

Opinion Evidence

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I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Distinguish between lay and expert opinion;
2. Understand and apply Rule 702, as amended, as it relates to the admissibility of expert opinions;
3. Properly perform the tasks of gatekeeper relative to the admission of scientific, technical, and specialized knowledge;
4. Rule on objections to expert opinion raised under Rules 703-705; and
5. Properly instruct the jury regarding the use of expert opinion.

II. Resources

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 1-23

Jessica Smith, CRIMINAL CASE COMPENDIUM (available at <http://www.sog.unc.edu/casecompendium>)

State Justice Institute, A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE, MODEL CURRICULUM (March 1999) (available at <http://www.judicialstudies.unr.edu/JudgesDeskbookFullDoc.pdf>).

Sanford L. Steelman, "Welcome Back Daubert!" (June 2012) (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Steelman_702%20Manuscript.pdf).

III. Opinion Evidence

A. Introduction

To protect juries from unreliable evidence, the common law trial system heavily favored testimony from first-hand observers and strictly regulated testimony in the form of opinions, inferences, or conclusions. Opinion testimony, as a small exception, was rarely allowed. When expert opinion testimony was allowed, it was strictly policed by arcane mechanisms such as the required use of hypothetical questions. Modern-day evidence rules eliminate the near-complete ban on opinion testimony, but retains many restrictions on both lay and expert opinion testimony.

B. Lay Opinion, Rule 701

Within the limits of these restrictions, both lay and expert witnesses may offer some opinions. Lay opinion is limited to testimony that is based on the witness' first-hand knowledge and that is also (a) rationally based on the witness' perceptions and (2) helpful to a clear understanding of the testimony or the determination of a fact in issue. The requirement that the lay opinion be based on a witness' perception is the embodiment of the first-hand knowledge requirement of Rule 602. The rule requires both that the lay opinion be based on the witness' first-hand perception and that the opinion be rationally derived from first-hand perceptions. The helpfulness requirement revolves around the witness' ability to articulate facts that are helpful to the jury's decision.

Implicitly, lay opinion may also not be based on scientific, technical, or other specialized knowledge. This requirement is not clearly spelled out in North Carolina Rule of Evidence 701, as it is in Federal Rule of Evidence 701, but is effectually the rule.

Lay witnesses are allowed to give opinions on some issues that would appear to require scientific, technical, or specialized knowledge when the witness' opinion is actually a composite expression of observations that are otherwise difficult to explain such as speed, size, weight, and physical condition. North Carolina courts characterize this type of evidence as a "shorthand statement of fact" and seem to admit this evidence freely, without regard to whether the evidence is actually helpful to the jury. For example, in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130 (2001), the North Carolina Supreme Court affirmed rulings allowing police officers to testify that a victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing and that defendant "looked guilty" when he raised his hands as the officers approached. Similarly, two other witnesses were allowed to testify that defendant appeared calm, relaxed, and without remorse. The North Carolina Supreme Court's rationale was that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* at 187 (quoting *State v. Skeen*, 182 N.C. 844, 845-46, 109 S.E. 71, 72 (1921)), *death sentence vacated*, 428 U.S. 904 (1976)). Notably, the decision does not indicate how these conclusions were actually *helpful* to the jury, which is an independent requirement of Rule 701. While testimony that amounts to no more than a witness's unsubstantiated conclusions is excluded, the lay opinion cases notably give little effect to Rule 701's helpfulness requirement. *See also State v. McVay*, 174 N.C. App. 335 (2005).

North Carolina case law also generously admits opinion testimony from police officers that have not been qualified as experts by virtue of their skill, experience, education, and training. Officers have been allowed to give their opinion regarding fingerprinting techniques, shoe impressions, location of shell casings, drug behavior, and various other topics despite their lay status. These cases are collected in the Criminal Case Compendium (available at <http://www.sog.unc.edu/casecompendium>) and also in

Sanford L. Steelman, “Welcome Back Daubert!” (June 2012) (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Steelman_702%20Manuscript.pdf).

C. Expert Opinion, Rule 702

Opinion testimony may also be offered by a properly qualified expert when the opinion involves a proper subject matter for expert testimony, specified as involving “scientific, technical, or specialized knowledge.” N.C. Evid. R. 702. The general standard for admissibility, set out in Rule 702 of the North Carolina Rules of Evidence, was changed to mirror the changes in Federal Rule of Evidence 702, which was amended following the United States Supreme Court’s decision in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Before the amendment, the North Carolina Supreme Court observed that the North Carolina approach to expert testimony was “decidedly less mechanistic and rigorous than the ‘exacting standards of reliability’ demanded by the federal approach.” *Howerton v. Arai Helmet*, 358 N.C. 440, 464 (2004). The *Howerton* Court further noted that once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable and relevant, any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. *Id.* at 461. A chart showing a side-by-side comparison of the former and current Rule 702 is presented in Appendix 1 on page 12 at the end of these materials. A detailed comparison between the North Carolina and federal approaches is presented graphically in Appendices 2 and 3 on pages 13-14 at the end of these materials.

With the verbatim adoption of the federal rule’s language, multiple issues arise with regard to the approach that North Carolina courts should now take in determining the reliability and relevance of expert testimony. In applying amended Rule 702, North Carolina courts may use federal precedent as guidance. Commentary to Rule 102 of the North Carolina Rules of Evidence (which, of course, predates the Rule 702 amendment) provides that “federal precedents are not binding on the courts of this State in construing these rules. Nonetheless, these rules were not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.”

Despite this more general recognition that federal precedent can be utilized by state courts for guidance, the North Carolina Court of Appeals recently rejected federal precedent in a case that raised the issue of the appropriate standard of review for evaluating error alleged to have occurred when the trial court excluded defendant’s expert witness. In *State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. 2013), the North Carolina Court of Appeals rejected the abuse of discretion standard adopted by the United States Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Because the

evidentiary ruling denied a “defendant’s right to present a witness through the misapplication of a rule of evidence,” the appellate court found constitutional error, concluded that the state failed to show that the error was “harmless beyond a reasonable doubt,” and ordered a new trial. *State v. Cooper*, 747 S.E.2d at 413; *but see State v. Bullard*, 312 N.C. 129, 140 (1984) (holding that trial courts are given “wide latitude of discretion when making a determination about the admissibility of expert testimony”); *State v. Anderson*, 322 N.C. 22, 28, *cert. denied*, 488 US. 975 (1988) (holding that the trial court decision regarding competence of witness to testify as an expert will not be reversed absent an abuse of discretion). It is notable that the appellate court relied upon the North Carolina Supreme Court’s expressed concern in *Howerton*, which rejected the *Daubert* approach, fearing “that trial courts asserting sweeping pre-trial ‘gatekeeping’ authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.” *Howerton*, 358 N.C. at 468.

The amended rule applies to scientific, technical, and specialized knowledge. The plain language of Rule 702 makes it clear that the rule applies to technical and specialized knowledge, as well as to scientific knowledge. This is consistent with the United States Supreme Court’s approach to Rule 702 in *Daubert* and in the subsequent case of *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999). This means that the gatekeeper function, anticipated for trial judges, extends to all expert witnesses, not just experts testifying about scientific knowledge. Consequently, trial judges “must determine whether [all] testimony [based on scientific, technical, or specialized knowledge] has a reliable basis in the knowledge and experience of [the relevant] discipline.” *Kumho Tire, Ltd.*, 526 U.S. at 149.

Rule 702 continues to include Section (a1) pertaining to the admissibility of testimony by a witness on the issue of impairment related to the results of a Horizontal Gaze Nystagmus test, when the test is administered by a person who has successfully completed training in HGN, N.C. Evid. R. 702 (a1), and pertaining to accident reconstruction in section (i), providing that a “witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.”

1. Qualifications

Experts may be qualified based on their knowledge, skill, experience, training, or education. In interpreting the qualifications requirement, courts generally consider the respective fields for guidance as to expert qualifications. The issue of whether an individual has sufficient qualifications to testify as an expert is a fact-based, Rule 104 preliminary question that is committed to the trial judge’s discretion.

2. Proper Subject Matter

Qualified experts may testify in the form of an opinion or otherwise “[i]f

scientific, technical or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” N.C. Evid. R. 702(a). Thus, the proper subject matter for expert testimony is scientific, technical, or other specialized knowledge.

3. Trial Judge as Gatekeeper

Both the issue of sufficient qualifications and the issue of proper subject matter are issues to be determined by the trial judge. The Supreme Court chose the metaphor of “gatekeeper” in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) to refer to the trial judge’s role, which includes the responsibility to determine the admissibility of the scientific, technical, or specialized knowledge by determining that the underlying bases is valid and that the evidence will assist the trier of fact.

At the time that *Daubert* was decided, the predominant rule in the United States for the admissibility of expert testimony was the “general acceptance” standard set out by in *Frye v. United States*, 293 F. 1013 (D.C. App. 1923), which focuses on whether experts in a given field generally accept the underlying empirical basis for an expert opinion. Under the *Frye* test, courts generally defer to experts for admissibility determinations. The decision in *Daubert* constructed a new approach. Rather than focus on whether members of a given field accepted a scientific proposition, the *Daubert* focus is on whether the underlying science is based on sound principles and methodology. *Daubert*, 509 U.S. 579.. Additionally, rather than defer to experts in a given field to determine whether opinion evidence should be admissible in the courts, *Daubert* places the burden of determining admissibility on the trial judge.

The trial judge must determine, as a threshold matter, whether the proffered expert opinion is reliable. The reliability of a qualified expert’s opinion depends upon the validity of the underlying theory, the validity of the technique applying the theory, and the proper application of the technique on a particular occasion. A reliable result is contingent on a valid theory and the valid and proper application of a valid technique. The validity of the theory and the application of the valid technique are two discrete issues. The validity of the scientific principle and technique may be stipulated; judicially notice; legislatively dictated; or proven through the presentation of expert testimony. Thus, for example the parties could stipulate that a particular scientific theory was valid, but could disagree that the expert had properly applied the theory to the case at hand. Although the *Daubert* approach arose in the context of scientific expert opinion, its reliability focus and rationale applies also to non-scientific, technical and specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Although the *Daubert* approach on paper appears very different from the *Frye* approach, the two approaches often yield similar results. When principles and methodology underlying a given field have a strong scientific foundation, they also will likely be generally accepted by the relevant scientific community. When they have a weak scientific foundation, they likely will not be generally accepted. In both situations, the admissibility determination under either a *Frye* or *Daubert* approach would be the same. But on occasion, the underlying principles and methodology will be scientifically

sound, yet not generally accepted, rendering the evidence admissible in a *Daubert* jurisdiction but not a *Frye* jurisdiction. Similarly, some scientific areas are generally accepted, but upon inspection, have not met the threshold requirement for validity because the underlying methodology and principles are not sound.

Under the federal approach, the gatekeeper function applies to all types of scientific, technical, or specialized evidence, not only to novel or non-conventional types of evidence. *Dauber v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 593 n.11 (1993)(noting that the rule does not apply exclusively to unconventional evidence, but to “well-established propositions are less likely to be challenged than those that are novel”). This has led to some federal courts excluding evidence that had been previously determined to be admissible.

Additionally, the federal approach includes a recognition that even though an expert’s methodology is scientifically valid, the expert opinion may nonetheless be excluded because of what is referred to as an “analytical gap.” “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert).

a. Preliminary Questions

A practical aspect of the *Daubert* approach is a shift in the court’s management of expert testimony. Most courts conduct Rule 104(a) hearings in advance of trial to determine the validity of the underlying science or technology. Some courts do so even in the absence of an objection, viewing their gatekeeper role as requiring a threshold determination of admissibility. But preliminary hearings are not mandated and may, in certain cases, not be necessary. As a rule of thumb, whether a hearing is necessary will turn on whether the record is sufficient without a hearing to enable the trial judge to make an informed decision as to admissibility and to allow the appellate court to conduct a meaningful review in the event of appeal. Special consideration should always be given to the difficulties that might be created by requiring counsel to “explore an expert’s qualifications and the bases for the expert’s opinion in the presence of the jury, and depending on the circumstances of the case, [the trial judge] should give due consideration to requests that questioning occur unconstrained by that pressure.” *United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000).

Additionally, trial judges should remain mindful of the need to create a sufficient record for appellate review. Thus, trial judges should make specific findings on the record which are sufficient for an appellate court to review the trial court’s conclusion concerning whether the testimony was scientifically reliable and factually relevant.

b. Burden of Proof

The burden of proof lies with the proponent of the expert testimony to establish its

admissibility. A preponderance standard applies. *Daubert*, 509 U.S. at 593 n.20. Because the party opposing the evidence often moves in limine to exclude the evidence, the burden is sometimes mistakenly reversed and placed on the opposing party. But, the proponent has the initial burden of production and the ultimate burden of persuading the trial judge that the basis for the expert's opinion is more likely than not valid.

c. Assessing Relevancy

Rule 702 is, in fact, a special relevancy rule, which focuses on “fit,” i.e., whether a valid science or technology applies to some disputed issue in the case. As the *Daubert* Court noted, Rule 702 “requires a valid scientific connection to a pertinent inquiry as a precondition to admissibility.” *Id.* at 591-92. Only then, will the expert opinion be helpful to the trier of fact, as Rule 702 also requires.

d. Helpfulness Standard

Rule 702's requirement that expert testimony “assist” the trier of fact is referred to as the helpfulness standard. Most commentators consider the helpfulness standard in Rule 702 to be a departure from common law principles. Traditionally, expert testimony had to be “beyond the ken” of the average juror to be admissible. The requirement of helpfulness is less stringent, allowing some expert testimony that would not be admissible under the previous standard.

e. Validity Standards

The *Daubert* Court set out four non-exclusive factors to guide the trial judge's determination of the validity of the underlying science or technology. Those factors are: (1) testability or falsifiability; (2) error rate; (3) peer review and publication; and (4) general acceptance. For some subject matters, the factors may not apply and other factors may be utilized to determine the underlying validity. Trial judges should use the factors as a starting point and should make it clear which of the factors and what additional factors they are applying in assessing the underlying validity. The judge should not apply the factors as a checklist. Rather, the judge's ultimate gatekeeper role is to apply the applicable *Daubert* factors and any relevant additional factors to determine if it is more likely than not that the expert's principles and methods validly support the expert's opinion.

In prior case law, the North Carolina Supreme Court cited scholars who indicated that trial judges predictably have been hampered by the list of factors and are reluctant to consider or apply different or additional factors. *Howerton v. Arai Helmet*, 358 N.C. 440, 465-66 (2004). To stimulate thinking about what other types of factors may be appropriate considerations, trial judges might find a list compiled by another state court judge helpful. The list included the *Daubert* factors and, additionally: (1) the existence and maintenance of standards governing the technique or method; (2) the presence of safeguards in the characteristics of the technique or methodology; (3) analogy to other scientific techniques or methods whose results are admissible; (4) the nature and breadth

of the inference involved; (5) the clarity and simplicity with which the technique can be described and the results explained; (6) the extent to which the basic data are verifiable by the court and the jury; (7) the availability of other experts to test and evaluate the technique; (8) the probative significance of the evidence in the circumstances of the case; (9) and the care with which the technique was employed in the case. McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911-12 (1982). Although some of these factors may risk merging the issue of admissibility with that of weight, the list may help stimulate thought about what types of factors are appropriate to assess the validity of different methods and techniques.

If North Carolina courts follow the federal courts' lead, the trial judge will retain considerable latitude in deciding which factors and what additional factors provide reasonable measures of validity for a particular area of knowledge. See *Kumho Tire Co., Ltd.*, 52 U.S. at 152. The Supreme Court's position on this issue is that the "[w]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. . . . The trial court must have the same latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are need to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is relevant." *Kumho Tire Co., Ltd.*, 52 U.S. at 153 & 152.

-Testability or Falsifiability

The *Daubert* Court noted that a "key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593. The factor of testability or falsifiability provides that "a statement or theory is falsifiable . . . if and only if there exists at least one potential falsifier—at least one possible basic statement that conflicts with it logically."¹ A less philosophical, more practical approach for judges would be to consider whether the opinion is whether the expert's statements are testable and how difficult or expensive testing would be. Because the other *Daubert* factors depend upon testability, many courts consider testability as a foundational inquiry.

The concept of falsifiability is different from the question of whether a scientific principle has been falsified or corroborated. Both concepts are subject to assessment under the *Daubert* factor but the manner of assessment was not specified. Thus, judges must evaluate the research methods used and distinguish reliable scientific research methods used to test a hypothesis from methods that merely mimic science.

-Error Rate

Error rate refers to the typical number of mistakes or errors that a technique or method will make in a set number of trials. The error rate factor focuses on actual errors and looks to what percentage of error is acceptable as well as whether most errors are

¹Karl Popper, *Realism and the Aim of Science* x (W. Bartley III, ed. 1983)(quoted in *Daubert v. Merrill Dow Pharm. Inc.*, 509 U.S. 579, 593 (1993).

false negatives or false positives.

No court, including the *Daubert* Court, has set an acceptable rate of error. Rather, this too must be determined by the trial judge depending on the particular circumstance and must include an analysis of the costs associated with error.

-Peer Review and Publication

The *Daubert* Court considered “the fact of publication (or lack thereof) in a peer-reviewed journal” as a “relevant, though not dispositive consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.” *Daubert*, 509 U.S. at 594. The factor should be considered as it reflects upon the larger issue – whether the technique or methodology has been subject to the scrutiny of the scientific community. *Id.* at 593. Judges must consider not only the fact of publication, but the nature of the publication since journals vary in stature and reputation.

-General Acceptance

In utilizing general acceptance as a factor in determining scientific validity under *Daubert*, the inquiry is not merely whether the relevant community has generally accepted the proposition as was the inquiry under *Frye*. Rather, a judge must evaluate also consider whether the relevant community “has the expertise critically to evaluate the methods and principles that underlie the test of opinion in question.” *United States v. Horn*, 185 F Supp. 2d 530, 557 (D. Md. 2002).

4. Applicability of new Rule 702

The amended rule applies in actions arising on or after October 1, 2011. The amended rule applies to criminal actions arising after the effective date. “A criminal action arises when the defendant is indicted.” *See State v. Gamez*, 745 S.E.2d 876, 878 (N.C. Ct. App. 2013). The amended rule does not apply to a second indictment joined with the first indictment even when the second indictment is filed after the effective date of the rule. Rather, “the criminal proceeding arose on the date of the filing of the first indictment.” *Id.* at 879. But the trigger date of a superseding indictment is “the date the superseding indictment was filed” because a “superseding indictment annuls or voids the original indictment.” *State v. Walston*, 747 S.E.2d 720 (N.C. Ct. App. 2013).

5. Appellate Review of Gatekeeper Function

The proper standard of review for the trial judge’s decision as to admissibility of expert testimony is an abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

6. Disclosure of Facts or Data Underlying Opinion

When an expert witness is called, the proponent of the expert testimony is not

required to have the expert testify to the facts or data which underlie the opinion, but the expert must disclose the underlying facts and data on cross-examination. N.C. Evid. R. 705.

7. Bases of Opinion

Rule 703 addresses the bases of the expert opinion and makes it clear that unlike a lay witness, the bases of an expert's opinion need not be first-hand knowledge. An expert may base an opinion on facts or data perceived by the expert or made known to the expert before or at the hearing. If the underlying facts or data are reasonably relied upon by expert in the field, the facts or data may be relied upon even if they are not admissible.

When the Federal Rules of Evidence were amended to reflect the *Daubert* holding, Rule 703 was amended in addition to Rule 702. The amendment provided that:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This amendment provides a presumption against disclosure to the jury of otherwise inadmissible information that the expert used to base the opinion upon. Scholars have noted that the question of the reliability of inadmissible evidence is integrally related to the *Daubert* analysis, but North Carolina has not adopted this portion of Rule 703.

Two recent North Carolina decisions consider the issue of the admissibility of bases of opinion evidence in support of a testifying expert's opinion. In *State v. Craven*, 367 N.C. 51 (2013), the court held that the admission of lab reports through the testimony of a substitute analyst violated the defendant's confrontation clause rights. In *Craven*, the analyst who testified did not testify to an independent opinion, but rather relied upon the opinion of the analysts who tested the substances to conclude that the substances were cocaine. The court held that the testimony was impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts' conclusions from their lab reports."

The *Craven* court distinguished the facts in the case from those in *State v. Ortiz-Zape*, 367 N.C. 1 (2013), in which an expert testified based upon her independent analysis of testing performed by another analyst in her laboratory. In finding no confrontation violation, the North Carolina Supreme Court considered *Williams v. Illinois*, 132 S. Ct. 2221 (2012), a plurality opinion of the United States Supreme Court, as standing for the proposition "that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." The North Carolina Court reasoned that:

when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the

expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.

State v. Ortiz-Zape, 367 N.C. 1, 8 (2013).

8. Opinion on Ultimate Issue

At common-law opinions on the ultimate issue in the case were barred. Rule 704 removes the common-law bar by providing that opinion evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Evid. R. 704(a).

9. Court-appointed Experts

Rule 706 sets out the procedure to be followed when the court on its own motion or on the motion of a party appoints an expert.

APPENDIX 1

Comparison of Current and Former Rule 702, North Carolina Rules of Evidence

Current Rule 702.

Testimony by experts. (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.**

Former Rule 702(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.

APPENDIX 2	<i>Howerton’s Take on Federal Approach</i>	<i>Goode² Approach</i>
Admissibility Standard	Ensure that any and all scientific testimony or evidence admitted is not only <u>relevant</u> , but <u>reliable</u> by determining whether reasoning or methodology is scientifically valid and can be applied to facts in issue (<i>Daubert</i> ³)	1. Is expert’s proffered method <u>reliable</u> ? Reliability determined by testimony, judicial notice, or precedent, but when novel, focus on use of established techniques, professional background, use of visual aids, and independent research 2. Is witness qualified as expert in area of testimony? ⁴ 3. Is testimony <u>relevant</u> ? Relevance determined by whether testimony can assist jury in drawing inferences from facts because expert is better qualified than jury to do so
Measures of scientific reliability	Testability Subject to Peer Review and Publication Known or Potential Rate of Error Existence and Maintenance of Standards General Acceptance within Relevant Community (<i>Daubert</i>)	Use of established techniques Professional background Visual aids to allow jury to visualize Independent research
Standard of review of trial judge’s decision	Abuse of Discretion (<i>Joiner</i> ⁵) Failure to apply relevant factor may constitute abuse of discretion (<i>Kumho Tire</i> , ⁶ concurring) Appellate court may reverse, rather than remand, when opinion incorrectly admitted (<i>Weisgram</i> ⁷)	Abuse of Discretion
Prerogative of judge	May exclude testimony though methodologically sound if reaches questionable conclusions due to analytical gap (<i>Joiner</i>)	
Application	Scientific, Technical, and Specialized Knowledge (<i>Kumho Tire</i>)	
Determination	Pretrial, via Rule 104 hearing Not bound by Rules of Evidence	Rule 104 determination, potentially pretrial; not bound by rules of evidence

² *State v. Goode*, 341 N.C. 513 (N.C.1995).

³ *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁴ Both the federal and North Carolina rules contain a separate, identical phrase requiring that the expert be qualified by virtue of “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702; N.C. Evid. R. 702.

⁵ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

⁶ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

⁷ *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

APPENDIX 3

Goode on why we don't follow Daubert

North Carolina Approach ⁸	Federal Approach
North Carolina approach is “less mechanistic and rigorous”	Federal approach is “more exacting standard of reliability demanded”
Gatekeeper role places trial judges in “onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert’s opinion.”	Federal approach demands that trial judges pass judgment on underlying validity of scientific or technological theory.
North Carolina is unwilling to expend the “human resources required to delve into complex scientific and technical issues.” ⁹	To undertake federal approach, judges must become knowledgeable of underlying scientific and technical theories.
North Carolina courts have historically embraced flexible approach.	Federal standard has proven to be “anything but liberal or relaxed” and trial courts are “reluctant to stray far from the original <i>Daubert</i> factors in their analysis of the reliability” of expert opinion.
North Carolina Supreme Court is concerned with case-dispositive nature of <i>Daubert</i> proceedings where pretrial <i>Daubert</i> motions are used to “bootstrap motions for summary judgment that otherwise would not likely succeed” brought about by different evidentiary standards.	Federal approach allows pretrial <i>Daubert</i> motion to substitute for trial because party may be able to exclude opponent’s expert on essential element of cause due to lessened standard that applies to the determination under Rule 104(a).
Trial judge’s “sweeping pre-trial ‘gatekeeping’ authority may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issue of fact and to assess the weight of the evidence.”	Under federal approach, pretrial determination replace need for jury trials, by eliminating party’s proof on essential element of the case, thereby depriving party of ability to have jury hear and weigh conflicting evidence.

⁸ The quotations in this chart are taken from *State v. Goode*, 341 N.C. 513 (N.C.1995) and *Howerton v. Arai Helmet*, 358 N.C. 440, 464 (2004).

⁹ Judges who are now delving into these difficult arenas may benefit from reviewing the Deskbook prepared by the State Justice Institute. State Justice Institute, A JUDGE’S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE, MODEL CURRICULUM (March 1999) (available at <http://www.judicialstudies.unr.edu/JudgesDeskbookFullDoc.pdf>).