Rule 702(a) Amendments regarding Expert Testimony

NC appears to be a *Daubert* State – What will it mean?

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Scope: This paper is focused on how the 2011 amendment to rule 702 impacts the preparation of your expert, the direct examination of your expert, and new avenues of attacking opposing experts. Law which is not impacted by the amendment will not be covered. The 2011 amendment modified our Rule 702 to contain the additional elements established in Daubert 509 U.S. 579(1993). The three additional hurdles for the admission of opinion evidence are as follows:

(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.

I. INTRODUCTION

A. THE AMENDMENT.

"(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."

North Carolina Rules of Evidence 702(a)

B. APPLIES ONLY TO AN EXPERT OFFERING *OPINION* TESTIMONY.

Experts may be used in ways other than offering opinion evidence. The amendment relates only to experts offering *opinion testimony* and therefore does not apply to an expert testifying to facts, nor educating the jury about general scientific principles applicable to some issue in the case.

For example, a physician might testify to the jury about a particular aspect of human anatomy which the proponent wants the jury to understand. This is not soliciting opinion, but rather simply educating about scientific facts. However, it is easy to slip from testimony about scientific facts to an "expert opinion". After explaining the particular aspect of human anatomy, if the witness is then asked "Is the plaintiff's anatomy consistent with what you just described?" – that is seeking an opinion. An expert may be called upon to simply describe what he did to treat an injury. That is factual testimony. If asked "Is this condition permanent", or "what caused this condition" – then you are asking opinion testimony.

Practice point: Be sure that you understand precisely what your expert intends to offer which is "opinion" evidence.

II. *HOWERTON* AND *DAUBERT*

Prior to the 2011 amendment, The US Supreme Court had decided Daubert, the Federal Rules of Evidence had been amended to track Daubert, and North Carolina Supreme Court had expressly rejected Daubert as the standard in North Carolina. In *Howerton v. Arai Helmet*, 358 N.C. 440, 597 S.E.2d 674 (2004), the Supreme Court held "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction. *Id.,* 358 N.C. at 469, 597 S.E.2d at 693. In its rejection of *Daubert,* the NC Supreme Court noted that both the NC approach and the *Daubert* approach share similarities, North Carolina would continue to apply a less rigorous approach that the exacting standards of reliability demanded in in federal court. In *Howerton,* the Court listed the three steps:

(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony?

(2) Is the witness testifying at trial qualified as an expert in that area of testimony?

(3) Is the expert's testimony relevant?"

Howerton, 358 N.C. at 458, 597 S .E.2d at 686 (citing *Goode,* 341 N.C. at 527–29, 461 S.E.2d at 639–41) The *Howerton* court entrusted the trial court, in its gate keeping function, to exercise discretion on the issue of whether an expert's opinion was sufficiently reliable to be heard by the jury. Once the trial court decided the reliability threshold was met, all other reliability issues would be challenged during cross examination and the jury was left to give any such opinion the weight the jury considered appropriate. Based upon cases decided to date, the approach under the amended Rule 702(a) remains substantially the same as that utilized by *Howerton,* in this writer's opinion. Pre amendment and post amendment the judge had to determine whether the opinion was reliable, is the expert qualified and will it help the jury, (relevant).

III. WHAT NORTH CAROLINA APPELLATE COURTS HAVE SAID

There appear to be four NC appellate decisions that have addressed the admissibility of expert in opinion post 2011 amendments to 702(a). Each case will be discussed

A. STATE V. MCGRADY, 753 SE2D 361 (2014)

The first appellate decision to address the requirements of Rule 702 after the 2011 amendments went into effect is State v. McGrady, 753 SE2d 361 (2014). The McGrady affirmed the trial court's exclusion of the "use of force" expert witnessed tendered by the defendant. Defendant McGrady was convicted of first degree murder. One of two issues raised on appeal was the trial court's exclusion of the defense expert on the "use of force" doctrine. The N.C. Supreme Court granted the defendant's petition for discretionary review but has not yet issued an opinion.

The deference to the trial court as the gate keeper of reliability articulated in *Howerton* will not necessarily be negated by the 2011 amendment. For example, the *McGrady* court cited *Howerton* when it stated:

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony.... In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's

> ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotation marks omitted)

The state, in *McGrady* filed a motion *in limine* to exclude the testimony of an expert, Dave Cloutier, identified by the defense. A *voir dire* hearing was held during the trial. See *McGrady* opinion provided herewith for the evidence adduced during that hearing and the forecast of opinions. Although this is the first case applying post amendment 702, due to the ruling of the trial court it is questionable as to whether the amended portion of Rule 702(a) needed to be addressed. As summarized in *McGrady,* sustained the State's objection to the expert witness for the following reasons:

> The [trial] court pointed out that (1) much of Cloutier's report constituted impermissible witness bolstering, (2) certain of Cloutier's opinions were based on medical knowledge that he was not qualified to discuss, (3) Cloutier's opinion on use of force variables would not be helpful to the jury because most individuals are able to recognize pre-attack cues and other use of force variables, and (4) Cloutier is not competent to testify about reaction times. In addition, the court determined that Cloutier's "testimony [was] not based on sufficient facts or data.... [,] not the product of reliable principles or methods.... [, and] simply a conclusory approach that [could not] reasonably assess for reliability." The court noted that Cloutier's testimony had not been subject to peer review, Cloutier had no knowledge of a potential rate of error regarding any of the use of force factors, and Cloutier did not recognize or apply the variables that could have affected his opinions in the case. As a result, the court concluded that Cloutier's "opinions ... [were] ... based on speculation. He[was] just guessing and overlooking a very important part of what could very well affect his opinions in ***367** this case." It also found, "[n]otwithstanding all those findings," that the probative value of Cloutier's testimony was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under Rule 403 of the North Carolina Rules of Evidence.

Therefore, adequate grounds for the exclusion of the expert were cited by the trial court without resort to the three new

prongs of the amended Rule 702(a). Those grounds being, that it was impermissible witness bolstering, beyond his demonstrated expertise, not helpful to the jury because lay people are able to recognize pre-attack clues and use of force variables. And then finally, the trial court also excluded under Rule 403. If those grounds, in the trial court's sound discretion, were sufficient to exclude the testimony, then the discussion of the three new prongs of 702(a) are not necessary.

But it is interesting to review what the court did say regarding the amended Rule 702(a) and *Daubert*. Of interest the *McGrady* court:

1. Held that the legislators intended to adopt the standards for the admissibility of expert opinion under the amended Rule 702(a) "should be applied according to the federal standard as articulated in *Daubert".*

2. Applied *Daubert's* analysis to that portion of Rule 702(a) which had not been amended. For example, what is meant by the phrase "Scientific… knowledge" was quoted from *Daubert.*

3. Adopted the analysis from *Daubert* regarding whether or not the "scientific knowledge" "will assist the trier of fact to understand or determine a fact in issue". The discussion of the various tests of reliability appear in the context of determining whether or not the testimony will be "helpful".

4. The inquiry of the Court as gatekeeper "is a flexible one" and is to be reviewed under an abuse of discretion standard.

5. Recited the holding from *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) for the proposition that a trial judge can still exclude the expert,, even if the expert says that he relied upon scientific principles used in cited studies. Quote in *McGrady* from *Joiner:*

> conclusions and methodology are not entirely distinct from one another.... *[N]othing ... requires* a [trial court] to admit opinion evidence that is connected *to* existing data only by the *ipse dixit*[6] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146, 118 S.Ct. at 519, 139 L.Ed.2d at 519.

6. Applied an abuse of discretion standard of review.

The *McGrady* court, in its deference to the trial judge, pointed out the lack of any evidence to support the experts assertions that his use of force analysis had been "tested"; the lack of any publications, although t
he expert testified they existed; and no evidence to show that the theory he utilized was relied upon regularly. So the practical lesson from this opinion is to do more than simply have your expert state in conclusory fashion the premises set forth in 702(a) or in *daubert.*

B. POPE V. BRIDGE BROOM, INC. 770 S.E.2d 702 (2015)

This wrongful death action was filed by the estate of a motorcycle passenger who was thrown from the motorcycle while her husband was trying to avoid a collision. The jury returned a verdict of no negligence. One of the issues on appeal was the alleged error of the trial court in not excluding a defense expert witness's opinions. Plaintiff moved *in limine* to exclude the defense accident reconstruction expert. The trial court denied the motion and the expert, Timothy Cheek testified that the cause of the passenger's death was the driver's improper braking of the motorcycle.

The *Pope* court analyzed the issue based upon the 2011 amendment even though the facts indicate that the case arose prior to the effective date. There is no mention of the effective date in the opinion but the court applied Rule 702(a) as amended.

After reviewing factors articulated in *Daubert* and in commentary to Federal Rule 702 amendments, the *Pope* court held that the plaintiff appellant had not shown an abuse of discretion and affirmed the admission of the accident reconstruction's opinions.

The *Pope* court recognized that the factors to be considered are not exclusive and gave deference to the trial court's discretion.

Factors listed from *Daubert:*

> 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review

> and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community.

Factors cited by *Pope* from other federal decisions and the Rules Committee notes following the amendment to Federal Rule 702:

> Additionally, in applying *Daubert,* federal courts have recognized other factors relevant to determining the reliability of expert testimony, including whether the expert proposes to testify about matters growing naturally and directly out of research the expert has conducted independent of the litigation, or, conversely, whether the expert has developed opinions expressly for purposes of testifying; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for obvious alternative explanations; whether the expert is as careful in his testimony as he ***709** would be outside the context of his paid litigation consulting; and whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Fed.R.Evid. 702, Advisory Committee Notes on the 2000 Amendments (citing cases in support of factors).

The *Pope* opinion discussed plaintiff's challenge to each of the three new prongs of Rule 702(a) and basically said that the plaintiff's arguments may go to weight but that there was sufficient evidence of reliability that it was not an abuse of discretion.

C. STATE V. TURBYFILL, 776 S.E.2d 249 (2015)

Defendant Turbyfill appealed his conviction for driving while impaired and driving after consuming alcohol under the age of 21 years. The appeal challenged the trial court's admission of one of the expert witness's opinion regarding retrograde extrapolation. The decision, applying the post 2011 amended Rule affirmed the conviction. However the court also found that a portion of the expert's testimony was inadmissible, but the error was waived since no objection was made at trial and that the admission was not plain error.

The state tendered an expert witness, Burnette, as an "expert in blood alcohol physiology, pharmacology, and related research on retrograde extrapolation". He then applied that science and testified that the defendant's BAC while driving was .10 and consistent with a BAC of .07 less than two hours after the accident. Defendant challenged Burnett as an expert and argued that the amended Rule 702(a) required a more rigorous scrutiny and that Burnette was not qualified under the more exacting demands of *Daubert.* The Court of Appeals held that the application of the amended Rule 702, consistent with *Daubert*, would not significantly change the trial court's analysis and affirmed the acceptance of Burnette's expert testimony. In reaching this conclusion, the Court made the following points:

1. The great deal of discretion given to the trial court's determination reviewed only for an abuse of discretion.

2. Under amended Rule 702(a) the opinion of an expert is admissible if it meets three requirements. Those being the expert must be qualified, the opinion must be relevant (helpful to finder of facts) and must be reliable. (Same standard as *Howerton)*

3. Treated the three new prongs of 702(a) as factors that "guide the trial court by providing general standards to assess reliability."

4. Relied upon another case that had previously determined that retrograde extrapolation science was reliable.

In *Turbyfill* only the third prong of amended 702(a) was challenged, whether the witness had applied the principles and methods reliably to the facts of the case. Nonetheless, The Court spent substantial time reviewing the expert's qualifications, the science and methods at issue and then concluded that the witness had applied those principles and methods reliably to this case. The witness testified as to how he did his analysis and that it was done properly according to the science and methods on which he was well qualified. All points raised by the defense merely went to the weight and not to admissibility of the evidence.

D. NC STATE BAR VS BRITT, (UNPUBLISHED – WEST LAW 2015 WL 5123869)

The fourth of four appellate decision that this writer found is an appeal from a DHC trial. Defendant proffered an

expert witness in accounting, Robert Norman, who was prepared to offer his opinion that the defendant did not act in a manner consistent with embezzlement or fraud. The State Bar objected and the DHC sustained the objection. The grounds for the exclusion of his expert opinions appear to be grounded on the basis that he was not qualified to give such opinions.

In *Britt,* the court cited other cases and held that when the challenge to the evidence is based upon an alleged incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review is *de novo.* They reviewed the standard applied *de novo* and reviewed the trial court's analysis for abuse of discretion. The court concluded that the correct standard was applied and the trial court did not abuse it's discretion. The decision seems based upon the court's determination that the witness was not qualified *and/or* the purported opinion was not helpful because it was based in large part to his impressions when interacting with the person being investigated.

IV. PRACTICAL CONSIDERATIONS

A. DIRECT EXAMINATION

From a practical stand point, what should you do differently when qualifying your expert? Your direct examination should be just has it has always been in terms of qualifying the witness as an expert, having the expert discuss the scientific principles at issue, and describe in great detail what the expert did to gather sufficient data and facts needed to be able to form and opinion. After doing that each of the three prongs should be expressly covered:

> 702(a)(1) The testimony is based upon sufficient facts or data.

Example:

Q. Now that you have shared with us what you did to learn about this case, I want to turn your attention to whether you gathered sufficient facts and data on which to form an opinion. (this is letting the trial court know I'm covering that 702(a) prong) Based upon the science you have already explained, did you have sufficient facts or data upon which to form an opinion?

A. Yes.

Q. What are the facts and data significant to your opinion?

A. Blah Blah

Q. Are there additional facts you need to learn before being able to render an opinion?

A. No.

(if you know that your opponent is critical over the fact that the witness failed to learn a particular fact or failed to do something – go ahead and cover that)

Q. Do you believe it is necessary that you know MISSING FACT?

A. No

Q. Why?

A. Brilliant explanation follows.

OR

Q. Do you believe it is necessary that you visit the scene of the collision?

A. No.

Q. Why?

A. Brilliant explanation follows.

End of example.

Remember that you are building a record to show that the trial court had received evidence supporting his gate keeping preliminary finding that the opinion is based upon “sufficient facts or data”. Once the trial court makes that determination it will only be reversed upon a finding of abuse of discretion.

> 702(a)(2) The testimony is the product of reliable principles and methods.

EXAMPLE

(Again, this only comes after all of the detailed discussion of qualification, what the expert did to learn about the case and

the science or other technical subject at issue. Your audience for these questions are the judge so that she will know that your are covering the three new prongs of Rule 702(a))

Q. Now that you have talked about the sufficiency of the facts and data available to you, I want to turn your attention to the principles and methods used by you in forming your opinion. Please describe those principles and methods.

A. Blah Blah (this is probably going to be someone repetitive because the expert has already touch on this when describing what he did after learning what he needed to learn about the facts)

Q. Are those principles and methods reliable? (recall that a trial court is not bound to accept the expert's unsupported statement that the principles and methods are reliable, but she can)

A. Yes.

Q. Please describe what you believe makes these principles and methods reliable?

A. Blah Blah.

This part of the examination will vary greatly depending upon the nature of the expert testimony. For example, a pathologists with the chief medical examiner's office will not have to do much here as forensic pathology has been recognized as reliable many times, is a specialty in medicine and an entire state agency is dedicated to that subject. Whereas an expert wanting to testify about the science behind an allegation that exposure to a particular substance can cause deformities to a fetus during pregnancy may have to provide much greater detail.

The more unusual the topic of the expert's opinion, the more diligent the examiner and the witness must be to convince the judge that the principles and methods are reliable. Once you have introduced testimony sufficient to support a finding of reliability, then the judge's decision will be reviewed on an abuse of discretion standard.

Sources that can be called upon by you and your expert include practically anything which bolsters reliability:

- This is the way I was taught to do this in medical school and residency.
- This method has been the subject of peer reviewed journals – and cite them.

- Other cases have recognized the science and methodology.
- Multiple textbooks legitimate this approach.
- This method has been repeatedly tested and found to be reliable with descriptions of how that is known.

(3) The witness has applied the principles and methods reliably to the facts of the case.

The last prong of Rule 702(a) is convincing the judge that the expert applied the principles and methods reliably to the facts of the case. This is an important prong to make sure you have covered with the expert on direct and a futile ground for attack if the opposing expert has neglected to follow proper protocol.

Example:

Q. Now that we have covered the principles and methods, I want to turn our attention to how you applied the principles and methods to the facts of this case and formed your opinion. So please explain to us how you did that?

A. Blah Blah

Q. Why did you (insert the various steps the expert describes in the foregoing answer so that the expert can elaborate on why it is necessary to apply the science/method, in the way that he did. This will usually involve multiple questions)

There is no one method of approaching this part of the examination as it will vary greatly depending on the topic and what the expert did to arrive at an opinion. The key point to keep in mind is that you want to have the expert explain all of this sufficiently for the judge to be comfortable with the reliability of your expert. A good example is the discussion from *State v Turbyfill*. Reading the opinion shows how the court can sometimes blur the various prongs. When you have an extremely well qualified expert, chances are good that the court will accept what that expert says about the other prongs and that will not be seen as an abuse of discretion on appeal.

Attached to this paper is an example of a direct examination of an expert in the field of DNA analysis intended to cover the three prongs of amended 702(a).

B. PREPARE YOUR EXPERT AND CHALLEENGE THEIR EXPERT'S FOUNDATION

1. Prepare your Expert.

It is essential that your expert be given an explanation for how Rule 702 forces you to cover various topics with her during direct examination and to be prepared when the questions come on cross examination. If you are working with a retained expert you should be afforded adequate opportunity to do so. But what about the treating physician that has not been very available for prep and is about to be deposed by opposing counsel? Answer – you must do the best you can to alert them to the issue that may arise during cross. Otherwise the expert could give answers that create unwarranted, and unwanted, answers.

2. Attacking their Expert.

Another way the amendment to Rule 702(a) may impact practice on a practical basis is the amount of time you spend questioning opposing experts on issues related to Rule 702(a) and *Daubert*.

What principles they applied, how, publications about those principles,

Methodology used, why, where is that methodology published, etc.

Can what they do be replicated by an independent test?

What did they do to test reliability of their method

What studies relied upon?

Etc.

C. CAN ALL OF THIS BE DONE BY WAY OF A PRE-TRIAL MOTION?

Attempt to have your trial judge rule on preliminary expert witness foundation questions prior to trial. *Motions in limine* may be used not only to exclude the other's expert, but to get an advance ruling that you can satisfy the foundation issues that are directed only to the judge.

In order to do this, if your expert is being deposed by your opponent, once they have finished questioning the expert, examine your expert on the questions of his qualifications, and the three prongs of 702(a). If no deposition, why not try the same approach with an affidavit from your expert? Then, as part of your pretrial motions you ask the trial judge to rule in

advance that you have satisfied all foundation issues by submitting that deposition during the pre-trial hearing. There are three possible outcomes:

1. The judge agrees with you and rules that the witness is qualified. If that happens, then make sure the order references the deposition testimony as the basis for ruling that the expert is qualified to give opinion testimony under Rule 702. If you are successful, then your direct examination at trial can be focused on those aspects of the qualification that are important to persuasion without worrying about whether you have satisfied the judge of Rule 702.

2. If the judge reserves ruling until after the expert actually testifies at trial, you have at least educated the judge about the issue and probably learned important information from your opponent about the nature of their attack on your expert.

3. If the judge instead rules that the expert will not be permitted to testify, then if the expert is an *essential* witness, you can decide if you want to burn a voluntary dismissal and start over, or appeal the inevitable grant of defendant's motion for summary judgment.

When deciding about the attack on an opposing expert you have to decide from a strategy perspective when you want to launch the attack. Of course opposing counsel should be prepared for it either way but there are times where you may want to NOT make it a matter of a *motion in limine* but do it by way of a *voir dire.* The opposing counsel and the witness may be less prepared for the attack if done in this manner. Procedurally all you do is at the point that the witness is tendered as an expert you simply object and ask for an opportunity to *voir dire* the witness. If there is no tender then lodge the same objection when the first opinion question is asked. The judge will send jury to deliberation room and then you conduct an examination sufficiently to establish reason why you believe the objection should be sustained.

CONCLUSION

We are still waiting to see how our NC Supreme Court alters the approach of analyzing the admissibility of expert opinion testimony. Qualifications, relevance and reliability have been the standard for many decades and will continue to be the standard. Although you will want to include the wording from the three prongs of the amended Rule 702(a), if you show that your witness is qualified, that their testimony will be helpful to the jury, and that it is reliable, you should be safe.

Useful Secondary Sources

North Carolina Evidentiary Foundations, Third Ed.; Robert P. Mosteller, Donald H. Beskind, Judge R. Allen Baddour, Jr., and Edward J. Imwinkelried. Matthew Bender (LexisNexis) 2014.

105 A.L.R. Fed. 299 (Originally published in 1991) Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases.

APPENDIX INDEX

Sample Direct Examination of experts to comply with *Daubert.* From *North Carolina Evidentiary Foundations*, Third Ed.; Robert P. Mosteller, Donald H. Beskind, Judge R. Allen Baddour, Jr., and Edward J. Imwinkelried. Matthew Bender (LexisNexis) 2014.

Sample of a Defense Motion to Exclude Expert based upon *Daubert*

Sample Memorandum in Support of Plaintiff's Motion to Exclude Defense Expert based upon Daubert

Presentation to the North Carolina Superior Court Judges Conference October 2013 by Robert C. Ervin and Shannon R. Joseph, Superior Court Judges