

## **EXPERTS VS. LAY WITNESSES LAY AND EXPERT TESTIMONY and A MODEST PROPOSAL**

Kevin L. Miller

*Kevin L. Miller, Attorney, Winston-Salem, NC*

### **INTRODUCTION**

The “*admissibility*” of evidence, any evidence, is a threshold determination by a judge, not by the finder of fact. Before evidence may be submitted to the fact finder for its consideration, the proper evidentiary “*foundation*” must be laid or sufficiently demonstrated to the judge. The judge is, therefore, the “*gatekeeper*” of evidence, allowing in only that evidence for which there is a proper foundation.<sup>1</sup>

The process for determining whether a sufficient “foundation” has been laid to merit “admission” is governed by Rule 104(a) of the North Carolina Rules of Evidence (hereinafter, “RE”). *See also* RE Rule 1102(b)(1).

The admissibility of *testimonial evidence*, whether lay or expert, rests upon a three-pillared “foundation.” The three pillars are: (1) competence; (2) relevance; and (3) reliability. The “strength” of the *competence* and *reliability* pillars required for the admission of *lay testimony* compared to that required for *expert testimony* is vastly different.

This paper is divided into four (4) sections, plus an appendix. Sections I-III begin with a summary of the main points, under the heading “Practice Pointers.”

The first section of this paper will assert the importance of (a) admissibility considerations, and (b) application of the rules of evidence, in *bench* trials.

The second section of this paper will identify and discuss the evidentiary rules and statutes that undergird each of the three pillars as applied to the admission of lay witness testimony.

The third section will identify and discuss the evidentiary rules and statutes that undergird each of the three pillars as applied to the admission of “expert” testimony. The “reliability” pillar required for the admissibility of expert testimony will be discussed in more, indeed, *much* more detail. North Carolina’s October, 2011 revision of RE Rule 702 has likely overturned

---

<sup>1</sup> Technically, North Carolina Rule of Evidence Rule 104(b) provides for the “provisional” admission of evidence, the relevancy of which is “conditioned on a fact.” This abstract rule is more easily understood by the example of the “provisional” admission of a letter which proves a key element of plaintiff’s claim, but which is yet to be “authenticated” as required pursuant to Rule 901. The letter’s tendency “to make the existence of [a material] fact...more probable,” that is, the letter’s “relevancy” within the meaning of RE Rule 401, is *conditioned* upon the *fact* that the letter is *authentic*.

*Howerton v. Aria Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), transforming North Carolina into a *Daubert*<sup>2</sup> jurisdiction.

In light of North Carolina’s “Daubertization” and the perceived adjudicatory deficiencies to be cured by *Daubert*, the fourth section of the paper will suggest a “modest proposal”<sup>3</sup> for the use of court-appointed experts, pursuant to RE Rule 706.

Included in the appendix are reference materials with respect to *Daubert*, revised RE Rule 702, and the application of *Daubert* to social science expert testimony, particularly that of psychological testimony in the child custody evaluation setting.

## I. WHY EVIDENTIARY CONSIDERATIONS MATTER IN BENCH TRIALS [RE Rule 103, N.C. Rule of Civil Procedure (“CP”) Rule 61, and *State v. Davis*]<sup>4</sup>

### *Practice Pointers:*

- CP Rule 61 and RE Rule 103 provide that the admission of or refusal to admit evidence is not error or the basis for post-trial relief unless such evidentiary ruling affects a substantial right.
- Barring extraordinary relief, RE Rule 103 requires timely objection to preserve the issue of the erroneous admission of evidence and an offer of proof to preserve the issue of the erroneous exclusion of evidence.
- In a *bench* trial, the Court’s reliance on incompetent evidence, *even if there is sufficient competent evidence to support the finding and conclusion*, is grounds for reversal.

CP Rule 61 and RE Rule 103 in sum clearly provide that “unless a substantial right” of a party is “affected” or “denied,” the Court’s wrongful admission or refusal to admit evidence shall not be the basis for granting a new trial, setting aside a verdict, vacating, modifying, or otherwise disturbing a judgment or order, or supporting an appeal:

**Rule 61. Harmless error.** No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

---

<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

<sup>3</sup> Though the proposal suggested *infra* is different from Twist’s original “modest proposal,” the Court’s ingestion of certain experts might also merit consideration.

<sup>4</sup> The rules of evidence were designed and adopted to secure fairness and promote the ascertainment of truth (Rule 102); arguably, that ought be reason enough that the rules should matter even in bench trials.

**Rule 103. Rulings on evidence.** (a) Effect of erroneous ruling. – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...

Further, as *Broun* points out, the evidentiary rules' exclusion of certain evidence is primarily a product of the jury system, to prevent jurors from (1) relying upon evidence that is not minimally reliable (e.g., hearsay statements), or (2) being unduly swayed by emotional or confusing evidence which is of relatively low probative value (*see* Rule 403). Presumably, when a Judge, rather than a jury, is a fact-finder, she will recognize incompetent evidence and will disregard such evidence:

Since the jury system is chiefly responsible for many of the exclusionary rules, some evidence that is incompetent in a jury trial might well be regarded as competent at a trial before the judge, but there is no clear recognition of such a general proposition in the North Carolina cases, or the Rules of Evidence.

However, there is a distinction between *admission* of incompetent evidence and *reliance* upon it in making findings, as “the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found.”

Kenneth S. Broun, Brandis & Broun on North Carolina Evidence, § 5 (7<sup>th</sup> Edition, 2011).

Taken at first blush, Rules 61 and 103 combined with *Broun* appear to allow the trial Judge to all but dispense with admissibility considerations in bench trials. However, once incompetent evidence is admitted in a bench trial, reversible error can easily creep into the Court's judgment:

There is a rebuttable presumption that if incompetent evidence was admitted, it was disregarded and did not influence the findings; but “this presumption is weakened when, over objection, the judge admits clearly incompetent evidence,” and “unquestionably it is the rule in this jurisdiction that a judge's findings of fact will be reversed where it affirmatively appears that they are based *in whole or in part* upon incompetent evidence.”

*Id.* The quotation in *Broun* is from *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976). *State v. Davis* itself, however, quotes *Cogdill v. North Carolina State Hwy. Comm'n*, 279 N.C. 313, 182 S.E.2d 373 (1971), which held: “...the court's finding of fact will not be reversed unless based *only* on incompetent evidence.” (Emphasis supplied.) *Broun* editorializes that “in view of the general tenor of the opinion in *Davis*, if there is conflict between these statements, the [*Davis*] quotation in the text should be taken as authoritative.” *See also Johnson v. Southern Industrial Constructors*, 126 N.C. App. 103, 484 S.E.2d 574 (1997), *rev'd on other grounds*, 347 N.C. 530, 495 S.E.2d 356 (1998) (judge impermissibly relied upon hearsay evidence in hearing under N.C.G.S. § 97-10.2(j) dealing with workers' compensation liens). *Id.*

The presumption of the judge's non-reliance on incompetent evidence is rebutted when: (1) **the only evidence supporting a finding was incompetent** [*Morse v. Curtis*, 276 N.C. 371, 172 S.E.2d 495 (1970); *Harrell v. Lloyd Constr. Co.*, 300 N.C. 353, 266 S.E.2d 626 (1980)]; and (2) **when the judge by words or conduct indicated that incompetent evidence was considered** [*Erwin Mills v. Textile Workers Union*, 235 N.C. 107, 68 S.E.2d 813 (1952) (specific objection and motion to strike overruled; presumption not available); *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967) (affirmatively appeared finding based, at least in part, on privileged communication admitted over objection); *Orr v. Orgo*, 12 N.C. App. 679, 184 S.E.2d 369 (1971) (judge's statements indicated he relied on the incompetent evidence)].

Further, as demonstrated in Section 3 *infra*, North Carolina's reliability threshold with respect to "expert evidence" has increased, requiring a clearer demonstration of reliability for "*admissibility*" purposes. Expert evidence that does not meet the *admissibility* threshold is, by definition, incompetent. Consequently, a judge's admission expert testimony that does not meet the new reliability requirements increases the likelihood of the judge's impermissible reliance on such testimony, resulting in reversible error.

A judge who dispenses with appropriate admissibility screening in a bench trial does so at the peril of contaminating her judgment with incompetent evidence and creating reversible error. However, **it must be emphasized** that in order to preserve the judge's "evidentiary error" for post-trial relief or appeal, the moving or appealing party must, in most instances, have **timely objected** to wrongly admitted evidence or, conversely, have made an **offer of proof** of the wrongly excluded evidence. RE Rule 103.

## II. LAY WITNESSES [RE Rules 104, 401, 402, 403, 601, 602, 701, 1101; G.S. Chapter 8 Evidence, Article 7 Competency of Witnesses; CP Rules 32 and 43]

### *Practice Pointers:*

- The *admissibility* of evidence is determined by the judge.
- Only *relevant* evidence is admissible; irrelevant evidence is inadmissible. (RE Rule 401)
- The words "material" or "materiality" do not appear in the rules of evidence; within the meaning of RE Rule 401, a *material fact* is one that is "of consequence to the determination of the action." Generically, a *material fact* is one that *matters* and what *matters* is determined by the elements of the claims and defenses at issue.
- RE Rules 401 and 402 provide that, unless otherwise excluded by law or pursuant to RE Rule 403, all evidence that has a tendency to make the existence of a *material fact* more or less probable than it would be without the evidence (i.e., "relevant evidence"), is admissible.
- Only that *lay witness testimony* that is *truthful*, is **based upon the witnesses' personal knowledge**, and can be *clearly communicated* is evidence that may have a tendency to

make the existence of a material fact more or less probable. Untruthful testimony, not based upon the lay witness' personal knowledge, neither has the tendency to prove or disprove the facts at issue.

- Whether there exists minimally sufficient evidence from which a fact-finder *could find* that a lay witness is truthful and that the lay witness' testimony is based on his personal knowledge are *questions preliminary to the admission of the testimony*.
- RE Rules 104 and 1101 provide that in ruling upon *preliminary [factual] questions*, including the *admissibility* of evidence, the *competence* of a witness, and *the qualifications of an expert*, the judge is **not bound by the rules of evidence; indeed, except for the rules with respect to privilege, the rules of evidence do not apply to the determination of preliminary questions**.
- Broadly, there are two "types" of preliminary factual questions that determine the admissibility of evidence: (1) one in which the fact to be preliminarily determined conditions only the logical relevance of the evidence (e.g., whether a document is *authentic*); and (2) the other type, in which the preliminary fact to be determined conditions the application of doctrines which exclude logically relevant evidence (e.g., whether a privilege exists or whether an *expert witness* is qualified).
- The judge decides "type 1" preliminary questions only upon the proponent's evidence; she decides "type 2" preliminary questions upon the evidence of both the proponent and opponent, and the opponent has the right of *voir dire*.
- With respect to "type 1" preliminary questions, the judge essentially determines whether the proponent has presented minimally sufficient evidence from which the fact-finder *could* rationally find the "conditioning facts." Ultimately, the fact-finder determines whether the fact actually exists.
- Whether a lay witness is *competent within the meaning of RE Rule 601* and whether a lay witness has *personal knowledge* of the facts about which he is going to testify (RE Rule 602) are "type 1" preliminary questions.
- *Competency* within the meaning of RE Rule 601 requires that (1) the witness be able to adequately communicate, individually or through an interpreter, his testimony, and (2) appreciate his duty to tell the truth.
- *Personal knowledge* within the meaning of Rule 602 is *knowledge* acquired by the witness by means of one of the five (5) senses: sight, hearing, taste, "touch" or "feeling," or smell.
- *Opinions* may be offered by lay witnesses only if the opinions are (1) rationally based upon the lay witness' *personal knowledge*, and (2) helpful to an understanding of his testimony or a determination of material facts. (RE Rule 701)

- G.S. Chapter 8, Article 7 *incompetency* (e.g., the *incompetency* of physicians, clergy, and counselors in certain instances) is the product of policies to encourage and protect certain communications and “confidential” relationships; whether such communications are entitled to protection and should be protected are “type 2” preliminary questions in which both the proponent and opponent of the evidence may present evidence to the judge on the issue of *competence*.
- The *reliability* requirement for the *admission* of lay witness “factual” testimony is met upon satisfaction of RE Rules 601 and 602 and for “opinion” testimony, upon satisfaction of RE Rule 701.
- Lay witness testimony may, in certain instances and at the discretion of the judge, be presented by affidavit in support of or opposition to motions. (CP Rule 43)
- Lay witness testimony may be presented by deposition at trial against a party “present at” or “who had notice of” the deposition, (1) when the deposition testimony is used to contradict or impeach a witness, (2) as *substantive evidence* by a party adverse to the party calling the lay witness, or by the party calling the witness if the deposition testimony is in conflict with or inconsistent with the witness’ trial testimony, (3) if the deponent is a party, by an adverse party for any purpose, (4) if the witness is “unavailable” at trial, or (5) if justice so requires. (CP Rule 32)

**A. The Determination of Questions Preliminary to the Admission of Lay Witness Testimony [RE Rules 104 and 1101]**

Absent judicial notice or the parties’ stipulation to the admissibility of evidence, there are questions preliminary to the admissibility of any and all evidence. The particular preliminary questions that must be answered vary by the *type* of evidence and the *purpose* for which the evidence is offered:

- Will this diagram help illustrate your testimony concerning the accident?
- Does what has been marked as Exhibit A for identification [a photograph] accurately show the condition of the body when you arrived on the scene?
- **Were you present when the defendant and the plaintiff were arguing concerning the defendant’s whereabouts the night before? And, you have no hearing impediment, do you? And, you were able to hear the defendant clearly, correct? And, the defendant did speak while you were present, correct? And, do you recall what the defendant said that evening while you were present?**

The presentation of evidence for the purpose of answering the questions preliminary to the admission of evidence is referred to as *laying the foundation*.

Lay witness testimony must be based upon the witness' *personal knowledge*, that is, knowledge acquired by the witness' senses, including the sense of hearing. (RE 602) Therefore, three of the questions preliminary to the admission of an "*ear witness*" are: (1) can he hear, (2) was he present and in a position to hear the defendant, had he said something, and (3) did he hear defendant say something.

In laying the foundation for an "*ear witness*" as illustrated above, note that leading questions are used to illicit the predicate facts that (1) the lay witness was present, and (2) heard with his own ears what the defendant said. RE Rules 104 and 1101 provide that other than the rules with respect to privilege, the judge (and presumably, the proponent of the evidence) is **not bound** by the rules of evidence in determining the preliminary questions—that is, in determining whether the foundation for admission has been laid:

RE Rule 104(a) Questions of admissibility generally. – Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Consequently, CP Rule 43's and RE Rule 611's proscriptions on leading questions do not apply in laying a foundation for the admission of evidence.

There are two "types" of preliminary factual questions that determine the admissibility of evidence: (1) one in which the fact to be preliminarily determined conditions only the logical relevance of the evidence; and (2) the other type, in which the preliminary fact to be determined conditions the application of doctrines which exclude logically relevant evidence.<sup>5</sup> The judge decides "type 1" preliminary questions only upon the proponent's evidence; she decides "type 2" preliminary questions upon the evidence of both the proponent and opponent, and the opponent has the right of *voir dire*.<sup>6</sup>

With respect to "type 1" preliminary questions, the judge essentially determines whether the proponent has presented minimally sufficient evidence from which the fact-finder *could* rationally find the "conditioning facts."<sup>7</sup> Ultimately, aided by "*vigorous cross-examination, the presentation of contrary evidence, and careful instruction on the burden of proof,*"<sup>8</sup> the fact-finder determines whether the preliminary fact(s) actually exists.

With respect to "type 2" preliminary questions, those concerning whether arguably relevant evidence will be excluded, the judge, not the fact-finder, determines the *preliminary fact* at issue finally. Whether proffered evidence is impermissible hearsay or whether an individual is, in fact, qualified as an expert and will be allowed to express an opinion *not* based on personal

---

<sup>5</sup> Edward J. Imwinkelreid, Evidentiary Foundations, Chapter 2 at 19 (4<sup>th</sup> Ed., \_\_\_\_\_).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> These are the "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, at 596.

knowledge, are “type 2” preliminary questions; the judge’s determination to of these questions is final.

**B. RE Rule 601 Witness Competency [Incompetency], RE Rule 602 Testimonial Competence, and The Ground Rules for “Vigorous Cross-Examination” and “Presentation of Contrary Evidence” (RE Rules 607-611; 613 and 615)**

“The common law could boast of an imposing list of persons who were incompetent to testify as witnesses. The list included the defendant in a criminal case, all parties to a civil action or suit, the spouse of a party, any person interested in the event of the action, persons convicted of a crime and infidels.”<sup>9</sup>

The common law dealt with the problem of “obvious bias” by excluding all testimony from the obviously biased witness. Consequently, a defendant could not testify in his own defense and parties could not testify in their own civil suit. Of course, this bright line rule excluded some, if not the most, relevant evidence.

Our adversarial system deals with bias differently. Our adversarial system arms opposing counsel with the tools of “vigorous cross-examination” and the presentation of “contrary evidence” to expose bias and provides for “careful instructions” to enable the fact-finder to “weigh” evidence, determine bias, and find and speak “the truth.”<sup>10</sup>

Consequently, the threshold showing of witness competency has been reduced under the rules of evidence. RE Rule 601 provides that a witness is *incompetent* if he is unable to (a) communicate, individually or through an interpreter, or (b) appreciate the duty to tell the truth:

RE Rule 601(a) General rule. – Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witness in general. – A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.

Even though RE Rule 601(a) states that every person is competent except as otherwise provided in these rules, the judge likely retains discretionary power to exclude lay witnesses on grounds other than those stated in RE Rule 601(b). For example, were the court to determine that the eyewitness “Dory” from *Finding Nemo* lacked the minimally necessary memory to accurately record and recall what she witnessed, then the court could find her to be incompetent.

---

<sup>9</sup> *Broun*, at 492.

<sup>10</sup> **The efficacy of these “tools” is essential to the quality of “justice” produced from our judicial system. If they prove ineffective in exposing bias and untruth that can be appreciated by the fact-finder, then our system will not produce “justice.”**

RE Rule 602 requires that *lay witness*' testimony be based upon his *personal knowledge*:

RE Rule 602 A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

*Personal knowledge* is that *knowledge* which is *acquired through* one of the witness' five *senses*: sight, hearing, taste, "touch" or feeling, or smell.<sup>11</sup>

Consistent with RE Rule 602, opinion testimony offered by lay witnesses must be based upon the witness' *personal knowledge* and *must be helpful* to the fact-finder:

RE Rule 701. Opinion testimony by lay witness

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

RE Rules 603 and 604 address the oath required of witnesses and use of interpreters. RE Rule 605 and 606 preclude the judge and jurors from serving as witnesses. RE Rule 612 governs the use of objects or writings to refresh a witness' recollection. RE Rule 614 permits the court to call and interrogate witnesses, but provides the parties with an automatic objection to all questions asked by the court.

The remainder of the rules under Article 6, RE Rules 607-611, 613 and 615 provide the ground rules for "vigorous cross-examination" designed to expose witness bias, prejudice, misperception, and dishonesty.

In sum, the rules relax lay witness competency requirements, leaving to the opposing counsel/litigant to expose witness bias, prejudice, misperception and dishonesty.

### **C. G.S. Chapter 8 Evidence, Article 7 Competency of Witnesses [and Blood Tests]**

G.S 8-50.1 sets forth the "competency" of blood tests in any trial in which parentage is an issue. All other statutes within Chapter 8, Article 7 of the General Statutes limits the

---

<sup>11</sup> **All witnesses, lay and expert, must testify from knowledge. The difference between lay and expert witnesses is manner in which each is permitted to acquire his *knowledge*. Lay witnesses must acquire their knowledge from one or more of their five senses (RE Rule 602). Expert witnesses, scientific, technical, or other, must acquire their knowledge from data commonly relied upon by such experts, through the application of reliable means and principles, reliably applied to the facts of the particular case in question (RE Rules 702 and 703).**

admissibility of communications with certain “service professionals,” whose ability to render services is dependent upon candid communication by the person(s) seeking the services.

Notably, if the conclusion of all of the experts is that blood test indicates a less than 85% probability that the defendant is the parent, then there is a rebuttable presumption that the defendant is not the parent, which presumption may be rebutted only by clear, cogent and convincing evidence. If the tests reveal that the probability of defendant’s parentage is between 85% and 97%, no presumption arises and that evidence shall be submitted to and weighed by the fact-finder. If the experts conclude that the tests do not exclude the defendant and indicate that the probability of parentage is 97% or greater, then there is a rebuttable presumption that defendant is the parent, which presumption may be rebutted only by *clear, cogent* and *convincing* evidence.

Two opinions from the court of appeals remind practitioners that evidentiary standards such as “clear, cogent, and convincing” refer to the *quality*, not *quantity*, of evidence necessary to meet the evidentiary burden. Both of these cases addressed the competency and sufficiency of testimony by a single lay witness to overcome a presumption by “clear, cogent and convincing” evidence. One of these opinions, Jonathan McGirt’s *Romulus* case, will be discussed briefly in Section V., concerning presumptions in family law. The other, *Nash County DSS v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851 (1997), can best be remembered either as “hope springs eternal” or “that’s my story, your honor, and I’m sticking to it.”

In *Beamon*, defendant acknowledged that he had been “in town” at the time of the conception, some 16-17 years before, but, despite the genetic tests indicating a 99.96% probability of parentage, defendant maintained that “he did not recall” meeting the mother at a club, did not know her, did not have sex with her, and was not the father of the child. The trial court, sitting as fact finder, found that defendant had rebutted the presumption of parentage by clear, cogent and convincing evidence, and that defendant was not the father. The court of appeals affirmed, holding that the record revealed sufficient competent evidence from which the fact finder could find the presumption rebutted and conclude that the defendant was not the father.

The other statutes within Chapter 8, Article 7 exclude testimony not on the basis of irrelevancy or unreliability, but on the policy ground that permitting testimony as to “sensitive” communications would dis-incentivize people from providing candid information necessary to receive help from qualified professionals, such as doctors, nurses, counselors, and clergymen. Of the statutes under Article 7, the following have particular significance in family law:

**8-53.1. Physician-patient and nurse privilege; limitations.**

(a) Notwithstanding the provisions of G.S. 8- 53 and G.S. 8- 53.13, the physician- patient or nurse privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina.

### **8-53.2. Communications between clergymen and communicants.**

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

### **8-53.3. Communications between psychologist and client or patient.**

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8- 53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

Notwithstanding the provisions of this section, the psychologist- client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist- client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes.

### **8-53.4. School counselor privilege.**

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in

the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.

**8-53.5. Communications between licensed marital and family therapist and client(s).**

No person, duly licensed as a licensed marriage and family therapist, nor any of the person's employees or associates, shall be required to disclose any information which the person may have acquired in rendering professional marriage and family therapy services, and which information was necessary to enable the person to render professional marriage and family therapy services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8- 53.6, compel disclosure, either at the trial or prior thereto, if in the court's opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

**8-53.6. No disclosure in alimony and divorce actions.**

In an action pursuant to G.S. 50- 5.1, 50- 6, 50- 7, 50- 16.2A, and 50- 16.3A if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counseling.

**8-53.7. Social worker privilege.**

No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by G.S. 8- 53.6 or any other statute or regulation.

**8-53.8. Counselor privilege.**

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation.

**8-53.12. Communications with agents of rape crises centers and domestic violence programs privileged.**

... (b) Privileged Communications. – No agent of a center shall be required to disclose any information which the agent acquired during the provision of services to a victim and which information was necessary to enable the agent to render the services; provided, however, that this subsection shall not apply where the victim waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending shall compel disclosure, either at the trial or prior thereto, if the court finds, by a preponderance of the evidence, a good faith, specific and reasonable basis for believing that (i) the records or testimony sought contain information that is relevant and material to factual issues to be determined in a civil proceeding, or is relevant, material, and exculpatory upon the issue of guilt, degree of guilt, or sentencing in a criminal proceeding for the offense charged or any lesser included offense, (ii) the evidence is not sought merely for character impeachment purposes, and (iii) the evidence sought is not merely cumulative of other evidence or information available or already obtained by the party seeking the disclosure or the party's counsel. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court, the judge shall be a superior court judge.

Before requiring production of records, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information subject to disclosure under this subsection. If the court finds a sufficient showing has been made, the court shall order that the records be produced for the court under seal, shall examine the records in camera, and may allow disclosure of those portions of the records which the court finds contain information subject to disclosure under this subsection. After all appeals in the action have been exhausted, any records received by the court under seal shall be returned to the center, unless otherwise ordered by the court. The privilege afforded under this subsection terminates upon the death of the victim.

(c) Duty in Case of Abuse or Neglect. – Nothing in this section shall be construed to relieve any person of any duty pertaining to abuse or neglect of a child or disabled adult as required by law.

**8-56 Husband and wife as witnesses in civil action.**

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

**8-57.1. Husband-wife privilege waived in child abuse.**

Notwithstanding the provisions of G.S. 8- 56 and G.S. 8- 57, the husband- wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes of North Carolina.

**8-57.2. Presumed father or mother as witnesses where paternity at issue.**

Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which may otherwise apply. No parent offering such evidence shall thereafter be prosecuted based upon that evidence for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony.

As noted above in subsection A., *preliminary questions* concerning the exclusion of testimony due to the application of one of the above Chapter 8, Article 7 statutes are “type 2” preliminary questions in which both the proponent and opponent of the evidence are entitled to present evidence and be heard on the admissibility of such evidence.

**D. Relevancy: RE Rules 401 and 402; and Its Limits, Rules 403-405 and 407-413**

All evidence, including testimonial evidence, must be *relevant* to be admitted. RE Rule 401 defines relevant evidence as “that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” As noted in the practice pointers above, the concept of “*materiality*” appears within RE Rule 401 in the phrase “of any fact that is of consequence to the determination of the action.” Those facts which are “of consequence” are “material.” Similarly, the concept of “*probity*” appears in RE Rule 401 in the phrase “having any tendency to make the existence of [a] fact...more probable or less probable than it would be without the evidence.”

Rule 402 provides that except as otherwise provided by law, relevant evidence is admissible and irrelevant evidence is inadmissible.

Except as to RE Rules 406 pertaining to the admission of evidence of habit and RE Rule 414 pertaining to the admission of evidence of medical expenses, the remainder of Article 4 of the rules of evidence limits the admission of arguably relevant evidence (e.g.’s, “unfairly prejudicial evidence” (Rule 403), “character evidence for the purpose of showing defendant acted in conformity therewith” (Rule 404), evidence of subsequent remedial repairs (Rule 407)).

**E. Reliability—Is There a Reliability Requirement for the Admission of Lay Witness Testimony?**

The words “reliable” or “reliability” or “reliably” do not appear in RE Rules 601, 602, or 701; indeed, the words “reliable” or “reliably” appear ONLY TWICE in all of the rules of evidence. As will be discussed at length below in Section III., RE Rule 702 requires that *expert* testimony be sufficiently “reliable” before it is admitted. Correspondingly, RE Rule 803(18) provides that “learned treatises” may be admitted as an exception to hearsay, if such treatises are shown by *expert* testimony or judicial notice to be a “*reliable authority*.”

So, is there no preliminary finding of “reliability” required for the admission of *lay* witness testimony? Although there is no explicit requirement of “reliability” for the admission of *lay* testimony, minimally sufficient “reliability” may be implicit in RE Rule 602’s requirement that the witness testify from *personal knowledge*. In other words, the requirement that the witness may only testify to knowledge acquired through what he saw, heard, tasted, felt or smelled guarantees some minimal reliability.

In all events, the “reliability” requirement for the admission on *lay* witness testimony is at most minimal. That fact-finders are human and have in common the five (5) senses, they are well-equipped to evaluate the reliability of lay witness testimony, when aided by “vigorous cross-examination,” the “presentation of contrary evidence,” and careful instruction from the court. Indeed, “hearsay” is excluded, precisely because the out-of-court declarant’s credibility has not been and cannot be adequately assessed absent cross-examination.

### III. EXPERT WITNESSES [RE Rules 104, 401, 402, 403, 601, 702, 703, 704, 705, 1101; CP Rules 32 and 43]

#### *Practice Pointers:*

- RE Rule 401’s *relevancy* requirement applicable to all evidence and RE Rule 601’s *competency* requirements applicable to all witnesses supply, in part, two of the three requirements for the *admission* of *expert witness* testimony. [See Section II., subsections B. and D. above, pertaining respectively to RE Rule 601 witness competency and RE Rule 401, *et seq.*, relevancy.]
- RE Rule 702 supplies the **unique reliability and competency requirements** for the *admission* of *expert witness* testimony.
- *Lay witnesses* must base their testimony on *personal knowledge*, that is, knowledge or “facts” acquired through one of their five senses: sight, hearing, taste, “touch” or feeling, or smell. *Expert witnesses* also must base their testimony on *knowledge*. However, an expert’s *knowledge* is acquired not from the five senses common to people, but rather from the application of “reliable” principles and methods within the expert’s field of expertise. RE Rule 702 requires that, as a *condition to admissibility*, the expert sufficiently demonstrate to the judge that his testimony is, in fact, based on such **knowledge and that such knowledge reliably applies to the facts of the case at issue**.
- As part of North Carolina’s tort reform legislation, RE Rule 702 was amended to conform with Federal Rule of Evidence (“FRE”) Rule 702. FRE Rule 702 was itself

amended in 2000, for the purpose of codifying the *Daubert* admissibility requirements. Amended RE Rule 702 applies to cases filed on or after October 1, 2011.

- No North Carolina appellate case has expressly held that *Howerton* has been legislatively “overturned” by the amendment of RE Rule 702; however, in the unpublished opinion *State v. Hudson*, the court of appeals noted in footnote 1 that by amending RE Rule 702, the legislature adopted the standard for expert testimony set forth in *Daubert*. Further, Alyson Grine of the UNC School of Government and other North Carolina evidentiary treatises and commentators concur that North Carolina is now a *Daubert* jurisdiction.
- The *admissibility* of evidence is determined by the judge. With respect to expert testimony, *Daubert* requires that the judge perform a “gatekeeping” function, admitting into evidence only that expert testimony which is (1) “reliable,” and (2) “helpful” to the fact finder.
- Concerning (1) reliability:
  - Pursuant to amended RE Rule 702, expert testimony is reliable only if (a) the expert is “qualified,” and, (b) the testimony is based upon knowledge.
    - An expert is qualified [i.e., *competent*] if by knowledge, skill, experience, training, or education, the expert is familiar with the principles and methods utilized by experts in his field to acquire knowledge, is able to assess and attest to the “reliability” of such principles and methods, and is able to “reliably” apply such principles and methods to the particular facts of the case.
    - The testimony is based upon knowledge if (a) the testimony is the result or product of the application of “*reliable principles and methods*” utilized by such experts to acquire knowledge, **and** (b) the expert has “reliably” applied such principles and methods to the facts of the particular case (such that there is a “good fit” between the expert’s specialized knowledge and the facts of the particular case).
- Concerning (2) helpfulness:
  - Pursuant to amended RE Rule 702, expert testimony is helpful only if (a) the expert’s “specialized knowledge” will assist the trier of fact to understand the evidence or to determine a fact in issue.
- Summarizing all the *admissibility* requirements of *competence*, *reliability* and *relevance*, only that *expert witness testimony* that is (a) **truthful** (RE Rule 601), (b) **based upon the witness’ specialized knowledge**, and is **reliable** and **helpful** (RE Rule 702), and (c) can be **clearly communicated** (RE Rule 601) is evidence that may have a tendency to make the existence of a material fact more or less probable (RE Rule 401).

- Whether the proffered expert is qualified and his proffered testimony meets immediately above-stated requirements are *questions preliminary to the admission of the testimony*.
- RE Rules 104 and 1101 provide that in ruling upon *preliminary questions*, including the *admissibility* of evidence, the *competence* of a witness, and *the qualifications of an expert*, the judge is **not bound by the rules of evidence; indeed, except for the rules with respect to privilege, the rules of evidence do not apply to the determination of preliminary questions**.
- Broadly, there are two “types” of preliminary factual questions that determine the admissibility of evidence: (1) one in which the fact to be preliminarily determined conditions only the logical relevance of the evidence (e.g., whether a document is *authentic*); and (2) the other type, in which the preliminary fact to be determined conditions the application of doctrines which exclude logically relevant evidence (e.g., whether a privilege exists or whether an *expert witness* is qualified).
- The judge decides “type 1” preliminary questions only upon the proponent’s evidence; she decides “type 2” preliminary questions upon the evidence of both the proponent and opponent, and the opponent has the right of *voir dire*.
- With respect to “type 1” preliminary questions, the judge essentially determines whether the proponent has presented minimally sufficient evidence from which the fact-finder *could* rationally find the “conditioning facts.” Ultimately, the fact-finder determines whether the fact actually exists.
- Whether the proffered expert is qualified and his proffered testimony meets above-stated admissibility requirements should be “type 2” preliminary questions in which both parties are given an opportunity to be heard prior to the admission of the testimony. The court, as “gatekeeper,” determines whether to exclude the expert testimony or admit it for the fact finders’ ultimate determination as to its reliability, trustworthiness, helpfulness and weight.
- Presumably, expert witness testimony still may, in certain instances and at the judge’s discretion, be presented by affidavit in support of or opposition to motions. (CP Rule 43)
- Expert witness testimony may be presented by deposition at trial against a party “present at” or “who had notice of” the deposition (1) when the deposition testimony is used to contradict or impeach the expert witness, (2) as *substantive evidence* by a party adverse to the party calling the expert witness, or by the party calling the witness if the deposition testimony is in conflict with or inconsistent with the expert witness’ trial testimony, (3) if the expert witness is “unavailable” at trial, (4) if justice so requires, or (5) if the expert testimony has been procured by videotape as provided for under CP Rule 30(b)(4). (CP Rule 32)
- *Price v. Pennington* construes G.S. §§ 6-20, 7A-305 and 7A-314 to limit the prevailing party’s recovery of costs for expert witness’ trial testimony. In order for the prevailing

party to recover expert witness testimony fees as costs, the expert testimony must have been (1) reasonable, (2) necessary, and (3) given while under a subpoena. The court may also award costs for a subpoenaed witness' time attending, but not testifying, at the trial and for transportation costs under G.S. § 7A-314, but may not award expert witness fees for the expert's time spent preparing to testify.

#### **A. Most likely, North Carolina is now a *Daubert* Jurisdiction**

In *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004)<sup>12</sup>, the North Carolina Supreme Court rejected the federal standard for determining the admissibility of expert testimony. "North Carolina is not, nor has it ever been a *Daubert* jurisdiction." *Id.* at 469. Instead, *Howerton* articulated a three-part admissibility inquiry: "(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?" *Id.* at 458, *relying on State v. Goode*, 341 N.C. 513, 527-29 (1995) (internal citations omitted). *Howerton* both by its own language and in practice has proved a less rigorous admissibility standard than *Daubert*. In large measure, the Court rejected *Daubert* because it was concerned that the application of *Daubert* would result in fewer cases surviving summary judgment and being decided by juries.

In 2011, the General Assembly enacted a package of "tort reform" legislation. RE Rule 702(a), pertaining to the admissibility of expert testimony, was amended as part of that "package." RE Rule 702(a) was amended to conform to FRE Rule 702, which itself was amended in 2000, codifying the *Daubert* standard for the admissibility of expert testimony. Subsequent legislation provided that amended RE Rule 702 applied to (a) civil actions filed and (2) criminal conduct occurring, on or after October 1, 2011.

There is no official commentary concerning the legislative intent in amending RE Rule 702(a). However, that RE Rule 702(a) was amended in the context of "tort reform" signals that the intent of the legislature *was precisely* to "raise the gate" on expert testimony and to summarily dispose of cases based on "unreliable" expert testimony.

No North Carolina appellate case has expressly held that *Howerton* has been legislatively "overturned" by the amendment of RE Rule 702; however, in the unpublished opinion *State v. Hudson*<sup>13</sup>, the court of appeals noted in footnote 1 that by amending RE Rule 702, the legislature adopted the admissibility standard for expert testimony set forth in *Daubert*. Judge Sanford Steelman authored the *Hudson* opinion, which was filed February 7, 2012. On June 12, 2012, Judge Steelman presented to the North Carolina Superior Court Judicial Conference. Judge Steelman's presentation, entitled "*Welcome Back Daubert*," addressed the *possible* significance of the amendments to RE Rule 702. The case of *State v. Royal*, concerning the admission of expert testimony pertaining to the identification of contraband, is currently pending in the North Carolina court of appeals, scheduled for April 24, 2013, to be decided without oral argument; the panel for *Royal* is Judges Calabria, Steelman and McCullough. Defendant/Appellant Royal's

---

<sup>12</sup> See appendix for the entire *Howerton* opinion.

<sup>13</sup> See appendix, the opinion in *State v. Hudson*.

argument for reversal is grounded entirely upon the application of *Daubert*.<sup>14</sup> The *Royal* opinion may explicate further the significance of the amendment of RE Rule 702; the conduct in *Royal*, however, occurred prior to October 1, 2011, the effective date of the amendment. Consequently, the *Royal* opinion may include only limited discussion of amended RE Rule 702 and its implications.

While we await a North Carolina appellate decision expressly holding the North Carolina is a *Daubert* jurisdiction, Alyson Grine, UNC School of Government Defender Educator and distinguished lecturer, and several North Carolina evidentiary treatises and commentators concur that North Carolina is now likely a *Daubert* jurisdiction.

In her August 17, 2011 article published in *Forensic Resources: North Carolina Office of Indigent Defense Services*,<sup>15</sup> Ms. Grine writes:

In S.L. 2011-283 (H 542), the General Assembly revised North Carolina Evidence Rule 702(a). Rule 702(a) guides the trial court in serving a gatekeeper function with regard to expert testimony; the trial court must make a preliminary determination as to whether a witness has the qualifications to testify as an expert, and if so, whether the expert's testimony is admissible. S.L. 2011-283 was enacted as a part of new limits in civil tort actions; however, the amended rule applies to criminal cases as well as civil. Thus, criminal defenders are asking: to what extent has the framework for determining the admissibility of expert testimony changed?

The amendments to Chapter 8C, Rule 702(a) read:

(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~~ 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.

The legislation does not alter the language pertaining to the qualifications of an expert. **Instead, the legislation adds the above subparts to impose restrictions on the admissibility of expert testimony.** The subparts are lifted verbatim from Federal Rule of Evidence 702 as amended in 2000, which was intended to codify the criteria for the admissibility of expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). ***Daubert* established the modern standard for admitting expert testimony in federal trials; the Court set out five factors for trial judges to use as a measure of reliability in making a preliminary determination**

---

<sup>14</sup> See appendix, Defendant/Appellant's Brief in *State v. Royal*,

<sup>15</sup> See appendix, Ms. Grine's August 17, 2011 Article, *Legislative Change Regarding Expert Testimony*.

**about the admissibility of scientific evidence:**

1. Is the evidence based on a testable theory or technique;
2. Has the theory or technique been subjected to peer review and publication;
3. Does the technique have a known error rate;
4. Are there standards controlling operation of the technique; and
5. To what degree is the theory or technique generally accepted by the scientific community? *Id.* at 593-94.

In *Howerton v. Arai Helmet, Ltc.*, 358 N.C. 440 (2004), the North Carolina Supreme Court rejected the federal standard for determining the admissibility of expert testimony. “North Carolina is not, nor has it ever been a *Daubert* jurisdiction.” *Id.* at 469. Instead, North Carolina has used the three-part inquiry set forth in *Howerton*: “(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?” *Id.* at 458, *relying on State v. Goode*, 341 N.C. 513, 527-29 (1995) (internal citations omitted). The first prong of the *Howerton* test includes a requirement that the expert’s method of proof be reliable, much like the second restriction in amended Rule 702(a). Unlike amended Rule 702(a), however, the *Howerton* test does not explicitly require that experts have sufficient facts and data for their opinions, or that they apply their methods reliably to the facts. Arguably, these were implicit requirements under *Howerton* as they are components of reliability. Some North Carolina decisions have recognized that experts should have sufficient facts and data for their opinions and should apply their methods reliably. *See, e.g., State v. Grover*, 142 N.C. App. 411, *aff’d per curiam*, 354 N.C. 354 (2001). Amended Rule 702(a) makes it clear that trial judges must apply those requirements before allowing expert testimony before the jury.

The approach that North Carolina adopted in *Howerton* was “less mechanistic and rigorous than the exacting standards of reliability demanded by the federal approach.” *Howerton*, 358 N.C. at 464 (internal citations omitted); *see also* Robert P. Mosteller et al., *North Carolina Evidentiary Foundations* at pp. 10-15 to 10-17 (2d ed. 2006). **Amended Rule 702(a) may or may not mandate the precise approach required by *Daubert*, but by adopting the language of Federal Rule 702, the General Assembly has raised the bar (or better stated, “the gate”), thereby requiring greater scrutiny of expert testimony than the former North Carolina rule and the cases interpreting it.** Court actors should not presume that a method of proof that was deemed sufficiently reliable under the former North Carolina rule and *Howerton* will be admissible under the amended rule. The subparts added by S.L. 2011-283 are not a codification of *Howerton*, and it may no longer be good law. *See Daubert*, 509 U.S. at 586-87 (holding that the “general acceptance test” of *Frye v. United States*, 54 App. D.C. 46 (1923) was superseded by the adoption of the Federal Rules of Evidence). **In response to the legislative changes, defenders should be prepared to conduct more rigorous scrutiny of experts to determine admissibility, which will require probing discovery, motions, and voir dire practices to determine whether the expert’s testimony complies with the amended requirements.**

As mentioned above, the amendments to Rule 702(a) are part of the “An Act to Provide Tort Reform for North Carolina Citizens and Businesses.” Possibly, the General Assembly did not have an eye to the impact the amendments would have on criminal practice in North Carolina. However, recent cases reveal growing concerns about unreliable expert testimony in criminal cases. *See State v. Ward*, 364 N.C. 133 (2010) (expert’s testimony was not based on sufficiently reliable method of proof where expert identified substances based on a visual examination rather than a chemical analysis); *State v. Davis*, \_\_\_ N.C. App. \_\_\_, 702 S.E.2d 507 (2010) (expert’s testimony was not based on sufficiently reliable method of proof where expert relied on odor analysis to conduct retrograde extrapolation of defendant’s blood alcohol concentration at time of accident); *State v. Meadows*, \_\_\_ N.C. App. \_\_\_, 687 S.E.2d 305 (2010) (expert’s testimony was not based on sufficiently reliable methods of proof where expert relied on the results of the NarTest machine). Thus, amended Rule 702(a) may be viewed as a timely reform in the criminal context.

Note: A later bill (SL 2011-317) makes the revised rule applicable to actions arising on or after October 1, 2011. For criminal cases, the rule likely applies to cases in which the offense occurred on or after that date. (Emphasis added)

Similarly, the North Carolina Evidence Courtroom Manual states the following with respect to amended RE Rule 702:

For Actions Commenced After October 1, 2011, Rule 702(a) has been rewritten to mirror F.R.E. 702 at the time the statute was enacted. This indicates a clear legislative intent to abandon the *Howerton* standard announced by our Supreme Court in favor of the *Daubert* standard adopted by the United States Supreme Court as codified in F.R.E. 702. This presumably will tilt the legal analysis for admissibility to the generally accepted test of *Daubert*.

To the extent to which *Howerton* and its progeny are overturned by the new Rule 702(a) remains to be determined. The trial courts will undoubtedly now look to federal case law for guidance with respect to the acceptability of scientific methods, at least until North Carolina case law is developed in this area.

The plain language of the revised Rule 702(a), standing alone, does not appear to significantly change the reliability requirement that is the touchstone of *Howerton*. However, the extensive case law that has developed in light of *Daubert* and the subsequent modification of F.R.E. 702 suggests different factors that should be considered with respect to the admissibility of expert testimony.<sup>16</sup>

In his 2012 supplement to Brandis & Broun on North Carolina Evidence, Professor Ken Broun similarly notes the significance of the amendment of RE Rule 702:

---

<sup>16</sup> Walker Jameson Blakey, Dean P. Loven, Glen Weissenberger, North Carolina Evidence Courtroom Manual, p. 247 (2012 Edition); *see* appendix, *Id.* pp. 247-9.

The entire question of how the North Carolina courts are to treat scientific evidence was thrown into doubt in 2011 when the General Assembly amended Evidence Rule 702 as part of “An Act to Provide Tort Reform for North Carolina Citizens and Businesses,” effective for actions commenced on or after October 1, 2011. The amendment adopted verbatim the language of a 2000 amendment to Federal Rule 702. . . . The Federal Rules of Evidence Advisory Committee Note to its 2000 amendment of Rule 702 makes it clear that the intent of the amendment was to incorporate the principles set forth in *Daubert* and its progeny into the Federal Rules of Evidence. The amendment to the North Carolina rule could have the same effect, thus dramatically changing the approach announced in *Howerton*. Whether the North Carolina courts will interpret the amendment to put the state on the same path as the federal courts or whether the interpretation will be more in line with *Howerton* remains to be seen.

*Brown*, 2012 Cumulative Supplement, Section 113.

Last, Gordon Widenhouse, a Chapel Hill appellate attorney and adjunct professor of law at many of North Carolina’s law schools, authored an article which appeared in the April, 2012 Edition of the *Trial Briefs* newsletter.<sup>17</sup> Mr. Widenhouse notes that in rejecting the *Frye* admissibility standard of “general acceptance within the scientific community,” *Daubert* was intended to liberalize, not restrict, the admission of novel expert testimony. Mr. Widenhouse acknowledges, however, that following *Daubert*, the application of *Daubert*’s “reliability” requirements often has resulted in the exclusion of expert testimony in federal cases, which in many cases rendered plaintiff incapable of proving causation, resulting in summary judgment for the defendant. Mr. Widenhouse implies that the federal courts’ exclusion of experts post-*Daubert* has resulted from judges misapplying or misconstruing their “gatekeeping” responsibility, encroaching upon the jury’s role as fact-finder. Mr. Widenhouse concludes by arguing that the law of North Carolina prior to the amendment of RE Rule 702, as expressed in *Howerton* and *Daubert*, really are quite similar: both require that expert’s testimony be “reliable” and “relevant” in order to be admissible, but both prefer the admission of expert testimony for consideration by the jury.

Notably, Mr. Widenhouse does not conclude that North Carolina is not a *Daubert* jurisdiction, nor does he argue that the amendments to RE Rule 702(a) have no effect on the admissibility of expert testimony in North Carolina. To the contrary, Mr. Widenhouse agrees with Ms. Grine that, if nothing else, the amendments to RE Rule 702(a) undermines the precedential force of previously admitted expert testimony:

One aspect of *Howerton* and *Goode* that should not survive this amendment is the binding force of precedent. *Howerton* expressly directed trial courts to look to “precedential guidance” in deciding whether to admit expert testimony. Applied rigidly, this notion would freeze scientific testimony or at least make it more difficult for trial courts to revisit areas of expert testimony despite changes in scientific understanding. In light of recent scientific understanding of techniques heretofore accepted in criminal

---

<sup>17</sup> See appendix, Gordon M. Widenhouse, Jr., *Changes to Rule 702(a): Has North Carolina codified Daubert and Does It Matter?*

cases, such as blood spatter analysis and other types of novel or “junk science,” Rule 702(a) should provide for reexamination of admissibility.

Widenhouse, M. Gordon, Jr., *Changes to Rule 702(a): Has North Carolina Codified Daubert and Does It Matter?*, Trial Briefs, April 2012, at p. 10.

**B. “A BRAVE NEW WORLD:” RE Rule 702(a) and *Daubert* require that before admitting expert testimony, the Judge satisfies himself that (1) the expert really knows what he claims to know, and (2) that the expert will testify to no more than what he really knows.**

At one time or another, each of us has either asked, or wanted to ask (or yell or scream), of an “expert”: “HOW THE “HECK”<sup>18</sup> DO YOU **KNOW THAT AND WHAT DOES IT HAVE TO DO WITH THIS CASE?!?**” Pursuant to amended RE Rule 702(a) and *Daubert*, those are precisely the questions that the judge must ask and the expert must satisfactorily answer before the expert’s testimony can be admitted.

Just as are lay witnesses, experts are required to base their testimony on knowledge. Just as is required for lay witness opinion testimony, expert witness opinion testimony must be based on knowledge. Both *Daubert* and amended RE Rule 702(a) guard against the “bare assertion fallacy”—that is, an expert witness whose testimony is based only on his own *ipse dixit*—meaning, testimony that is based, not on knowledge, but only on the “expert” having said or asserted it.

In *Daubert*, Plaintiff claimed that the drug Bendectin, administered to pregnant women to combat morning sickness, caused birth defects, specifically limb shortening and malformation. Defendant’s expert was a well-credentialed epidemiologist who had reviewed more than 30 published studies pertaining the administration of Bendectin to women during their first trimester, none of which found Bendectin to be a substance capable of causing malformations in fetuses. Plaintiff’s scientific experts were also well-credentialed and testified that based upon (1) animal studies, and (2) their unpublished “reanalysis” of the data from human published studies, Bendectin can cause birth defects.<sup>19</sup> The trial court granted summary judgment for Defendant, holding that Plaintiff’s experts’ utilization of animal studies in the presence of actual human studies which had found no “birth defect causation” and purported non-published, non-peer

---

<sup>18</sup> Feel free to insert your word of choice.

<sup>19</sup> Attached hereto in the appendix is the *Daubert* opinion, respondent Merrell Dow’s brief by attorney Hall R. Marston, et al, and the two most significant competing *amicus* briefs: (1) the so-called Bayer brief in support of plaintiff-petitioners; and (2) the so-called Bloembergen brief in support of respondent Merrell Dow. There were 22 *amicus* briefs submitted in *Daubert*, most of which did not argue “the law” or rely on legal precedent. Rather, the “friends of the court” typically were scientists intent on explaining the limitations of scientific knowledge and attempting to assist the court in distinguishing between “valid” scientific observations and those for which there is no scientific basis. The most influential of the briefs was the Bloembergen brief.

reviewed “reanalysis” of the human study data were not “generally accepted scientific methods” in the field of epidemiology. Therefore, Plaintiff had no admissible evidence of causation. The 9<sup>th</sup> Circuit Court of Appeals affirmed the trial court’s summary judgment for Defendant, emphasizing that “reanalysis” which had not undergone peer-review scrutiny within the scientific community and had been conducted only for purposes of the pending litigation was an insufficient foundation for admission under the “general acceptance [within the scientific community]” standard.

The Supreme Court granted *certiorari* due to a split in the Circuit courts concerning whether “general acceptance” was the admissibility standard under F.R.E. Rule 702. The Supreme Court ultimately reversed the 9<sup>th</sup> Circuit and the trial court on the grounds that “general acceptance” was not the admissibility standard for expert testimony under F.R.E. Rule 702; rather, F.R.E. Rule 702 required that expert testimony be based on knowledge, *acquired* through reliable principles and *methods*, and reliably applied to the *particular facts of the case*. The case was remanded to the 9<sup>th</sup> Circuit for further proceedings consistent with the Court’s opinion.

The central holding of *Daubert* is that before admitting expert testimony, the judge, as “gatekeeper,” must determine that (1) the proffered expert testimony is based on knowledge acquired by the application of reliable principles and methods within the expert’s discipline, and (2) such knowledge is relevant to and can be reliably applied to the facts of the case:

...[U]nder the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories, about which an expert may testify. “*If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue*” an expert “may testify *thereto*.” The subject of an expert’s testimony must be “scientific...knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation. The term “applies to any body of know facts or to any body of ideas inferred from such facts or accepted as truths on “good grounds.”...(emphasis supplied)

Rule 702 further requires that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” This condition goes primarily to relevance.

*Daubert*, at 589-90.

**On remand, the 9<sup>th</sup> Circuit, applying the teachings of *Daubert*, held that, as a matter of law, plaintiff’s expert testimony was inadmissible and again affirmed summary judgment for defendant.** Under the heading “A Brave New World,” the 9<sup>th</sup> Circuit clearly articulated *Daubert*’s admissibility requirements:

#### **A. A BRAVE NEW WORLD**

Federal judges ruling on the admissibility of **expert** scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before. The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. *Solomon*, [753 F.2d at 1526](#). Under *Daubert*, we must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." \_\_\_ U.S. at \_\_\_, \_\_\_, [113 S.Ct. at 2795, 2797](#). Second, we must ensure that the proposed **expert** testimony is "relevant to the task at hand," *id.* at \_\_\_, [113 S.Ct. at 2797](#), i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "fit" requirement. *Id.* at \_\_\_, [113 S.Ct. at 2796](#).

The first prong of *Daubert* puts federal judges in an uncomfortable position. The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field; here, for example, the Supreme Court waxed eloquent on the impressive qualifications of plaintiffs' experts. *Id.* at \_\_\_ n. 2, [113 S.Ct. at 2791 n. 2](#). Yet something doesn't become "scientific knowledge" just because it's uttered by scientist; nor can an **expert's** self-serving assertion that his conclusions were "derived by the scientific method" be deemed conclusive, else the Supreme Court's opinion could have ended with footnote two. As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such **expert** testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

## **B. Deus ex Machina**

The Supreme Court's opinion in *Daubert* focuses closely on the language of Fed. R.Evid. 702, which permits opinion testimony by experts as to matters amounting to "scientific ...

knowledge." The Court recognized, however, that knowledge in this context does not mean absolute certainty. \_\_\_ U.S. at \_\_\_, [113 S.Ct. at 2795](#). Rather, the Court said, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." *Id.* Elsewhere in its opinion, the Court noted that Rule 702 is satisfied where the proffered testimony is "based on scientifically valid principles." *Id.* at \_\_\_, 113 S.Ct. at 2799. Our task, then, is to analyze not what the experts say, but what basis they have for saying it.

Which raises the question: How do we figure out whether scientists have derived their findings through the scientific method or whether their testimony is based on scientifically valid principles? Each **expert** proffered by the plaintiffs assures us that he has "utiliz[ed] the type of data that is generally and reasonably relied upon by scientists" in the relevant field, *see, e.g.*, Newman Aff. at 5, and that he has "utilized the methods and methodology that would generally and reasonably be accepted" by people who deal in these matters, *see, e.g.*, Gross Aff. at 5. The Court held, however, that federal judges perform a "gatekeeping role," *Daubert*, \_\_\_ U.S. at \_\_\_, [113 S.Ct. at 2798](#); to do so they must satisfy themselves that scientific evidence meets a certain standard of reliability before it is admitted. This means that the **expert's** bald assurance of validity is not enough. Rather, the party presenting the **expert** must show that the **expert's** findings are based on sound science, and this will require some objective, independent validation of the **expert's** methodology.

While declining to set forth a "definitive checklist or **test**," *id.* at \_\_\_, [113 S.Ct. at 2796](#), the Court did list several factors federal judges can consider in determining whether to admit **expert** scientific testimony under Fed.R.Evid. 702: whether the theory or technique employed by the **expert** is generally accepted in the scientific community; whether it's been subjected to peer review and publication; whether it can be and has been tested; and whether the known or potential rate of error is acceptable. *Id.* at \_\_\_, [113 S.Ct. at 2796-97](#).<sup>[3]</sup> We read these factors as illustrative rather than exhaustive; similarly, we do not deem each of them to be equally applicable (or applicable at all) in every case.<sup>[4]</sup> Rather, we read the Supreme Court as instructing us to determine whether the analysis undergirding the experts' testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions.

One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an **expert** testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed **expert** testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.<sup>[5]</sup>

That an **expert** testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. *See* Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom 206-09

(1991) (describing how the prevalent practice of **expert**-shopping leads to bad science). For one thing, experts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an **expert** prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests. Then, too, independent research carries its own indicia of reliability, as it is conducted, so to speak, in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support. Finally, there is usually a limited number of scientists actively conducting research on the very subject that is germane to a particular case, which provides a natural constraint on parties' ability to shop for experts who will come to the desired conclusion. That the testimony proffered by an **expert** is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions he expresses were "derived by the scientific method."

We have examined carefully the affidavits proffered by plaintiffs' experts, as well as the testimony from prior trials that plaintiffs have introduced in support of that testimony, and find that none of the experts based his testimony on preexisting or independent research. While plaintiffs' scientists are all experts in their respective fields, none claims to have studied the effect of Bendectin on limb reduction defects before being hired to testify in this or related cases.

If the proffered **expert** testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on "scientifically valid principles." One means of showing this is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication.<sup>[6]</sup> Huber, *Galileo's Revenge* at 209 (suggesting that "[t]he ultimate **test** of [a scientific **expert's**] integrity is her readiness to publish and be damned").

Peer review and publication do not, of course, guarantee that the conclusions reached are correct; much published scientific research is greeted with intense skepticism and is not borne out by further research. But the **test** under *Daubert* is not the correctness of the **expert's** conclusions but the soundness of his methodology. *See* n. 11 *infra*. That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science. *Daubert*,     U.S. at     , 113 S.Ct. at 2797 ("[S]crutiny of the scientific community is a component of `good science.'"). If nothing else, peer review and publication "increase the likelihood that substantive flaws in methodology will be detected." *Daubert*,     U.S. at     , 113 S.Ct. at 2797.<sup>[7]</sup>

Bendectin litigation has been pending in the courts for over a decade, yet the only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters.<sup>[8]</sup> None of the plaintiffs' experts has published his work on Bendectin in a

scientific journal or solicited formal review by his colleagues. Despite the many years the controversy has been brewing, no one in the scientific community—except defendant's experts—has deemed these studies worthy of verification, refutation or even comment. It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation.[\[9\]](#)

Establishing that an **expert's** proffered testimony grows out of pre-litigation research or that the **expert's** research has been subjected to peer review are the two principal ways the proponent of **expert** testimony can show that the evidence satisfies the first prong of Rule 702.[\[10\]](#) Where such evidence is unavailable, the proponent of **expert** scientific testimony may attempt to satisfy its burden through the testimony of its own experts. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field. See *United States v. Rincon*, [28 F.3d 921, 924 \(9th Cir.1994\)](#) (research must be described "in sufficient detail that the district court [can] determine if the research was scientifically valid").[\[11\]](#)

Plaintiffs have made no such showing. As noted above, plaintiffs rely entirely on the experts' unadorned assertions that the methodology they employed comports with standard scientific procedures. In support of these assertions, plaintiffs offer only the trial and deposition testimony of these experts in other cases. While these materials indicate that plaintiffs' experts have relied on animal studies, chemical structure analyses and epidemiological data, they neither explain the methodology the experts followed to reach their conclusions nor point to any external source to validate that methodology. We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.

*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315-19 (9<sup>th</sup> Cir. 1995).<sup>20</sup>

### C. AMATEUR SCIENTIST HOUR! TRULY THE BLIND LEADING THE BLIND

Given that *Daubert* calls both the judge and we lawyers to become amateur scientists, let's get to it! So, what are the questions the judge, and we, need to ask to determine whether the expert's testimony is "reliable"—that is, whether it is based on knowledge acquired through scientific means?

Ordinarily, 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. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, *Philosophy of Natural Science* 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical

---

<sup>20</sup> See appendix for entire 9<sup>th</sup> Circuit opinion.

test"); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).<sup>21</sup>

Boiled to its essence, *Daubert* requires that a “scientific” expert show that his testimony is based on “scientific knowledge.”

“Scientific knowledge” is knowledge acquired through “deductive reasoning” by the process of “experimentation,” utilizing “reliable” scientific “principles” and “methods.”

In attempting to explain an unknown observed phenomenon, a scientist takes the “known” or previously demonstrated scientific knowledge, and based on that “knowledge” makes an educated guess [a hypothesis] as to the cause of the observed phenomenon. Overly simplified, one form of deductive reasoning is: (1) If A (known scientific knowledge), (2) then B [the hypothesis], (3) therefore C [the conclusion—that there is a correlation between the hypothetical cause and the phenomenon.]

Frequently, scientific experiments are designed using a *null hypothesis*. A null hypothesis is a statement that there is no relationship between the hypothetical cause and the observed phenomenon (e.g., this drug has NO EFFECT on liver cancer).

The scientific method is the method of experimentation to determine whether the hypothesis can be disproved. If a null hypothesis is not rejected after repeated experimentation, then it is said that there is no scientific proof that the relationship exists.

If, however, it can be disproved, then the hypothetical is rejected. If a null hypothesis is rejected, then the experiment suggests there may be a relationship between the hypothetical cause and phenomenon. If the null hypothetical explanation is disproved or rejected, however, science does not hold that the hypothetical *has been proven* to be the cause of the phenomenon. Rather, the hypothetical is, for the time being, the best explanation for the phenomenon.

In order for the experimentation to be of any value, the hypothetical must be “**testable**” and “**capable of being proven false**” [“**falsifiability**”].

In performing the experiment under the same circumstances, the results should be “**consistent**,” the consistency of the results is a measure of the “**scientific reliability**” of the experiment. **NOTE: When Rule 702(a) speaks of “reliable” principles and methods, it is NOT referring to scientific “reliability;” rather, it is referring to scientific “validity.”**<sup>22</sup>

That an experiment produces “consistent” or “reliable” results, is meaningless unless the experiment is actually measuring what it is intended to measure. Whether an experiment is actually measuring what is intended to be measured is referred to as the “**validity**” of the experiment.

---

<sup>21</sup> See *Daubert*, at 593.

<sup>22</sup> See appendix, *Scientific Measures: Reliability and Validity*, PsychCentral.

For the limited purpose of illustrating the difference between scientific “reliability” and scientific “validity,” were I to step on a scale 1000 time and each time the scale indicated that I weighed exactly 10 lbs., the scale could be said to be “reliable” (“consistent”), but certainly not “valid” because it is not measuring what it is intended to measure—my true weight.

Last, all experiments conducted under even the best of circumstances, are prone to one of two types of error: (1) type 1 error is an incorrect rejection of a true null hypothesis [producing a “false positive” or a “false alarm”]; and (2) type 2 error is a failure to reject a false null hypothesis [producing a “miss” or “failing to sound the alarm”]. In our above null hypothetical—“this drug has NO EFFECT on liver cancer”—a type 1 error would erroneously suggest that the drug has an effect on liver cancer; a type 2 error would erroneously suggest that the drug has no effect on liver cancer, when it may. A “valid” experiment—one that measures, to some extent, that which is intended to be measured—is meaningless unless the type 1 and type 2 error rates are known.

In the words of the 9<sup>th</sup> Circuit, performing the *Daubert* “reliability” analysis is “complex” and “daunting.” For this reason, the Supreme Court provided some “guidelines”—“rules of thumb” if you please, to assist in determining whether the proffered expert testimony really is “reliable” and based on scientific knowledge:

1. Is the evidence based on a testable theory or technique;
2. Has the theory or technique been subjected to peer review and publication;
3. Does the technique have a known error rate;
4. Are there standards controlling operation of the technique; and
5. To what degree is the theory or technique generally accepted by the scientific community?

*Id.* at 593-94. Perhaps more pointedly, the 9<sup>th</sup> Circuit asked: “Was the expert’s theory developed in a laboratory in the ordinary course of the expert’s scientific work, or was it developed for purposes of the litigation?”

#### **D. "WHAT THE HECK<sup>23</sup> DOES THE ADMISSIBILITY STANDARD FOR SCIENTIFIC EVIDENCE HAVE TO DO WITH FAMILY LAW?" CHILD CUSTODY EVALUATIONS AS AN EXAMPLE**

*Daubert* involved the required reliability for the admission of expert testimony based on “scientific knowledge.” In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) the Supreme Court held the *Daubert* admissibility standard, requiring that expert testimony be based on *knowledge* acquired through *reliable principles and methods*, was the *admissibility standard applicable to all expert testimony*.<sup>24</sup> Consequently, the judge must still independently scrutinize

---

<sup>23</sup> Again, feel free to substitute your word of choice.

<sup>24</sup> The third decision of the *Daubert* trilogy, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), held that expert testimony should be excluded if there are gaps in reasoning between expert’s test

the “reliability” of expert testimony based upon “technical or other specialized knowledge” [rather than “scientific knowledge”] before the testimony can be admitted. *Kumho* did state, however, that:

[T]he test of reliability is “flexible,” and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.

*Id.*, at 141-42.

### 1. Application of Daubert to Psychological Testimony in General

Psychologists are *social scientists*. Psychologists who offer opinions concerning parental psychosis, child abuse syndromes, the recommended or preferred custodial arrangements, the “best interests of the child,” or the effect of relocation are offering “expert opinion testimony.” The admissibility of all expert testimony, including that of a psychologist, is governed by RE Rule 702(a). In order to be admissible, the psychologist’s testimony must be grounded upon knowledge, either “scientific” or “other specialized” knowledge, reliable, and relevant.

In their article *Protecting The Integrity of the Legal System* appearing in Psychology, Public Policy and Law shortly after *Kumho*, Psychologist William M. Grove of the Department of Psychology at the University of Minnesota and Christopher Barden of the National Association for Consumer Protection in Mental Health Practices noted that prior to the ruling in *Daubert*, “testimony from mental health and social science experts was largely unregulated by the legal system.”<sup>25</sup> Pre-*Daubert*, the standard for admissibility of psychological testimony was lenient, and did not require that the expert substantiate scientific soundness of his theories or testimony.<sup>26</sup> However, Grove and Barden recognized that the March, 1999 *Kumho Tire* decision had “enormous importance for the regulation of the testimony of mental health professionals.”<sup>27</sup>

Grove and Barden analyzed two exemplar areas of expert mental health testimony under the *Daubert* admissibility standards: (1) the Rorschach psychodiagnostic assessment or test, and (2) common courtroom testimony concerning post-traumatic stress disorder (“PTSD”) and/or multiple personality disorder (“MPD”), known as *dissociative identity disorder*.

The Rorschach test was selected because of all the projective tests, it had the most

---

data and conclusion. *Joiner* also made clear that on appeal, a judge’s decision to exclude expert testimony would be reviewed for abuse of discretion.

<sup>25</sup> William M. Grove and R. Christopher Barden, *Protecting The Integrity of the Legal System, Psychology, Public Policy and Law*, Vol. 5, No. 1, 224-242, at 224 (1999). NOTE: This article is available on-line for a fee through the American Psychological Association (“APA”) website; the author, however, could not obtain approval from the APA for the reprinting and distribution of the article.

<sup>26</sup> Id.

<sup>27</sup> Id., at 225.

“supporting research”:

Of the many extant projective tests, none has as much supporting research as the Rorschach. If it can be shown that testimony based on the Rorschach, when used for the diagnosis of mental disorders and personality description, is inadmissible under *Daubert*, it likely follows that no other projective technique is admissible, either.<sup>28</sup>

Grove and Barden concluded that testimony based on the Rorschach test is inadmissible under *Daubert* because the test has questionable validity, lack of general acceptance, unquantifiable or unacceptably high error rates, and lack of true peer review.<sup>29</sup>

Testimony pertaining to PTSD/MPD was analyzed to highlight a common fallacy: that a “mental disease” or “disorder” has been “labeled” in the *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed.; *DSM-IV*; American Psychiatric Association, 1994) does not mean that it is commonly accepted that the disease or disorder exists, much less that etiology has been determined.<sup>30</sup> Notably, Grove and Barden also make the point that “peer reviewed” literature in the field of psychology, at least with respect to MPD, may not carry the same imprimatur of “validity” as in other fields of science:

Because of the sharp divergence of some of these leaders’ MPD theories from more mainstream views, courts evaluating peer review for *Daubert* purposes need to understand that peer review may not always function in its normal manner (i.e., to detect and correct error). Courts may need to explore the knowledge, training, experience, and judgment of editors and peer reviewers, rather than simply assume that “peer review” is a simple, nonevaluative fact determination.<sup>31</sup>

For a myriad of reasons, Grove and Barden concluded that testimony pertaining to PTSD/MPD is inadmissible under *Daubert*.

While admittedly covering only a limited number of examples of psychological testimony, Grove and Barden conclude that *Daubert* excludes a lot of psychologists’ testimony:

We have covered just a few examples of testimonial areas that would, we believe, fail careful *Daubert/Kumho* scrutiny. One cannot generalize to all mental health testimony from these examples. However, given the relatively rigorous requirements of *Daubert*, the recent extension of its reach by *Kumho*, and the limited scientific knowledge base in many areas of clinical psychology and psychiatry, we believe a significant portion of mental health-related social science testimony may have trouble withstanding a well-

---

<sup>28</sup> *Id.*, at 226.

<sup>29</sup> *Id.*, at 229. Notably, Grove and Barden discuss and criticize in detail the analysis of McCann, who concluded pre-*Kumho*.

<sup>30</sup> *Id.*, at 231.

<sup>31</sup> *Id.*, at 234.

conducted *Daubert/Kumho* hearing.<sup>32</sup>

## 2. Application of *Daubert* to “Best Interests of the Child” Testimony In Child Custody Cases

In the same issue of *Psychology, Public Policy and Law*, Professors Daniel A. Krauss and Bruce D. Sales of the University of Arizona Department of Psychology published their article, *The Problem of “Helpfulness” in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*.<sup>33</sup>

Krauss/Sales state: “because the testimony in child custody cases is really a mixture of science and clinical opinion (i.e., hybrid testimony), there can be no question that *Daubert’s* and *Joiner’s* teachings apply to it.”<sup>34</sup>

At the time of their article shortly following the *Kumho* decision, Krauss/Sales could locate no case that had addressed the application of *Daubert* to “best interest of the child” (“BIOC”) testimony offered by a psychologist in a child custody case.

Krauss/Sales noted that certain pre-*Daubert* state court cases had applied differing admissibility standards to scientific expert testimony and “clinical judgment” expert testimony, with the latter allowed in more freely. Krauss/Sales noted that the “possible implicit or explicit judicial distinction between clinical opinion testimony (where there is no science) and scientific evidence testimony is puzzling unless juries or judges, sitting as “the trier of fact, can recognize the differences in these types of testimony and weigh the two types of testimony differentially.”<sup>35</sup> Krauss/Sales concluded that the assumptions that (1) juries or judges could distinguish scientific expert testimony and clinical opinion testimony and weight them differently, or (2) that judges are less swayed by “bad scientific” testimony are untested empirical assumptions, unsupported by then-existing psychological literature.<sup>36</sup>

In analyzing the application of *Daubert* to BIOC testimony, Krauss/Sales point out that ***BIOC is not one uniform standard***.<sup>37</sup> Some states have some statutory factors to be considered in determining the BIOC; however, these factors differ from state to state. Some states have identified in their case law the factors to be considered. Other states, like North Carolina, have no factors identified (other than “safety concerns”), leaving it entirely in the discretion of the

---

<sup>32</sup> *Id.*, at 238.

<sup>33</sup> Daniel A. Krauss and Bruce D. Sales, *The Problem of “Helpfulness” in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*, *Psychology, Public Policy and Law*, Vol. 5, No. 1, 78-99 (1999). NOTE: This article is available on-line for a fee through the American Psychological Association (“APA”) website; the author, however, could not obtain approval from the APA for the reprinting and distribution of the article.

<sup>34</sup> *Id.*, at 88.

<sup>35</sup> *Id.*, at 87.

<sup>36</sup> *Id.*, at 87-88.

<sup>37</sup> *Id.*, at 88.

judge to determine what is the BIOC.<sup>38</sup>

Even as to those factors articulated in the Uniform Marriage and Divorce Act (UMDA, 1975), an act nearly 25 years in existence as of writing of the Krauss/Sales article, psychology had produced only some scientific research on some of the factors, but not on all of the factors. Of the scientific research that had been done as of 1999, it focused on post-divorce adjustment of children, not on the “directly relevant legal questions” determinative of BIOC, and that research that had been done “had not used the methodological rigor that is necessary for a psychologist to offer exclusively science-based opinions on the best interest of a particular child.”<sup>39</sup> In other words, of the psychological research that had been done, it was not scientifically rigorous, and had little value in **predicting the BIOC for any individual child.**

It should be readily apparent even to the “amateur scientist” that if BIOC is an undefined term with no consensus concerning what constitutes the BIOC, then there can be no scientifically based opinion on the ultimate issue concerning the BIOC for any individual child. Psychologist and attorney Christopher R. Barbrack pointedly asserts that the use of mental health experts to “assist” the court in child custody is “fatally flawed” precisely because BIOC has neither been defined nor empirically analyzed:

The practice of using any mental health expert to assist the court in resolving disputes over child custody is fatally flawed for one basic reason. The keystone constructs of “parenting,” as in “good parenting” or “better parenting,” and “best interests of the child” have never been adequately defined or subjected to thoroughgoing empirical analyses. In addition, there is no evidence in the literature I can find where more sophisticated constructs such as “goodness of fit” as per Stella Chess, MD and Alexander Thomas, MD, between parent and child have been defined and measured. All of the players in the child custody dispute drama act as if these constructs have been defined and measured, or as if doing so is not essential to the proper resolution of the child custody dispute. Both assertions are categorically false. In fact, all of the other problems with child custody evaluations flow from this state of affairs.<sup>40</sup>

---

<sup>38</sup> G.S. § 50-13.2 provides in pertinent part: “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person...as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including the acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.”

<sup>39</sup> Krauss/Sales, at 89.

<sup>40</sup> See appendix, Christopher R. Barbrack, *Using Cross-examination to Challenge Child Custody Experts: A Step Along the Way to a More Productive Use of Psychologists in Resolving Child Custody Disputes* (2012), originally published in the *New Jersey Family Lawyer*, a publication of the New Jersey State Bar Association, reprinted in the appendix with permission.

On February 21, 2013, Psychologist Jonathan Gould appeared on a panel of psychologists/CCE at the Mecklenburg County Bar Association's Family Law Section's Annual Meeting. While Dr. Gould would most certainly disagree with Dr. Barbrack's assertion that mental health professionals should not be used in child custody matters, Dr. Gould does agree that because the BIOC standard is undefined, it often leaves the judge without "scientific knowledge about what is best for the child."

At the February 21, 2013 meeting, Dr. Gould presented in his written materials a book chapter in which he and David Martindale opine that the undefined, individualized nature of the BIOC is both its greatest strength and weakness:

The individualized nature of the BIOC is both its greatest strength and greatest vulnerability (Elrod & Dale, 2008). Its strengths include its "child-centered focus, its flexibility, its minimal a priori bias relative to the parties" (Wyer, Gaylord, & Grove, 1987) and its ability to respond to changing social mores, values, and situations in a diverse society (Elrod & Dale, 2008; Kelly, 1997, 2002). **The BIOC standard requires courts to consider parents based on the merits of their parenting and the strength of their parent-child relationships rather than on their gender, economic situation, or sexual orientation or preference** (Kelly, 1997). **A BIOC determination requires a careful consideration of each child's developmental and psychological needs and eliminates a presumptive focus on parental demands, social stereotypes, and cultural traditions.**<sup>41</sup> A focus on the BIOC represents the willingness of the court and law to consider children on a case-by-case basis rather than conceptualizing children as a class or homogeneous grouping (Elrod & Dale, 2008).

When compared to the variety of legal presumptions it replaced (e.g., the maternal preference rule, the tender years doctrine, the psychological parent preference rule, and the fault concept), the strength of the BIOC standard lies in its use of unweighed, unprioritized factors that are indeterminate (Mnookin, 1975). **Neither among mental health professionals nor the judiciary has consensus been achieved concerning what factors, viewed collectively, define the BIOC standard** (Gould, 1999; Gould & Martindale, 2009). As a result, the standard has been applied in unpredictable ways, fueling conflict because of their unpredictable application (American Law Institute, 2002, Elrod, 2001; Mnookin, 1975) and **often leaves judges to make decisions based on personal experiences and beliefs rather than on scientific knowledge about what is best for the child** (Kelly, 1997).<sup>42</sup>

Since the *Kumho* decision, Dr. Gould has been a prolific publisher of articles, most of

---

<sup>41</sup> No doubt, Dr. Gould has faithfully summarized other social scientists' descriptions of the BIOC standard. However, if the BIOC standard is undefined, using indeterminate factors, how then can any social scientist state authoritatively that the BIOC "requires" courts to consider parents on the merits of their "parenting" and "parent-child relationships," but not on the basis of "sexual preference" or "cultural traditions?"

<sup>42</sup> Jonathan W. Gould and David A Martindale, *Part II Forensic Evaluations in Civil Proceedings; Chapter 6: Current Literature and Practical Applications*.

which assert the application of *Daubert* to psychological testimony and many of which advocate for the establishment of a consistent forensic method or model for performing child custody evaluations.<sup>43</sup> In advocating for a consistent forensic model for performing evaluations, Dr. Gould consistently emphasizes that to the extent psychological tests and inventories are to be utilized in the evaluation, the evaluator must carefully select tests and inventories that are “reliable,” “valid” and “appropriate” both with respect to the purpose for which it is administered and the individual to whom it is administered:

With the majority of states adopting *Daubert* or a *Daubert*-like standard instead of the *Frye* test of “general acceptance” (Hamilton, 1998), increased scrutiny will be applied to psychologists’ testimony in child custody evaluations. Consequently, psychologists will have to be better prepared to defend and provide a rationale for their test selection and usage.

In selecting tests and inventories, psychologists need to be cognizant of important factors identified in this study and previously stressed in the literature (Heilbrun, 1992, 2001; Marlowe, 1995; Otto, 2000), such as a proven record of reliability and validity, sufficient body of research, adequate normative sample, and general acceptance in the child custody field. Further, other factors identified included relevance to the legal issue, acceptability within the scientific community, standard administration procedures, preference for objective tests, and presence of a manual. Failure to consider and utilize these factors in test selection could jeopardize their admissibility into evidence.<sup>44</sup>

### **3. The Most Recent Psychological Literature Unflinchingly States that Psychological Testimony Must Meet the *Daubert* “Scientific Knowledge” Admissibility Standards**

Dr. Gould has graciously provided for inclusion in the appendix hereto a copy of pertinent portions of his soon-to-be released book, co-authored with David A. Martindale.<sup>45</sup> Without attempting to summarize the entire book, significantly Gould/Martindale unflinchingly state that psychological testimony must meet the *Daubert* “scientific knowledge” admissibility standards, contend that “scientific methodology and rigor” is a necessary restraint on bias and is required by the APA ethical requirements, challenge their colleagues to cease offering testimony that is based only on clinical judgment or personal experience or opinion, and encourage psychological expert witness to be forthright with the court and all counsel concerning the

---

<sup>43</sup> See appendix, e.g., Mary Johanna McCurley, Kathryn J. Murphy, Jonathan W. Gould, *Protecting Children From Incompetent Forensic Evaluations and Expert Testimony*, Journal of the American Matrimonial Lawyers, Vol. 19, pp. 277-319 (2005); James N. Bow, Jonathan W. Gould, James R. Flens, Dana Greenhut, *Testing in Child Custody Evaluations—Selection, Usage, and Daubert Admissibility: A Survey of Psychologists*, Journal of Forensic Practice, Vol. 6(2), pp. 17-38 (2006).

<sup>44</sup> Bow, Gould, Flens, Greenhut, at 34.

<sup>45</sup> See appendix, Jonathan W. Gould and David A. Martindale, Mental Health Professionals Involved in Child Custody Litigation: From Court-Appointed Evaluators to Retained Experts (2013).

limitation of what is *known*. The book also contains helpful heuristic for evaluating whether a psychological study drawn from scientific literature is “reliable,” “valid” and “useful/helpful” in a child custody evaluation.<sup>46</sup>

Perhaps most significantly for us, in light of RE Rule 702(a)’s admissibility standards, Gould/Martindale issue a challenge to attorneys:

To those in the legal profession, we challenge you to expect more from your forensic mental health colleagues. We wish to challenge those in the legal profession to demand better quality evaluations and, to do so, requires that attorneys and judges learn more about forensic psychological procedures, research addressing child development and parenting plans. We invite our legal colleagues to challenge the mental health professional to provide a more competently crafted work product.<sup>47</sup>

In the words of the 9<sup>th</sup> Circuit’s “remand opinion” in *Daubert*, welcome to a “Brave New World.” In the words of Mr. Roarke (actor Ricardo Montalban), “Welcome to Fantasy Island.”

#### **IV. A MODEST PROPOSAL**

The heightened “reliability admissibility test” imposed by the *Daubert* Trilogy<sup>48</sup> was and is a sweeping change to the American judiciary’s traditionally laissez-faire approach toward the admissibility of most categories of expert testimony.<sup>49</sup> Despite its paradigmatic shift, the Supreme Court has yet to explain the “implicit policy considerations” which “motivated its decision to reverse generations of judicial practice.”<sup>50</sup>

The *Daubert* court acknowledged that expert testimony can be very powerful and misleading because of the difficulty in evaluating it. *Daubert*, at 509 U.S. 595. Expert testimony can be very powerful testimony precisely because the fact finder does not know how to determine whether the testimony is based on *knowledge* or whether the expert with “fancy credentials” is merely a “hired gun,” advocating “out of thin air” his employer’s litigation position.

More than one observer has asserted that the implicit rationale for the special “reliability” requirements imposed on expert testimony is because of “adversarial bias”—defined as bias

---

<sup>46</sup> *Id.*, at 64-68.

<sup>47</sup> *Id.*, at 10.

<sup>48</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

<sup>49</sup> David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, George Mason Law and Economics Research Paper Series, Social Science Research Network at [http://ssrn.abstract\\_id=963461](http://ssrn.abstract_id=963461).

<sup>50</sup> *Id.*, at 102.

arising because a party to the adversarial proceeding retains the expert to advance its cause.<sup>51</sup>

Adversarial bias can be parsed into three sub-types: (1) conscious bias, (2) unconscious bias, and (3) selection or “retention” bias.<sup>52</sup>

“Conscious bias” occurs when “hired guns” adapt their opinions to the needs of the party that hires them. While lay witnesses clearly can also be consciously biased, Professor David Bernstein asserts that the problem is particularly pernicious among expert witnesses, in part because experts are paid to give “opinion testimony” that is more difficult for the fact-finder to evaluate.<sup>53</sup> Biased expert testimony is particularly effective in misleading the fact-finder because jurors in particular, but Judges too, may assume that experts, particularly “scientific experts,” are *unbiased*, honest, forthright, and their opinions grounded solidly in fact. In stark contrast to these assumptions, Clinical Psychology’s infographic, attached in the appendix to this paper, demonstrates that “bad science,” consisting of falsification and distortion of data and results, is rampant.

The second type of adversarial bias is “unconscious bias,” defined by the English Judge Sir George Jessel as the “natural bias to do something serviceable to those who employ you.”<sup>54</sup> Even a well-intentioned, earnest expert can be unknowingly biased in favor of his employer’s position, leading to an unconscious selection, interpretation and ignoring or discounting of data in support of her employer’s litigation position.

Professor Joel Harrison is “less delicate” than Sir George Jessel in his excoriation of expert witnesses. Professor Harrison argues that, cloaked with judicial immunity/impunity, the expert witness commercial enterprise is without the contractual or tort restraints and boundaries that accompany all other commercial enterprise. Expert witnesses deliver a service that the marketplace demands—that is, they are paid to be “effective,” not nonpartisan, much less honest.<sup>55</sup> Professor Harrison identifies real macro and micro costs to our justice system as a result of “money-changing” that occurs in the “courtyard of America’s courtrooms.” At the macro level, judicial and juror’s distrust and cynicism with respect to expert testimony “costs” our judicial system credibility, confidence, trust and respect and erodes the “rule of law,” and increases the economic cost of litigation without a corresponding benefit of improved justice. The cost at the micro level is that individual litigants are denied justice in their cases.<sup>56</sup> Professor Harrison’s likens the resulting damage to “unfair competition” and suggests that in order to

---

<sup>51</sup> Id., at 103.

<sup>52</sup> Id., at 104.

<sup>53</sup> Id., at 105.

<sup>54</sup> Id.

<sup>55</sup> Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*. Yale Journal on Regulation (Summer 2001).

<sup>56</sup> Id.

restrain such behavior and remediate the damage, there out be damages awardable against such experts.

The criticisms of Professor Harrison illuminate the third type of adversarial bias, “selection” or “retention” bias. Selection bias arises from the fact that in our adversarial system, it is an adversary who selects, employs and proffers expert testimony.

*Daubert*’s solution to the unreliability created by expert witness bias is to require greater “reliability rigor” and insist that the trial judge more vigorously “guard the admissibility gate,” admitting only that expert testimony which (1) will assist the trier of fact to understand or to determine a fact in evidence (i.e., the *helpfulness* requirement), (2) is based upon principals and methods that are valid (i.e., the *reliability* requirement), and (3) has reliably applied such principals and methods to the facts of the given case (the *relevancy* or “*good fit*” requirement).

Justice Blackmun, writing for the majority, also expresses continuing confidence in the adversarial system’s traditional means of attacking the veracity of expert testimony that has been admitted: **vigorous cross-examination, the introduction of contrary evidence, and careful jury instructions.**

In their separate opinion, concurring in part and dissenting in part, Justices Rehnquist and Stevens, however, state that they do not even understand much of Blackmun’s scientific discussion and warn against the requirement that judges—indeed, federal judges—become amateur scientists in determining the admissibility of expert testimony.

Assuming opposing counsel understands the scientific or technical evidence, which is itself a huge assumption, one must question whether the traditional adversarial tools of cross-examination, contrary evidence, and careful jury instruction really are effective, when *Daubert* itself indicates that frequently neither the judge nor the jury is capable of understanding the underlying science or technical information. It is telling that in the second opinion of the *Daubert* trilogy, *General Electric v. Joiner*, 522 U.S. 136 (1997), authored by Rehnquist, the Court announced that the trial court’s expert testimony admissibility decisions would be reviewed only for an abuse of discretion.

Assuming *arguendo* that North Carolina is now a *Daubert* jurisdiction, the Court and Bar must work cooperatively to determine if there is a better way to guard against the adversarial bias endemic to expert testimony.

If adversarial bias results from the expert’s loyalty to its adversarial employer, then let’s change the expert’s employer. Rule 706 provides the necessary authority for the Court to appoint its own experts, and pass the costs on to the litigants. The expert’s “guild” is better suited than the black-robed amateur scientist to judge the “reliability” of a colleague’s proffered testimony, Courts should employ experts to assist the court in understanding the pertinent expert testimony, science, applicable “principles” and “methods,” and their “reliability” and “validity,” if any, and/or to perform an independent review of a proffered adversarial expert’s work product.

There are well-reasoned detractors from the utilization of court-appointed experts, particularly if such expert is the only expert to be utilized. Knowing that one will be challenged

by an opposing expert may impose some restraint; if the court-appointed expert were operating “without competition,” then the product quality may suffer from monopolization.<sup>57</sup> Such criticism fails to account for the competition that could be afforded by the Court having a panel of experts from which to select, such that each panel-member would have a quality incentive in each assignment.

This proposal will not eliminate all bias; every person, even a court-appointed advisor, has bias. However, by aligning the expert squarely with the court’s interest in determining the best interests of the child rather than aligning the expert with interest of one or the other of the parents, adversarial bias should be significantly reduced.

- 

---

<sup>57</sup> See Christopher R. Barbrack, *Using Cross-Examination to Challenge Child Custody Experts: A Step Along the Way to a More Productive Use of Psychologists in Resolving Child Custody Disputes*, p. 10, New Jersey State Bar Association, **New Jersey Family Lawyer**.