPERT WITNESS DISCOVERY)):

A. N.C. R. Civ. Pro. 26 governs discovery of expert testimony in civil cases in district and superior courts.

B. An expert disclosed in discovery must still meet Rule 702 requisites.

C. Discovery only applies to experts acquired or developed in anticipation of litigation or for trial, including facts known and opinions held. N.C. R. Civ. Pro. 26(b)(4). Generally, discovery of a consulting witness is not permitted though limited exceptions apply. N.C. R. Civ. Pro. 26(b)(4)b.2.

D. Depositions and Interrogatories are the exclusive means for discovering facts and opinions held by expert witnesses. Rule 26(b)(4); *Green v. Maness*, 69 N.C. App. 403 (1984). Serve expert witness interrogatories at least 90 days before trial to trigger the opposing party's obligation to identify an expert and allow time, after extension, to respond. N.C. R. Civ. Pro. 26(b)(4)a.3; N.C. R. Civ. Pro. 26 (b)(4)f.1. *But see Turner v. Duke Univ.*, 325 N.C. 152 (1989) (holding the treating physician need not be identified as an expert witness). Drafts of expert witness reports are not discoverable. N.C. R. Civ. Pro. 26(b)(4)d. Experts may be deposed without a court order. N.C. R. Civ. Pro. 26(b)(4)b.

E. Parties have the option to accompany interrogatory disclosures with a written report prepared and signed by the expert witness at least 90 days before trial. N.C. R. Civ. Pro. 26(b)(4)a.2. An expert report must contain: (1) a complete statement of all opinions the witnesses will express, the basis of the opinion and exhibits used, and the reasons for same;

(2) the witness's qualifications, including a list of all publications in the last ten years; (3) a list of all cases in which the witness testified as an expert at trial or a deposition in the previous four years; and (4) a statement of compensation to be paid. *Id.*

F. To avoid surprise, serve two interrogatories about potential experts: the first seeks information about fact witnesses, and the second about experts retained to provide opinion testimony.

G. Most communications between an attorney and experts are not discoverable, regardless of the form of communication. Exceptions relate to compensation, facts or data the expert considered in forming an opinion, and assumptions the expert relied upon in forming an opinion. N.C. R. Civ. Pro. 26(b)(4)e.

H. An expert is paid a reasonable fee only for time spent at his respective deposition, not for time spent preparing or traveling. N.C. R. Civ. Pro. 26(b)(4)c.

VIII. SCOPE OF CROSS-EXAMINATION:

A. *State v. Short*, 322 N.C. 783 (1988) (holding the right to cross-examine is "absolute and not merely a privilege" and that its denial is "prejudicial and fatal error").

B. *State v. Davis*, 340 N.C. 1 (1995) (holding trial court committed error when it prohibited defense counsel from asking about the basis of the expert's opinion).

C. *State v. Williams*, 330 N.C. 711 (1992) (holding a witness may be examined on any matter relevant to any issue in the case, including credibility).

D. *State v. Hunt*, 324 N.C. 343 (1989) (holding 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).

IX. PRACTICE STRATEGIES:

A. Know the facts. Experts frequently gloss over case facts. A fertile area for examination, bolstering a legal challenge for insufficient factual knowledge. *State v. Ragland*, 226 N.C. App. 547 (2013) (holding an expert opinion may not be based upon a question that assumes a fact not in evidence).

B. Do your own research on the subject. Ask experienced attorneys. Consult with an expert in the field to discover fruitful areas of examination. Then frame your examination.

C. Consider filing a "Motion for a Rule 702(a) Hearing." I prefer an oral request at the time of tender, yielding no notice. Examine an expert's qualifications, test the three-prong requirement under the rule, and consider delving into cloudy issues.

D. Forecast for the court why you are asking for a voir dire. 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.

E. Consider having your expert listen to relevant trial testimony. *State v. Lee*, 154 N.C. App. 410 (2002) (upholding denial of proffered defense expert as he did not interview witnesses, visit the crime scene, or observe testimony of witnesses).

F. In a battle of experts, consider (1) asking the court to hear from your expert and (2) submitting your expert's affidavit for the court's consideration prior to ruling on the opposing's expert.

G. Anticipate objections to your expert. Demonstrate conformity to the rule.

H. If you have an expert report, critically analyze the same. Limit the expert from testifying beyond the scope of his tendered area of expertise. Use his report to circumscribe the testimony. Expert reports are routinely sparse. Argue embellishment is a discovery violation. N.C. Civ. Pro. 26(b)(4)a.2.

I. Do not allow opposing counsel to parrot the rule to meet the requisites of the rule. Object, citing the question seeks conclusions of law from the expert.

J. If an expert reviews his materials while testifying or admits to earlier review to refresh his recollection, seek to examine his materials before beginning cross. The occasional gold mine. N.C. R. Evid. 612(a)–(b).

K. Explore the basis of an expert's opinion, including articles, studies, data, testing, methods, or other experts in the field relied upon to form the opinion.

L. Frame the examination to gain admissions. Lead the witness. Listen to the answers. Nuggets come unexpectedly. Administer his demise by a thousand nicks.

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

N. Recast an expert's technical or esoteric language into plain and simple terms.

O. If an expert is evasive or nonresponsive, redirect and simplify. Judges eschew gamesmanship.

P. Use bullet-point, topic reminders for cross-examination. This technique allows you to listen, armed with a master checklist.

Q. Stop after obtaining concessions or discrediting. End well.

R. Pause and review your materials before ending your examination. Take a moment with your client. A valuable technique.

S. If there are opposing experts, be mindful of rebuttal testimony. Keep your expert near.

T. Be knowledgeable. Then be the most reasonable person in the courtroom.

U. Consider how expert testimony may infringe upon evidence rules, statutes, and constitutional protections. *See State v. McGrady*, 368 N.C. 880 (2016) (holding, among other things, constitutional rights are not absolute but are constrained by the rules of evidence (citing *Taylor v. Illinois*, 484 U.S. 400 (1988)); N.C. R. Evid. 405(a) (providing expert testimony on character is not admissible as circumstantial evidence of behavior); *State v. Kennedy*, 320 N.C. 20 (1987) (holding expert cannot testify to credibility of a witness); N.C. R. Evid. 609 (providing convictions prescribed by the rule shall be elicited from the witness on cross examination or thereafter).

V. 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? *See, e.g.*, N.C. R. Evid. 702; *State v. McGrady*, 368 N.C. 880 (2016).

W. Argue the specific language and requirements of the rule, citing no discretion exists to admit without meeting the rule. *Id.* Practice pointer: One 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 *Joiner*, a post-*Daubert* U.S. Supreme Court case, rejected the view the rules of evidence governing expert testimony preferred admissibility. The rule expresses mandatory prerequisites for admission. Tell the court it is a hot topic for appellate review.

X. Object to the admission of the opponent's expert evidence. A party must make a specific objection to content or qualification of an expert in a particular field. *State v. Mendoza*, 250 N.C. App. 731 (2016). Failure to object defaults to plain error review on appeal. Make an offer of proof. Under plain error review, appellate courts will not consider data or theories not presented or made part of the record. *State v. Gray*, ___ N.C. App. ___, 815 S.E.2d 736 (2018)

Y. Constitutionalize all objections: cite due process, confrontation clause, right to obtain witnesses, fundamental fairness, etc. Always raise comparable state and federal constitutional provisions. Constitutional objections heighten the standard of appellate review. *In re Adoption of S.D.W.*, 367 N.C. 386 (2014) (noting that when constitutional rights are implicated, the appropriate standard of review is *de novo*).

Z. Remember: (1) Be prepared, make your point, and show why you are right. Educate the judge on the law. Empower the gatekeeper to protect the system; (2) you may wish to ask the 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) 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); (4) object to introduction of the evidence during trial. Failure to do so waives appellate review. *State v. Williams*, 355 N.C. 501 (2002); and (5) renew your objections at the close of the opposing's case, end of all the evidence, and post-trial.

X. TENDER AND EXCLUSION:

A. *See* **EXHIBIT A**.

XI. EPILOGUE:

Prepare, research, consult, and try cases. Be objective about your case and expert. Be courageous. Stand up, make a record, and seek appellate review if you believe you are right. When you are weary, remember the following:

"THE DAY MAY COME WHEN WE ARE UNABLE TO MUSTER THE COURAGE TO KEEP FIGHTING . . . BUT IT IS NOT THIS DAY."

- THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

WALK THROUGH AN EXPERT TENDER AND EXCLUSION

BY: JAMES A. DAVIS

EXHIBIT A

OUTLINE FOR TENDER/EXCLUSION

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? Prosecution and/or defense?
Denied expert status? Fact witness?
Describe the area of expertise. Explain what you do.
At this point the witness is only qualified. Object if tendered as an expert.

The **new rule requires** coverage of the following:
* 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.

*** These sections are required by N.C. R. Evid. 702.**

Now proceed as follows:

Tender	Exclude/Limit
Tender as an expert in a specific field. Discuss the individual case as follows: A. Know client? B. Describe your history with client. C. Did you follow a standard procedure? Describe same. D. Summarize your findings.	If insufficient foundation elements for tender (or non-compliance with discovery), object. Do not repair. Otherwise, move to voir dire as follows: Attack expert's qualifications. A. Address deficits in education, licensure, experience, employment, publishing, peer review, training, expert in tendered

E. Render opinion.	field, one-side expert, denied expert status, etc.? Explore expert's command of the facts. Address whether field is a hard or soft science. If soft science, have witness admit less reliable than hard science. Even then, only nuclear DNA is reliable per NAS. If traditional field, use 2009 NAS/2016 Report to the President to gain admissions. Then use the following flow chart: If novel or traditional field, have witness commit to scientific method model. A. Scientific method model: establish an objective, gather information, form a hypothesis, design the experiment, perform the experiment, verify the data, interpret the data; then repeat. B. Admit variables would change opinion? C. Identified variables. D. Seek admissions for all assumptions made. E. Admit that without making a single assumption witness cannot support hypothesis? For novel or traditional field, continue by having the witness acknowledge other reliable authorities in field. Confront with contrary writings, findings, or principles. For novel or traditional field, address (1) reliability of methodology and (2) application of the methodology reliably to the facts (*McGrady*/*Daubert* factors). 1. Has theory/technique been tested? Can it be tested? 2. Known or potential rate of error? 3. Subject to peer review? Publication? 4. Witness testifying about his research independent of litigation? Opinion developed expressly for this case?

5. Considered alternative explanations?
6. Acting as carefully here as in his professional work? Use scientific method model.
7. Actually inspected evidence (versus photos)?
8. Errors in data used?
9. Reliance on theory without papers/articles used by other experts in field?
10. Subjective (versus objective) nature of analysis performed?
11. Disagreement between other experts in field?
12. Unjustifiable extrapolation from an accepted premise to unfounded conclusion ("too great an analytical gap")?
13. Ability to determine a relevant fact with precision?
14. Any step using an assumption, a misapplication, or otherwise unreliable in analysis?
15. The more subjective, the more likely testimony is unreliable?
16. Opinion encroach on constitutionally-mandated jury function (invade province of fact-finder)?
17. Unqualified sub-opinions forming basis of opinion?
18. Foundation of opinion based in impermissible witness bolstering?
19. Insufficient knowledge about any facts/factors forming basis of opinion?
20. Failing to recognize or apply variables/assumptions that could affect opinion?
21. Existence/maintenance of standards and controls?
22. Has field of study reached same reliable results as opinion?
23. Generally accepted in scientific community?

Attack specific area of tendered expertise. Witness unqualified?

Show field of expertise is unreliable (impeach validity of field or methodology).

	Show expert did not apply the principles/methods reliably to the facts. A. Fit test/nexus. Not *ipse dixit*. Impeachment of witness: A. Address ethics rules and any deviation therefrom. Address multiple clients, clarifying who is the client, written agreement, whether working to establish collaborative relationships with parents, refraining from diagnosis (based on age and historical/social prejudice), etc. B. If attend without subpoena, argue bias. C. If paid, argue bias. Closing argument. *See* **Exhibit B**. (covering, *inter alia*, insufficiency of facts, unreliability of field, unreliability of principles/methods as applied to facts, evidence restrictions, Rule 403, fundamental fairness, and sound policy).

WALK THROUGH AN EXPERT TENDER AND EXCLUSION

BY: JAMES A. DAVIS

EXHIBIT B

CLOSING ARGUMENT FOR EXCLUSION

In a Superior Court DWI prosecution, Paul Glover, the leading DWI expert for the State of North Carolina, was excluded as an expert witness. 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.

Synopsis of case facts: Defendant hit several mailboxes driving his truck in the late afternoon on a country road. Neighbors observed the event and called law enforcement. A trooper went to defendant's home about an hour later, found him highly intoxicated in bed, and arrested him for DWI. Defendant asserted he got excited, drank most of a pint of liquor, and blew a .30. I filed a motion for a Rule 702(a) hearing. Post-hearing, Mr. Glover was excluded as an expert witness.

The strategy and method I used to examine Mr. Glover is in outline form. His general responses are contained within the parenthetical following each entry:

Alerted the judge prehearing Mr. Glover was the State's flagship DWI expert, the case was an absorption phase and not a retrograde extrapolation case, and I was puzzled about the theory Mr. Glover would espouse.

Asked the court to release the defendant before *voir dire* to eliminate observations of defendant.

Covered academic background (BS and Master's Degrees in biology from FSU).

Covered work history (generally in lab research, a police officer, and 17th year with state of N.C.; emphasized he is currently a police officer).

Covered prior acceptance by state and federal courts as an expert (310 to 320 times; tendered as expert in various fields of expertise; testified nine times for the defense).

Covered current occupation (head of Forensic Tests for Alcohol Branch within DHHS; trains officers on breath tests using instruments; conducts training on SFST's and DRE's; oversees permit issuance of chemical analysts who draw blood for alcohol and drug tests; and trains judges, prosecutors, and law enforcement officers in the testing and effects of alcohol and drugs).

Asked if he was a research scientist (yes).

Asked if he did any studies of alcohol in three previous jobs (no).

Asked if he had heard any testimony in the instant case (no).

Requested the factual basis he was relying on to provide an opinion (rough knowledge based on conversations with the prosecutor and review of charging documents).

Requested factual basis for time of alcohol consumption either before, during, or after driving (said he would start at end point of .30 breath test at 9:19 p.m. and work backwards).

Requested again the factual basis to render an opinion (male, 130 lbs., review of officer's DWIR form, history of alcohol use, preventive maintenance was current, no statements by defendant).

Asked if he spoke with the officer (no).

Asked again if there were other facts which helped him render an opinion (he began to discuss rate of elimination, etc.; I redirected).

Asked if he knew the type of alcohol consumed (no).

Asked if he was testifying regarding a particular theory, retrograde extrapolation or another (he did not know).

Asked why he was here (because he was faxed information and subpoenaed to come, and he may be used on direct or rebuttal).

Asked if prepared a report (no).

Asked if he had ever been denied expert status (yes; one time in Brunswick County).

Asked if he was a medical doctor (no).

Asked if he had a degree in a related discipline like physiology or pharmacology (no).

Asked if he had a doctorate in those fields (no; he says he is certified by the Forensic Toxicology Certification Board as a diplomate in alcohol toxicology).

Asked which fields of expertise he expected to apply in the instant case (breath alcohol testing, Intoxilyzer 5000, blood alcohol physiology, pharmacology, and related research).

Asked about process of alcohol consumption, absorption, and elimination.

Asked if he agreed there is an absorption phase (yes).

Covered factors that affect absorption (food, gender, alcohol concentration, etc.).

Asked if there is a peak alcohol concentration (yes; between 15 and 90 minutes; normally expect about 45 minutes).

Asked if he agreed there is a large degree of variability in absorption (it is very difficult to measure; there is some variability).

Asked about articles and research in medical journals on ethanol metabolism (he gets his information from reading journals).

Quoted hypotheses, findings, and statements from reliable authorities and journals on rates of absorption (e.g., factors include concentration of alcohol, speed of consumption, rate of gastric emptying, etc.).

Asked about elimination rates (accepts .012 to .054 as the credible range for rates of elimination; uses the rate of .0165 because of *State v. Cato*).

Asked about NHTSA training standards (he does not personally do NHTSA training).

Asked about NHTSA comparisons of beer, wine, and liquor consumption with similarly-sized, same gender individuals and resulting alcohol concentrations (he was unaware of same).

Questioned him about a number of published studies, medical journal articles, and expert opinions; asked him who were reliable authorities in the field; and asked what articles he found reliable, and why. Used quotes from persons he deemed reliable authorities to show disagreement within the field, even on retrograde extrapolation.

Asked if blood, breath, or urine testing was more reliable (stated he did not know what I meant by reliable).

Asked him to show the court any authority supporting his position (none).

Asked if he used the scientific method (yes).

Walked through the scientific method (i.e., establish an objective, gather information, form a hypothesis, design the experiment, perform the experiment, verify the data, interpret the data, repeat) (he agreed).

Asked to admit there are variables that would change his opinion (yes).

Identified variables (food, gender, etc.).

Asked to admit that, without making a single assumption, he could not tell the defendant's BAC at the time of driving (agreed he could not).

Asked to admit he recently testified on a theory of odor analysis (yes).

Asked about his hypothesis on odor analysis and opinion of a specific alcohol concentration (.16 to .18).

Asked if the appellate court said it was a novel scientific theory (yes).

Asked if the appellate court said it was unreliable (he did not believe so).

Refreshed his recollection of the court's holding and findings.

Asked if he had received peer review (he asked what I meant; stated there is no peer review unless you publish).

Asked if he had published (published in a newsletter, etc.).

Asked to name any reputable authorities in the field who had done a peer review on him (none).

My argument: Mr. Glover had insufficient, and incorrect, facts; did not articulate application of any field(s) of expertise (or their principles/methods) to the facts; *a fortiori*, did not reliably apply any field of expertise (or principles/methods) to facts; Rule 702(a), as amended, specifically required the same; the proffered expert recently espoused, as described by our appellate court, a "novel theory" on odor analysis (ethanol has no odor); the purpose of *voir dire*; the instant case was an absorption case, and the proffered expert could not assist the trier of fact; covered "indices of reliability," citing the absence of established techniques, visual aids, independent research, or peer review, thus leading the jury to sacrifice its independence and accept scientific hypothesis on faith; noted a prior example of expert exclusion when a witness had merely read published articles and research; referenced infringement of Rule 609 (limiting impeachment of crimes to cross-examination) and Rule 405(a) (barring expert evidence on credibility of a witness; *see also State v. Hammett*, 361 N.C. 92 (2006)) in light of his expected testimony about "experienced drinkers" and apparent intent to reference defendant's prior DWI's in the State's case-in-chief; and a final concern about appellate review, highlighting again Mr. Glover's lack of familiarity with the evidence, failure to apply the principles/methods of any field of expertise, and the requirement he do so reliably.