EVIDENCE:
Expert Testimony and Hearsay

June 17, 2014
Steven I. Friedland

NC Association of District Court Judges
2014 Summer Conference
Wrightsville Beach, NC

I. OVERVIEW- THE EVIDENCE HIGHWAY

Introductory Hypo: Schmerd is charged with battery. Defendant allegedly threw a bottle that struck an umpire in the back after a critical call at a championship high school baseball game. At trial, Schmerd called an engineering expert, professor Bert Jones, who has testified several times about accident reconstruction. Dr. Jones testified, "I measured the distance from the defendant's seat to where the umpire was standing with my Pro-Act yardage-measuring device, and it said it was precisely 101.5 feet. Here is the printout from my measuring device for confirmation, which says, "You are 101.5 feet away from the control point."" In addition, I used the velocity and angle at which the umpire was struck, as the LabCorp analysis concluded. I also considered a statement by a bystander that indicated an object was thrown at the umpire from behind the stands, not in it, to determine that it was highly improbable for the bottle to have come from defendant at his seat."

1. What are the primary objections to the expert's testimony?
   - A. Hearsay
   - B. Expert Opinion
   - C. The Best Evidence Rule
   - D. Credibility

____

____

Evidence Law Framework:

a. Case – Area – Rule – Exception (CARE)

b. Case Questions
   1. What Kind of Case? ____________________________
   2. Which Party Is Offering the Evidence? ______________________
   3. In What Examination Is it offered?___________________________

Hypo: *For Sale*. Schmerd and Lawyer enter into an agreement for Schmerd to sell Lawyer 2000 sheets of stationery, delivered on July 15th. Schmerd fails to deliver and Lawyer sues Schmerd. At trial, Schmerd offers an expert who is asked on cross examination whether she lied on her driver's license test four years ago. How do the case questions help determine whether the cross examination is permissible?

____

____

c. *Area Questions*
   1. Is the evidence offered to impeach a witness?

____

____

2. Is the evidence offered to prove an element of the claim, cause of action, or defense?

____

____

3. *Special Issues*

   a. Impeachment vs. Character Evidence

      1. Credibility of a Witness
      2. Character proving an element

d. Rules Questions ____

e. Exceptions Questions ____________________________________

II. EXPERT WITNESSES

A. Experts everywhere ______________________________________

B. Medical Journals, too. ______________________________________

The number of journals indexed in Medicus exceeds:

A. 500
B. 1,000
C. 5,000
D. 50,000

C. The Rules

1. The old NC Rule 702(a)

N.C.G.S. Section 8C-1, Rule 702(a): If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

2. The new – improved? – NC Rule 702(a)

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, 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. 2011 N.C. Sess. Laws 283, ss. 1.3, 4.2.

3. What does the Rule mean for NC?

Hypo: Plaintiff sued the manufacturer of a ladder, claiming it was defective and caused plaintiff's injuries. Plaintiff wanted to call an expert, Dr. Suzie Backus, an engineer by training, to testify that the caster stem collapsed on account of a brittle fracture resulting from overtightening. The expert found many articles on brittle fracture after a Google search. Would you allow the expert to testify?

See Bielskis v. Louisville Ladder, Inc., 663 F.3d 887 (7th Cir. 2011).

4. Import *Daubert* and Leave *Howerton* behind.

5. Start the revolution.
   1. The Good – ______________________
   2. The Bad – _______________________
   3. The Ugly – ______________________

D. Two broad themes:

(1) Relocates the line between judge and jury, and turns judges into amateur scientists

____

____

(2) Creates a managerial model for judges (Case Management)

____

____

E. *Daubert*

It is the trial court's responsibility under Rule 104(a) to determine if (1) an expert is proposing to testify to scientific knowledge (2) that will assist the trial of fact in understanding a fact in issue. The trial court can consider various factors in making a reliability determination.

a. *Daubert* Factors -

1. Whether a theory or technique can be (and has been) *tested*

Key to testing? "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, at 645.
Really Means? ____

2. Whether the theory or technique has been subjected to *peer review and publication*.

Publications: Admissible? Better ones?

____

3. *The known or potential rate of error* and the existence and maintenance of standards controlling the technique's operation, and

4. Whether the theory or techniques *generally accepted* as reliable in the relevant scientific community.

a. Self-Referential? ____________________________________

b. The Fed. R. Evid. 702 Advisory Committee Notes to the year 2000 Amendment to Fed. R. Evid. 702 provided *additional factors* to consider:

(1) Whether 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." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc*., 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.").

c. These are guidelines; the test is flexible

Hypo: Suppose Judge Stone in a pretrial hearing reviews dozens of publications regarding brittle fracture theory involving ladder defects and found that the theory was sufficiently scientific to warrant a finding that it was more likely than not reliable. The judge ignored the potential rate of error and whether the theory was generally accepted in the scientific community.
Permissible?

____

Why did the Court make judges put on their scientist hats? *Justice Harry Blackmun*, that's why.

d. *Daubert* gives us 3Rs for expert testimony – Relevant, Reliable, and Reviewable.

Hypo: *What is reliable*? In a case involving a patent dispute over an artificial lens designed by the plaintiff to be surgically placed within a human eye, the question boiled down to how many optical points the plaintiff's lens generated, to distinguish it from defendant's lens. Plaintiff wished to introduce testimony of an expert who relied on a very small amount of personal research and a significant amount of other relevant literature in the field of optics to show a difference between the lenses. Admit? *See Nielsen v. Alcon, Inc.* (N.D. Tx 2011)(Order Denying Summary Judgment Motion) 2011 WL 4529762 at 3.

F. The Trilogy

1. Super *Daubert* (*Daubert* Plus Amendment to Fed. R. Evid. 702)

2. *General Electric Co. v. Joiner*, 522 US 136 (1997) - Daubert applies to all testimony under the abuse of discretion standard, is a flexible inquiry, and deference need not be given to the ipse dixit of the expert.

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

> "This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding– setting forth the trial judge's general "gatekeeping" obligation–applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Applying these standards, we determine that the District Court's decision in this case–not to admit certain expert testimony–was within its discretion and therefore lawful."

Hypo: *Breaking Way Bad*. A pharmacy school professor is prosecuted for recruiting a street gang to sell designer pharmaceuticals, mostly in prisons on the east coast. The gang recruited is a subset of the Bloods. An expert for the prosecution is offered to testify about the history, symbology and operations of the Bloods gang, particularly in that area. In a pretrial hearing, the expert concedes that his information is mostly based on his 25 years in police work, largely spent in gang enforcement as a detective, and training he received on the local gangs in various programs. The prosecution offers no publications in support of the expert's testimony, or educational degrees in the area.

(a) How would you state your opinion about the *Daubert* factors here? *See United States v. Thomas* 2012 WL 2951410 (4th Cir. 2012).
(b) What about Ipse dixit ("He himself said it")? ______________________________
____

3. Is *Daubert* Liberal, Conservative or Both?

- Traditional Science?
- Junk Science?

Hypo: *DNA Profiling. State v. Beach*. The state offers an expert on DNA profiling, who will discuss what is required for a DNA match, the statistics on the significance of matches and mismatches, and her opinion on whether a match occurred in this case. Allow?

____
____

Hypo: *Second chances*. Expert testified for the plaintiff about the cause of a house fire. The testimony was permitted by the trial court. If the appellate court reverses the lower court because it finds that the expert's testimony, can the appellate court order the lower court to dismiss the case if it believes the plaintiff's case is insufficient to go forward without the expert testimony or must it allow the party a second chance to find a good expert? *See Weisgram v. Marley Co*., 528 U.S. 440 (2000).

____
____

Summary: Judge as Gatekeeper:

a. Put on your amateur scientist hat
b. Use Rule 104(a)

G. Applying the *Daubert* Trilogy

1. A Managerial Model

Hypo: *2018*. In the year 2018 a NC judge wants to look back and see what effect Daubert has had on NC cases. What will she find?

(a) More/less/the same number of pretrial challenges to the admissibility of expert testimony?
(b) In which kind of cases is the greatest change, civil or criminal?
(c) Who is making the most challenges, the defense or plaintiff/prosecution?

2. Publications Use: Pretrial and Trial

Is there a difference in the use of publications pretrial and trial?

Hypo: *Journals*. The main disputed issue in a case was whether a cancer patient's odds of survival relate to how many lymph nodes the cancer had infected. The plaintiff's expert said there was a relationship – the larger the number of nodes, the poorer the chance of survival -- and the defendant's expert said that no such relationship existed. The Court reviewed the publications relating to the theory.

(a) If the Court found that there was insufficient support for the theory in the literature, what should it do? *Edry v. Adelman*, 786 N.W. 2d 567 (Mich. 2010).

____

____

(b) If the Court found there was sufficient scientific reliability underpinning the theory, should these publications be admitted at trial? Why or why not?

____

____

Hypo: *Rule 9J*. Suzie files a medical malpractice action against Dr. Gangrene. She files it just before the Statute of Limitations runs. See seeks to amend the case after the Statute of Limitations has run and after a voluntary dismissal, given that her expert in the case likely would not satisfy the new Rule 702. Permitted?

Rule 9. Pleading Special Matters.

J. Medical malpractice. - Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; ***

(2) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

---

3. Specific Causation Cases

Hypo: *Causation*. Jones became ill and died in a hospital after a relatively minor operation. The issue in the case was whether the operation caused the death or whether plaintiff's symptoms were caused by a particular disease or illness.

Major Premise: If a patient has symptoms X, Y, and Z, then Patient has S, an illness. [rule 702(a)]

Minor Premise: This patient has symptoms X,Y, and Z (case specific) (rule 703]

Conclusion: Then the patient has illness S [Rule 704]

---

4. Judge as Science Manager

AMA Code of Medical Ethics Opinion 9.07 (Available at the Web site of the NC Medical Board). Found at:
http://www.ncmedboard.org/position_statements/detail/medical_testimony
When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field.

Hypo: *State v. Blue*. Defendant Peter Blue shot and killed his cousin Jimmy Shaw after an argument. Late at night, the two were arguing and the decedent pointed an AR-15 at the defendant, who promptly stood up and fired seven shots in rapid succession at decedent with the loaded 9-millimeter Beretta pistol he was carrying. Defendant then said, "What about now, Bozo?...." At trial, defendant offered an

expert regarding the doctrine of the "use of force." The expert, one Dave Clotter, was going to testify to "pre-attack cues," "reaction time" and "force variables." The expert was a graduate of the FBI Academy and worked at the NC Department of Justice as an instructor "for subject control and arrest techniques. When asked about his knowledge, Clotter said it came from published articles in the field of use of force and his training as well as the tests used in the Justice Academy. Clotter said he had read and participated in some of the studies.

What questions should the judge ask the expert as the gatekeeper. *See State v. McGrady*, 753 S.E.2d 361 (NC App. 2014).

Hypo: *State v. Husband*. Husband is accused of killing wife and said the death was accidental after she had attacked him. At trial, the prosecution called Dr. Sandler, the State's forensic pathologist, who testified that the charred remains in a barrel found on defendant's deck were the decedent's and that death was due to "undetermined homicidal violence." The defendant objected to Dr. Sandler's testimony based on Rule 702, arguing that the expert is in no better position than the trier of fact to have an opinion about wife's death and that homicide is a legal conclusion. Allow? *See State v. Simpson*, 2014 NC App., LEXIS 536 (May 20, 2014).

Hypo: *Charlie Comped.* The plaintiff sued the defendant for failure to warn about a side-effect of one of its drugs. The plaintiff was prescribed defendant's drug, Requip, a dopamine agonist, to treat his Parkinson's Disease. Plaintiff subsequently lost $10 million gambling in Las Vegas and sued, claiming the drug had a side-effect of causing impulsive behavior that included pathological gambling. When he stopped taking the drug, he stopped going to Law Vegas. A study, called the Weintraub Poster, indicated that patients taking the same drug to treat their Parkinson's Disease exhibited impulsive behaviors, including pathological gambling. Admit the expert's testimony? *See Wells v. SmithKlineBeecham Corp.*, 601 F3d 375, 381 (5th Cir. 2010).

Hypo: *Soccer and Boxing – Peas in a Pod?.* Danny, age 5, played soccer on the Raleigh United soccer team. He headed the ball three times and felt dizzy. Later that month, he started exhibiting increased symptoms of autism. By the end of the year, he was diagnosed with autism. The parents sued the soccer league, claiming the blows to the brain caused autism. The expert proposed by plaintiff was a medical doctor. Allow? *See Hendrix ex rel G.P. v. Evenflo Co.*, 609 F.3d 1183 (11th Cir. 2010)

Hypo: *Planted Fields*. Jones was charged with fraud for submitting a false insurance claim over crops that had allegedly been planted but failed. At trial, the government offered an expert to show, based on computer analysis of satellite images, that the field had not been planted Should this testimony be allowed? The expert referred to hundreds of articles published on the topic and the use of the process by NASA and major universities to enhance agricultural productivity. Allow? *See United States v. Larry Reed & Sons* Partnership, 280 F3d 1212 (8th Cir. 2002).

III. Hearsay

A. Hearsay and Burdens

Who has the burden of trustworthiness?

Hypo: Jones offers a record of his business, Custard Home Inspections, Inc., which is challenged by the opponent for trustworthiness. Who has the burden of showing trustworthiness?

B. Hearsay and the Confrontation Clause

Hypo: Interpreters. Shayne acted as an interpreter for Arabic speakers. In a criminal case, if the interpreter's translation of a witness is offered by the prosecution, must the translator be available to testify? *See United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013)

C. Hearsay, Experts and the Confrontation Clause

Hypo: DNA. A forensic expert testifies about DNA testing in a sexual assault and robbery case. The expert refers to a lab report from another analyst that provided conclusions from other analysts who had performed DNA testing in the case, finding that the DNA of the rape victim matched the DNA of the defendant. Does this expert testimony violate the Confrontation Clause?

Williams v. Illinois, 567 U.S. __ (2012) – Means?

1. *What does Williams v. Illinois, 567 U.S. __ (2012), mean for expert testimony*? There are at least a dozen cases pending before the Court seeking clarification of this area. The splintered Court, with a 4-1-4 plurality, left many questions about the admissibility of experts testifying to statements by

non-testifying persons and left lower courts grasping for a predictable pronouncement to follow. While there is a rule courts follow for plurality decisions – e.g., "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those members who concurred in the judgments on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977) – no such clear lowest common denominator is apparent in *Williams*. What statements are admissible, and under what rationale, is still open to debate. In *Williams*, Justice Alito's plurality opinion, joined by Chief Justice Roberts and Justices Anthony Kennedy and Stephen Breyer, found that the Confrontation Clause was not violated by an expert who testified about the results of DNA testing by non-testifying analysts because of two independent reasons:

(a) the testimony was nonhearsay offered "for the purpose of explaining the assumptions on which that opinion rests" and
(b) was not "testimonial" as the lab report "was not prepared for the primary purpose of accusing a targeted individual." *Id*.

Justice Thomas agreed with the outcome, but not the plurality's reasoning. Justice Kagen, joined by Justices Scalia, Sotomayor and Ginsburg, concluded that the Confrontation Clause was violated when the defendant did not have the opportunity to cross-examine the lab analyst who prepared the report.

Brennan's Rule? ____

D. Hearsay in the Jury Room -- Social Media

Hypo: *Jurors Who Google.* After a verdict in a criminal trial, it became known that during difficult deliberations two of the jurors had used the Internet to Google a definition of reasonable doubt. The definition was presented to the other jurors during deliberations. Should the defendant's motion for a new trial be granted? *See United States v. Rand*, __ F.Supp. 2d __ (WD NC Sept. 2013) (Charlotte Div. 2013)

____
____