Short outline by Greg Hatcher and Arlene Zipp on Expert Witnesses

I. **How Expert Witnesses are Different From Lay Witnesses**

a. They do NOT have personal knowledge
b. Testimony is based upon reading/hearing/observing what others have said
c. May offer *opinions* beyond direct "sensory" impressions
    i. Cause or consequence of events
    ii. Interpret actions/reactions of others
    iii. Make conclusions
    iv. Comment on likelihood of reoccurrence
    v. State non-factual opinions such as issues of fault or standard of care

II. **Trial Court's "Gatekeeper" Role**

- "Trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony…trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony…" [1]

a. 3 Questions a court may ask when considering admissibility of expert testimony:
    i. Is the subject matter proper for expert testimony?
    ii. Is the expert qualified?
    iii. Is the expert testimony reliable?

III. **How to Qualify your Expert Witness**

a. An expert witness must have knowledge greater than the lay witness in order to make testimony "useful" to the judge/jury and be able to offer reliable testimony
b. **Voir Dire**
    i. Voir dire examination refers to the process of qualifying your witness as an expert in order to present reliable and credible testimony to help jury understand the facts in issue
    ii. Use short, simple questions to develop testimony
    iii. You may lead the witness in order to develop preliminary/foundational questions only

[1] State v. McGrady, 368 N.C. 880 (2016).

iv. Voir dire can be used as a direct examination by the person offering the witness as an expert and as cross examination to exclude expert testimony
v. Use this time to go through your expert's resume or CV
vi. An expert is not considered such until tendered by the trial court
vii. Consider questioning your witness about compensation/fees in order to "draw the sting" if you believe this would be in contention

c. **Resume/CV**
   i. Highlight and focus on publications, qualifications, awards, experience, training and expertise
   ii. Place special emphasis on those areas that are relevant to the subject matter of your case
   iii. Fully discuss your expert's resume and talk in depth about their qualifications and experience
   iv. Admit resume into evidence unless you face an objection based upon hearsay or cumulative evidence

IV. Reliability of Expert Testimony - *Daubert* and North Carolina Law

a. Even after you proffer evidence to qualify your expert witness, the testimony must be reliable and helpful to the judge or jury
b. North Carolina is probably considered a *Daubert* [2] state (although, our Supreme Court has yet to affirm this)
c. ***Daubert* Standard**
   i. The key inquiry is whether the offered expert testimony is relevant and reliable and the trial judge must determine whether the expert will testify to "scientific knowledge that will assist the trier of fact to understand or determine a fact in issue"
   ii. Factors a trial court may consider
      1. Whether theory/technique has been tested
      2. Peer review and publication
      3. Known/potential rate of error
      4. Generally accepted by scientific community
   iii. Applies to all expert testimony (not just experts in the field of "hard" science) [3]
      1. Psychology and psychiatry are not "exact" sciences

[2] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
[3] Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167 (1999).

d. **Rule 702. Testimony by Experts.** "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 a n expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all 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 this case."
        a. Note: the amended language in above North Carolina Rule 702 closely tracks the Federal Rule 702 and generally implements the standards set forth in *Daubert*

e. **North Carolina - *Howerton* Factors**
    i. "…North Carolina emphasizes the reliability of the scientific method and not its popularity within a scientific community…"
    ii. In addition to Rule 702, North Carolina courts focuses on indices of reliability including:
        1. Expert's use of established techniques
        2. Expert's professional background in the field
        3. Use of visual aids before the jury
        4. Independent research conducted by the expert" [4]

V. **Rule 26(b) - Discovery of Expert Witnesses and 2015 Amendments**

a. **Are all experts subject to discovery?**
    i. No. **Rule 26(b)(4)** permits discovery of facts known and opinions held by experts that are ***acquired or developed in anticipation of litigation or for trial***. It does not apply to the expert witness whose information was acquired "because he wasn't an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness" [5]
    ii. **Practice tip:** Designate all witnesses who may offer opinion (including treating physicians and mental health providers) as experts

b. **Interrogatories and Depositions**

[4] Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004).

[5] N.C.G.S. § 1A-1, Rule 26(b)(4) comment (1975).

i. Rule 26(b)(4) provides the exclusive means for discovering facts and opinions held by opposing expert witnesses through deposition or interrogatories [6]

c. **Two stages of discovery**

i. Stage 1: **Interrogatories**

1. Identity of each expert witness you intend to call at trial
2. The subject matter on which each expert is expected to testify
3. The substance of facts and opinion to be offered and a summary of the grounds for each opinion

i. Note: the Court may limit the area of permissible inquiry

b. **Practice Tip:** Serve an expert witness interrogatory at least 90 days before trial date; 60 day extension of time granted; receive expert disclosure 30 days before trial

c. **Practice Tip:** If an expert witness is not listed in an interrogatory answer, the court may prohibit an unlisted witness from testifying at trial unless the ends of justice require it.[7]

ii. Stage 2: **Deposition**

1. The Court may order additional discovery through other means, usually by deposition or request for production of documents pursuant to a 26(b)(4) a.2 Motion
2. A deposition is a statement made orally by a person under oath before an examiner or officer of the court, but not in open court, and reduced to writing by the examiner
3. Depositions are subject to the same trial evidentiary standards

d. **Amendments to Rule 26(b)**

i. **Rule 26(b)(4) a.2. Option to disclose expert report**

1. Parties now have the option (not obligation) to exchange a written report prepared and signed by the expert witness at least 90 days before trial
2. Report must contain:
   a. All opinions, basis and reasons
   b. Facts or data considered by witnesses in forming opinions
   c. All supporting exhibits
   d. Qualifications and publications from last 10 years

[6] Green v. Maness, 69 N.C. App. 403, 316 N.E.2d 911.
[7] Shepherd v. Oliver, 57 N.C. App. 188, 290 S.E.2d 761 (1982).

e. All cases in which witness testified as expert or deposition in past 4 years
f. Statement of compensation

ii. **Rule 26(b)(4) b.1. Depositions of testifying experts**
1. A party may depose an opposing party's testifying expert as a matter of right and obtain additional information using document requests and subpoenas *duces tecum*

iii. **Rule 26(b)(4)(d). Trial preparation protection for draft reports of testifying experts**
1. Drafts of expert witness reports are not discoverable.
2. Note, however, draft expert interrogatory answers and designations might be discoverable

iv. **Rule 26(b)(4)(e). Trial preparation protection for communications between attorney and testifying experts**
1. Most attorney-expert communications are not discoverable unless the communications:
a. Relate to compensation for expert's study or testimony
b. Identify facts or data that the party's attorney provided and that the expert *considered* in forming the opinions to be expressed
c. Identify assumptions that the party's attorney provided and that the expert *relied* on in forming the opinions to be expressed

v. **Rule 26(b)(4)(b.2). Discovery related to consulting experts**
1. A consulting witness is not a witness in your case
2. Generally, discovery about a consulting expert is not permitted unless:
a. The court orders party to submit to physical or mental examination per N.C. Civ. Pro. Rule 35 (Physical and mental examinations of persons); or
b. Exceptional circumstances make it impracticable for party to obtain facts or opinions on the same subject by other means

VI. Basis for Expert Opinion

a. Once your witness is tendered as an expert you will likely have to address the basis for your expert opinion(s)
b. **Rule 703. Basis if opinion testimony by experts.**

i. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

c. The expert can base his or her testimony on facts and data not in evidence, so long as those facts and data are the type that experts reasonably rely upon in their field.

d. **Hearsay**

i. Courts allow expert witnesses to offer testimony based upon hearsay

1. Opinions of other experts [8]

2. Learned treatises (Rule 803(18)): "if relied upon by the expert witness in direct examination" then statements contained in learned treatises may be *read into evidence but not received as an exhibit*

a. Statements contained in published treatises, periodicals or pamphlets

b. On a subject of history, medicine or other science or art

c. Established as a reliable authority by the testimony or admission of witness or other expert testimony or judicial notice

i. Procedurally, the material must be called to attention of expert upon cross examination or relied upon by expert in direct examination

3. Research, surveys, reports, articles, witness interviews, etc.

a. Note - psychiatrists tend to rely heavily upon interviews

ii. Be prepared to address an opponent attempting to "back door" hearsay testimony or responding to the same objection

VII. Rule 704. Opinion on ultimate issue

a. "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"

b. Standard is whether the opinion is based upon the expertise of a witness and whether the expert is in a better position to have an opinion on the subject

[8] Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989). A psychological summary by a licensed psychologist was properly admitted in a custody case under Rule 703 to show the basis of an opinion offered by another psychologist. Statements made by one psychologist to another are presumed reliable and reasonably relied upon by experts in psychology and therefore admissible.

matter than the trier of fact [9]

VIII. **Rule 705. Disclosure of facts or data underlying expert opinion**

a. "The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, *unless an adverse party requests otherwise,* in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire* before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question."

IX. **What is the Key to doing this right?**

a. Prepare. Prepare. Prepare.
b. Prep your witness for direct *and* cross examinations
    i. Review your expert's written report and resume
    ii. Practice the direct examination with your expert using and/or creating exhibits, if possible
    iii. Remind your expert to speak in plain English
    iv. Remember that your opponent will likely rebut your expert witness's testimony with their own expert witness. Therefore, consult your witness to help understand the opponent's expert's probable testimony. Who knows – perhaps your expert will give you some ideas for specific cross examination questions
c. Simplify and avoid technical or complex language or techniques
d. Use a simple and straightforward approach with short, clear questions
e. Your expert is the teacher is going to educate the judge/jury
f. Your expert is going to educate YOU.

X. **Sample Outline for your Expert Witness Direct Examination**

a. Introduction
    i. Who is the expert?
    ii. What did the expert do?
b. Qualifications/Education
    i. Background
    ii. Education and training
    iii. Experience
c. Tender the witness as an expert
d. Opinion (brief)

[9] In re McDonald et. Al., 72 N.C. App. 234, 423 S.E.2d 847 (1985).

        i. Remember you are permitted to ask hypothetical questions
e. Bases for opinion
        i. Ask your witness about the sources for opinion
        ii. Hearsay (see above)
f. What the expert did to learn about the case
g. Opinion (fully explained in detail)
        i. Exhibits and visual aids
            1. The expert is the teacher – use visual aids to illustrate and keep testimony interesting and memorable
h. If possible, stipulate to exhibits before trial so that you don't waste time on establishing the foundation.