APPLYING NORTH CAROLINA RULE OF EVIDENCE 702(a)

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October 2013

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1. What is the effective date for amended N.C. R. Evid. 702(a)?

During its 2011 session, the General Assembly amended N.C. R. Evid. 702(a). The amended rule applies in actions *arising* on or after 1 October 2011. (See Questions 6 and 7 for more information.)

2. What is the rule?

N.C. R. Evid. 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, 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.

3. How is it different than the previously-existing rule?

Before the 2011 legislation, N.C. R. Evid. 702(a) did not have the three subparagraphs containing additional conditions for admissibility. The previous rule simply said:

(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.

Pre-amendment, the North Carolina Supreme Court observed that "application of the [pre-amendment] North Carolina approach is 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 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, of course, 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. (emphasis added).

4. How does amended N.C. R. Evid. 702(a) compare to the federal expert testimony rule?

The provisions of the two rules are essentially the same, but they are not mirror images. A side-by-side comparison showing the substantive similarity appears below.

Fed. R. Evid. 702	N.C. R. Evid. 702(a)
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or otherwise specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;	(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:
(b) The testimony is based on sufficient facts or data;	(1) The testimony is based upon sufficient facts or data.
(c) The testimony is the product of reliable principles and methods; and	(2) The testimony is the product of reliable principles and methods.
(d) The expert has reliably applied the principles and methods to the facts of the case.	(3) The witness has applied the principles and methods reliably to the facts of the case.

5. Does the amendment apply in criminal cases?

YES. The Rules of Evidence apply in both civil and criminal cases. *See* N.C. R. Evid. 1101(a). The North Carolina Court of Appeals has confirmed that amended N.C. R. Evid. 702(a) applies in a criminal case. *See State v. Meadows*, 2013 N.C. App. LEXIS 989 (N.C. Ct. App. October 1, 2013) (holding that trial court should evaluate admissibility in light of amended Rule 702(a)).

6. In a criminal case, what event triggers application of the amended rule?

"A criminal action arises when the defendant is indicted." *See State v. Gamez*, 745 S.E.2d 876, 878 (N.C. Ct. App. July 16, 2013); *see also State v. Meadows*, 2013 N.C. App. LEXIS 989 (October 1, 2013) (repeating standard enunciated in *Gamez*). A second bill of indictment filed after the effective date for the amended statute, but which is joined with the first indictment, does not trigger application of the amended rule: "the criminal proceeding arose on the date of the filing of the first indictment." *Gamez*, 745 S.E.2d at 879. In contrast, when the State obtains a superseding indictment, because a

"superseding indictment annuls or voids the original indictment," "the 'trigger date' is the date the superseding indictment was filed." *State v. Walston*, 747 S.E.2d 720 (N.C. Ct. App. August 20, 2013).

7. In a civil case, what event triggers application of the amended rule?

Amended Rule 702(a) became effective 1 October 2011 and applies to actions *arising* on or after that date. A civil action "arises" when a party has a right to apply to a proper tribunal for relief. *See Swartzberg v. Reserve Life Ins. Co*, 252 N.C. 270, 276 (1960) ("In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises.")

8. What consideration should I give to federal case law on this subject?

Federal law is not binding, but it certainly is an excellent start.

The substantive similarity between amended N.C. R. Evid. 702(a) and Fed. R. Evid. 702 is not happenstance.

Further, the North Carolina Court of Appeals relied on *Daubert* in evaluating the admissibility of expert testimony in appellate cases after 1993 (*Daubert*) and before 2004, when the North Carolina Supreme Court rejected its application. *Howerton v. Arai Helmet*, 358 N.C. 440 (2004). The Honorable Sanford Steelman collected a number of those cases in the paper he presented to the Conference in June 2012.

Also, the Commentary to Rule 102 of the North Carolina Rules of Evidence observes 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."

9. Assuming the expert is qualified, what standard should apply to judge admissibility of the proffered opinion?

The United States Supreme Court summarized the inquiry for scientific evidence:

"Faced with a proffer of expert scientific testimony, the trial judge must determine at the outset," . . . whether the expert is proposing to testify to

(1) scientific knowledge that

(2) will assist the trier of fact to understand or determine a fact in issue.

This entails a preliminary assessment of **whether the reasoning or methodology underlying the testimony is scientifically valid** and of **whether that reasoning or methodology properly can be applied to the facts in issue**." *Daubert v. Merrell Dow*, 509 U.S. 579, 592 (1993) (emphasis added).

North Carolina amended Rule 702(a) essentially embraces this test with the specification of the required conditions of admissibility: (1) a basis of sufficient data or facts; (2) the product of reliable principles and methods; and (3) the product of reliable application of those principles and methods.

10. Does amended Rule 702(a) apply only to scientific opinion testimony?

NO. First, the rule's language is not limited to only scientific evidence. Second, federal courts have applied the rule beyond scientific opinion testimony.

Specifically, in *Kumho Tire*, the Supreme Court observed that "the . . . basic gatekeeping obligation applies . . . to all expert testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

11. Does the gatekeeping function of amended Rule 702(a) apply only to novel or unconventional subject matter?

NO. First, the rule's language is not limited to only novel or unconventional subject matter, but speaks to "scientific, technical or other specialized knowledge." Second, the United States Supreme Court has observed that the requirements of Rule 702 do not apply exclusively to unconventional evidence. *Daubert*, 509 U.S. at 593 n.11 (noting that the rule does not apply exclusively to unconventional evidence, but "well-established propositions are less likely to be challenged than those that are novel").

12. Will previously-accepted areas of expert testimony be admissible under the amended rule?

IT DEPENDS.

In a pre-amendment and pre-*Howerton* case, the North Carolina Court of Appeals stated that "nothing in *Daubert* or *Goode* requires that the trial court re-determine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new evidence calling that reliability into question." *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145 (2001).

Similarly, although the North Carolina Supreme Court rejected the *Daubert* admissibility test in *Howerton*, it did recognize that "initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical

methodology underlying an expert's opinion is reliable . . . when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Howerton*, 358 N.C. at 459.

Remember, though, that there are different prongs to N.C. R. Evid. 702(a). A determination of admissibility requires not only examination of whether the science or specialized knowledge is valid or reliable, but whether the "testimony is based upon sufficient facts or data" and the "witness has applied the principles and methods reliably to the facts of the case," even in those fields previously determined to be generally reliable. N.C. R. Evid. 702(a)(3).

To illustrate, in *Joiner*, the United States Supreme Court observed that the issue before the trial court was not "whether animal studies can be a proper foundation for an expert's opinion," but "whether *these* experts' opinions were sufficiently supported by the animal studies on which they purported to rely." *General Electric Co. v. Joiner*, 522 U.S. 136, 144 (1997). The Court concluded that the "studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the [trial court] to have rejected the experts' reliance on them." *Id.* at 145.

13. Is there a checklist that I can use?

NO. The United States Supreme Court has observed that "**many factors will bear on this inquiry, and we do not presume to set out a definitive checklist or test**." 509 U.S. at 593. The test is a "**flexible one**." *Kumho Tire*, 526 U.S. at 141. The gatekeeping inquiry must be tied to the facts of the particular case. 509 U.S. at 593.

14. What factors should I consider when a dispute arises concerning the ability of an expert witness to testify?

The United States Supreme Court identified some factors that may bear on the determination, particularly when scientific testimony is at issue:

- whether the theory or technique can be (or has been) tested;
- whether the theory or technique has been subjected to peer review and publication;
- whether a particular technique has a known or potential error rate, and whether there are standards controlling the technique's operation; and
- whether the theory or technique is generally accepted.

Kumho Tire, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592-94).

15. What considerations do I use when analyzing technical evidence and not scientific evidence?

Each case will have its own particularized considerations.

As an illustration, in *Kumho Tire*, the Supreme Court considered an engineer's analysis of tire failure. The *Daubert* factors were largely inapplicable. In the Supreme Court's analysis, the following considerations were addressed.

- The engineer's actual inspection of the tire.
- The expert's qualifications in terms of degrees and experience.
- The expert's inability to determine with any precision the number of miles the tire had been driven.
- The expert originally formed his opinion based on photographs and only inspected the tire on the day his deposition was taken.
- The data that the expert relied upon to underpin his opinion contained errors.
- The subjective nature of the expert's analysis.
- The expert's reliance on a theory of tire failure without any indication that any other expert used this theory or that any articles or papers had ever relied on the theory.

526. U.S. at 152-57.

The Supreme Court observed that the expert should employ "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

16. Do I have to accept the expert's testimony merely because the expert himself claims the method is accurate?

NO. 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).

17. What about challenges to expert testimony at the summary judgment stage?

Expect to see full attacks on expert admissibility at the summary judgment stage. *See generally Joiner*, 522 U.S. 136 (1997).

The test for admissibility is the same at summary judgment as it is at trial. "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." *Howerton*, 358 N.C. at 467.

Practical point: If a party asserts that certain expert testimony is inadmissible at summary judgment, the court should make clear if (and how) it ruled on that challenge. Remember that a determination on admissibility likely binds the trial judge should the matter proceed to trial.

18. How right do I have to be when I rule on admissibility of expert testimony?

Historically in North Carolina, the ruling on expert admissibility has been reviewed for abuse of discretion. *Howerton*, 358 N.C. at 469 ("Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair."); *see also State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. Sept. 3, 2013) ("Generally, the decision of a trial court to exclude expert witness testimony is reviewed for an abuse of discretion.")); *see also Joiner*, 522 U.S. at 138 (holding abuse of discretion is the appropriate standard of review).

The United States Supreme Court has reasoned that discretion should be afforded to give effect to the purpose of the evidentiary rules: "to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "just determination" of proceedings." *Id.* (quoting Fed. R. Evid. 102). North Carolina's evidence rules articulate the same purpose.

That said, the *Howerton* court expressed its concern "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. This type of concern and criticism of the federal-*Daubert* approach recently was expressed by the North Carolina Court of Appeals: notably after adoption of amended Rule 702(a). *See State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. Sept. 3, 2013).

19. Are there other pitfalls about which I should be aware?

YES. In a criminal case, if presented with a challenge to the admissibility of the defendant's expert witness, you should be mindful of *State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. Sept. 3, 2013).

In *Cooper*, the North Carolina Court of Appeals did *not* review the exclusion of the defendant's proposed expert witness for an abuse of discretion. Rather, the court noted that "[c]onstitutional rights are not to be granted or withheld in the court's discretion." *Id.* (quoted case omitted). The court reasoned that "the denial of a defendant's right to present a witness through a misapplication of a rule of evidence" can amount to a constitutional violation. The court therefore reviewed for error. Finding error, it then concluded that the State failed to show that the error was "harmless beyond a reasonable doubt," and ordered a new trial. (The State has indicated that it will petition for discretionary review.)

20. All of this is fascinating. Where can I read more about expert testimony admissibility?

We know. We can't get enough of this stuff either. Luckily, there is no end of materials available to you, not even taking into account the cases themselves. (Shepardizing *Daubert* yields over 20,000 results!) Just a few resources to get you started are listed below.

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

State Justice Institute, "*A Judge's Deskbook on the Basic Philosophies and Methods of Science, Model Curriculum*," (March 1999), *at* http://www.judicialstudies.unr.edu/JudgesDeskbookFullDoc.pdf

PricewaterhouseCoopers LLP, "Daubert *challenges to financial experts: A yearly study of trends and outcomes*," (2012), *at* http://www.pwc.com/en_US/us/forensic-services/publications/assets/daubert-study-2011.pdf