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Rule 9(j)  
versus  
Rule 702

Rule 9(j) addresses the preliminary, gatekeeping inquiry of whether a proffered expert witness is *reasonably expected to qualify* as an expert witness under Rule 702.

Rule 702 governs whether the expert *will actually* qualify as an expert witness. The trial court has wide discretion to allow or exclude testimony.

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N.C. Gen. Stat. § 8C-1, Rule 702(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:

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Rule 702(a) cont.

- (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.

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SAME OR SIMILAR  
SPECIALTY  
("Specialist")

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N.C. Gen. Stat. § 8C-1,  
Rule 702(b)

- (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

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Rule 702(b) cont.

- (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
  - a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
  - b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

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Rule 702(b) cont.

- **AND**
- (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

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- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

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- b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

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*Da Silva v. WakeMed,*  
375 N.C. 1, 846 S.E.2d 634 (2020)

- On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals;
- Question: Whether an internist proffered by plaintiff to provide standard of care expert testimony against three hospitalists is properly qualified under Rule 702(b) of the North Carolina Rules of Evidence?

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*Da Silva v. WakeMed, cont.*

- A 76-year-old female presented to WakeMed Cary emergency room with fever, altered mental status, and weakness. She was presumed to have a urinary tract infection. Concerned that an infection had induced sepsis, emergency room personnel collected urine and blood cultures, and an emergency room physician ordered the administration of the antibiotic Levaquin intravenously.
- Levaquin has an FDA "black box" warning, which warns of an increased risk of tendon ruptures in patients over sixty years old and in patients who are concomitantly taking a corticosteroid.

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- The patient was admitted to a telemetry-intermediate care floor and came under the care of Dr. Jenkins, Dr. Daud, and Dr. Afridi.
- All three of these doctors are board certified in internal medicine, and all identified themselves as hospitalists – physicians who specialize in internal medicine in a hospital setting and care for hospitalized patients.
- During the patient’s hospitalization, each of the defendant hospitalists prescribed Levaquin and continued the patient on a daily dose of prednisone.
- All three doctors testified that they were familiar with the black box warning for Levaquin; they were aware she was over the age of 60; and she was taking a corticosteroid.

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- Roughly a week after the patient’s discharge from the hospital, her Achilles tendon ruptured, and she had to undergo tendon repair surgery. She never fully recovered and ultimately died from pneumonia and debility.
- Similarities between plaintiff’s proffered expert, Dr. Genecin, and the defendant hospitalists:
  - Board certified in internal medicine;
  - Similar education, training, and experience;
  - Dr. Genecin testified that a hospitalist does the same work as any internist who cares for hospitalized patients;
  - Dr. Genecin worked as an attending physician in a hospital two months of the year, where his primary duty is patient care and that in this capacity his role is identical to that of the hospitalists;
  - Dr. Genecin testified that he had prior experience treating patients similar to the patient in this case.

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- The Court found that:
  - The procedure that is the subject of the complaint includes the selection, prescription, and management of medication in the overall care of a patient;
  - Dr. Genecin’s practice as an internist includes the procedures at issue here;
  - Dr. Genecin has prescribe Levaquin to patients in the past;
  - Dr. Genecin had prior experience with patients similar to the Plaintiff’s decedent;
  - In the year prior to the decedent’s hospitalization, Dr. Genecin spent 55% - 60% of his overall professional time in clinical practice as an internist, including two months of the year in which he practiced internal medicine in a hospital full time.
- Holding: Dr. Genecin meets each of the applicable requirements of Rule 702(b). The Court concluded that Dr. Genecin may properly offer expert testimony on the standard of care against the hospitalists.

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*Sweatt v. Wong*  
145 N.C. App. 33, 549 S.E.2d 222 (2001)

- The decedent was admitted to the hospital on December 12, 1993 with abdominal pain. A sonogram revealed multiple gallstones and possible acute cholecystitis.
- Thereafter, on December 14, 1993, the decedent underwent a laparoscopic cholecystectomy to remove her gallbladder. The surgery was performed by the Defendants, Dr. She Ling Wong (surgeon) and Dr. Eugene Stanton (assistant).
- Over the next several days, the decedent experienced symptoms which included distention of her abdomen, constant need of pain medications, and listlessness.
- Dr. Wong ordered abdominal x-rays, which were interpreted by the radiologist "as revealing a large amount of free air in the abdomen".
- Dr. Wong went on vacation on December 17, 1993 and left the decedent in the care of Dr. Stanton.
- The decedent's personal physician had the decedent examined by another surgeon (Dr. Collins), who determined that the decedent was in need of an emergency, life-saving laparotomy, which he performed later that day.

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Sweatt v. Wong, cont.

- The surgery revealed the decedent had a perforation in the lower portion of her stomach caused by the lap chole procedure.
- Decedent was transferred to UNC Hospital where she underwent several major surgeries. Decedent died several years later.
- Issue: Whether the trial court erred in allowing one of the Plaintiff's experts, Dr. David Wellman, testify as to the negligence of the defendants.
  - Dr. Wellman was a general surgeon who was board certified in laparoscopic procedures.
  - However, during the year immediately preceding the date of the decedent's surgery, Dr. Wellman did not perform laparoscopic procedures. He served as the Director of the emergency department at Duke University Medical Center.

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Sweatt v. Wong, cont.

- The Defendants argued that Dr. Wellman was essentially an emergency room physician and, therefore, was not qualified to offer opinions regarding the care provided by the Defendants, who are general surgeons.
- In reviewing Dr. Wellman, qualifications and experience, the Court noted the following:
  - Dr. Wellman was a board certified general surgeon;
  - In his role as director of the emergency department, he examined and diagnosed patients who, after surgery, presented with signs and symptoms similar to those of the decedent Sweatt. Thus, he had an active clinical practice which included diagnosing patients with post-abdominal surgery complications such as infections;
  - In addition to his active clinical diagnostic practice, Dr. Wellman instructed residents in the emergency department regarding patients he treated.
- The Court of Appeals held that Dr. Wellman was properly qualified as an expert witness under Rule 702(b)(1)(b) and (2).

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Jacobs v. Mann  
2021-NCCOA-370, 860 S.E.2d 51  
(Unpublished Opinion)

- In April 2015, the decedent consulted with Defendants, Dr. Christian Mann and Southern Surgical Associates, P.A., for bariatric surgery.
- The surgery was to be performed at Defendant Atlantic Gastroenterology Endoscopy Center, P.A. (AGEC) outpatient surgical center.
- Decedent, at that time, was a thirty-six-year-old man who stood six-feet tall, weighed 501 pounds, and had a body mass index (BMI) of 67.9 putting him in what Defendant Dr. Mann classified as the "super morbidly obese" category.
- As part of the decedent's pre-surgery workup, he was referred to AGEC's surgical center for an upper endoscopy, under sedation.

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Jacobs v. Mann, cont.

- Decedent was also referred to a Dr. Surkin, in a separate medical practice, for a cardiac and pulmonary workup, as part of the pre-surgery workup.
- Dr. Surkin performed the sleep study on decedent on 15 July 2015. He noted that the decedent had obstructive sleep apnea, hypersomnia, and morbid obesity.
- Defendant Dr. Mann was not aware of the results of the sleep study or that the decedent had a follow up appointment scheduled with Dr. Surkin.
- Defendant Dr. Mann performed the upper endoscopy on 17 July 2015. The first time Dr. Mann met the decedent was just prior to the endoscopy. Dr. Mann's notes indicate that decedent had no past surgical history. However, it was discovered after the endoscopy that in 2013 decedent experienced

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Jacobs v. Mann, cont.

- Respiratory complications when administered Propofol as part of his conscious sedation before undergoing surgery to set a broken leg.
- For the upper endoscopy, decedent was given 200 micrograms of Fentanyl and 10 milligrams of Midazolam. During the procedure, Dr. Mann had to give the decedent more sedation because decedent was somewhat agitated during the procedure.
- In the recovery room following the upper endoscopy, decedent experienced breathing difficulties and a steady decrease in his oxygen saturation.
- Narcan was given to reverse the effects of the sedatives and resuscitative measures were taken. EMS was called.
- As the decedent arrived at the emergency department, his heart rate dropped and he had no pulse. Decedent was pronounced dead at the hospital.

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**Jacobs v. Mann, cont.**

- Defendant Dr. Mann is a general surgeon specializing in bariatric surgery.
- The Plaintiff designated four anesthesiologists as standard of care experts.
- The Plaintiff also designated Dr. James Calland (general surgeon with the University of Virginia) and Dr. John Paul Gonzalvo (general and bariatric surgeon)
- Defendants filed a motion to preclude the anesthesiology experts from rendering standard of care opinions against Dr. Mann.
- Defendants also sought to exclude Dr. Calland pursuant to Rule 702.

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**Jacobs v. Mann, cont.**

- Plaintiff argued the trial court erred in excluding his anesthesiology experts under Rule 702 because the issue was "sedation", and his anesthesiology experts perform the same sedation procedure in their practices as Dr. Mann performed in this case.
- The Court looked at the Plaintiff's Complaint and the Plaintiff's brief on appeal and noted that the sedation procedure used by Dr. Mann was not the issue.
- Instead, the Plaintiff's allegations was that: (a) Dr. Mann failed to properly assess the decedent's risks for anesthesia, (b) Dr. Mann used poor judgment in deciding to perform the upper endoscopy at a freestanding surgical center without anesthesiologists or certified nurse anesthetists, and (c) Dr. Mann failed to act in accordance with the standards of practice for a surgeon, of similar training and experience . . . With respect to the care and treatment of a patient like the decedent undergoing upper endoscopy.

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**Jacobs v. Mann, cont.**

- The Court found that the anesthesiologist experts did not practice in a similar specialty and perform the same procedure as Dr. Mann.
- The anesthesiologists went through different training than a surgeon would.
- Anesthesiologists testified they do not perform upper endoscopies.
- The Court noted that "even if the alleged medical negligence was viewed solely through the lens of administering anesthesia and managing anesthesia, the Record reflects Dr. Mann's administration and management of the anesthesia in this case occurred 'in a different context' than the ones in which the anesthesiologists at issue in this case administer and manage anesthesia."
- The Court held that the trial court did not err in concluding Plaintiff's anesthesiologist experts did not qualify under Rule 702(b)(1) and (2) of the North Carolina Rules of Evidence.

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### Jacobs v. Mann, cont.

- In regards to Dr. Calland, the Court held that the trial court did not err in excluding Dr. Calland because the trial court's conclusions Dr. Calland did not meet Rule 702(b)(2)'s requirements was supported by the trial court's findings, which were, in turn, supported by evidence in the Record.
- The trial court found "Dr. Calland did not devote a majority of his professional time to the active clinical practice of bariatric surgery or general surgery" because "60% of Dr. Calland's professional practice was spent in clinical care; and of that 60%, only half of his time was spent in general surgery."

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### Some Similar Specialties Require Close scrutiny



NEUROLOGY/NEUROSURGEON



CARDIOLOGY/CARDIOTHORACIC SURGEON



VASCULAR SURGEON/CARDIOVASCULAR SURGEON

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### Rule 702(b) checklist

- What is the procedure/care at issue?
- Does the proffered expert perform the same procedure/provide the same care at issue?
- During the year immediately preceding the date of the occurrence that is the basis of the action, did the proffered expert devote a majority of their professional time performing the same procedure/providing the same type of care that is the subject of the complaint?
- What is the proffered expert's prior experience treating similar patients?

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### Rule 702(b)

- Applies to physicians who are specialists.
- Applies to other health care providers (examples):
  - Nurses
  - Dentists
  - Chiropractors
  - Optometry
  - Psychologist

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### The General Practitioner

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### Rule 702(c)

- (c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:
  - (1) Active clinical practice as a general practitioner; or
  - (2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

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*Formyduval v. Bunn*  
 138 N.C. App. 381, 530 S.E.2d 96 (2000),  
disc. review denied, 353 N.C. 262, 546 S.E.2d 93 (2000)

- Defendant is a physician practicing as a general practitioner in Whiteville, North Carolina.
- The Decedent first became a patient of the Defendant doctor in 1976.
- On 26 August 1993, decedent was seen by the Defendant doctor in his office for complaints of red spots on his legs and ankles, and blue spots on his forearms.
- Defendant doctor had blood drawn and sent for analysis.
- On 31 August 1993, decedent returned to Defendant doctor for a scheduled follow-up visit, at which time the Defendant diagnosed the decedent with thrombocytopenia purpura (a blood disorder that results in blood clots forming in small blood vessels throughout the body).

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*Formyduval v. Bunn, cont.*

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- On 2 September 1993, decedent complained of a severe headache and blurry vision, and was taken to defendant's office.
- Defendant doctor advised decedent's administratrix to immediately take decedent to the emergency room.
- Decedent died in the hospital on 3 September 1993.
- The sole issue on appeal was whether plaintiff's expert witnesses were properly disqualified.

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*Formyduval v. Bunn, cont.*

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- The Court discussed the difference between a "general practitioner" and a "specialist".
  - A "general practitioner" covers a variety of medical problems in patients of all ages and does not limit his practice to a specialty.
  - A doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of Rule 702.
- The Court noted that Rule 702 is designed to protect the defendant general practitioner from being compared with the higher standard of care required from one who holds himself out as an expert in the field.

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### Formyduval v. Bunn, cont.

- Plaintiff sought to call as expert witnesses at trial:
  - Dr. Lloyd McCaskill – was not board certified; held himself out as a specialist in emergency medicine; primarily limited his practice to emergency medicine.
  - Dr. Douglass Hammer – board certified in emergency medicine.
  - Dr. Eugene Paschold – board certified in oncology.
- The Court found (and the parties agreed) that the Defendant doctor was a general practitioner. Therefore, the Court determined that Rule 702(c) applies.
- During the year immediately preceding the events giving rise to the lawsuit, none of the plaintiff's experts devoted a majority of their time to the active clinical practice as a general practitioner; *not*.
- Were the experts engaged in the instruction of students in the general practice of medicine.
- COA Held that the trial court properly disqualified plaintiff's expert witnesses under Rule 702.
  - (applies to standard of care and/or breach of the standard of care)

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### Rule 702(d)

- (d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

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### Rule 702(h)

- (h) Notwithstanding subsection (b) of this section, in a medical malpractice action as defined in G.S. 90-21.11(2)b against a hospital, or other health care or medical facility, a person shall not give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues unless the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.
- Negligent credentialing, negligent peer review, negligent monitoring of physicians or allied health providers, policies & procedures, etc.

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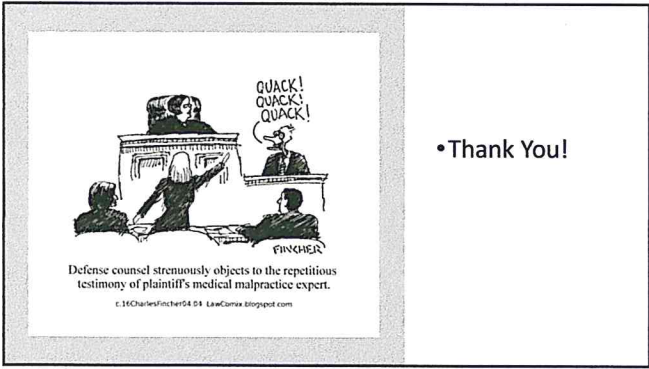
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