

How to Get Evidence and Expert Testimony Admitted Into Court

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II. GETTING SCIENTIFIC AND EXPERT TESTIMONY ADMITTED INTO EVIDENCE

Prior to the enactment of the Federal Rules of Evidence in 1975, the admissibility of scientific and expert testimony was governed by the rules of common law and the “general acceptance” test established in *Frye vs. United States*, 293 F. 1013 (D.C. Cir.1923). Under common law, experts were required to have formal learning; their testimony had to consist of information in areas beyond the knowledge of the average lay person; their testimony had to be based on evidence that was either admissible or admitted into evidence, and presented in the form of a hypothetical question in open court; their testimony was confined to proven facts; neither experts or lay witnesses could testify to an ultimate issue in the case; and expert conclusions had to be “based upon a reasonable degree of [professional] certainty.”² The common law standard was considered too restrictive. Therefore, in 1923, under *Frye*, the U.S. Supreme Court established a new standard to determine the admissibility of expert testimony known as the general acceptance test. The *Frye* standard provides that, in order for an expert testimony to be admitted into court, the scientific principle on which the expert’s testimony is based must have achieved “general acceptance” in its particular scientific community. The standard set out in *Frye*, was the rule of law governing the admissibility of expert testimony until the establishment of the Federal Rules of Evidence, specifically Rules 702 through 706. Rule 702 states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand 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 (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

In other words, the expert must be qualified; the testimony of the expert

must address a subject matter on which the fact finder can be assisted by the expert; the testimony must be reliable; and the testimony must fit the facts of the case. *See* Fed. Rule Evid. 702

Daubert v. Merrell Dow, Inc., 509 U.S. 579 (1993), a case which involved plaintiffs' claim that the drug Bendectin, ingested by plaintiff during pregnancy for nausea and vomiting, was the proximate cause of injury (limb reduction birth defect) sustained by plaintiffs' infant child. The plaintiffs offered eight experts to support their claim that Bendectin causes birth defects. However, the plaintiffs' expert opinions were not supported by epidemiological evidence. Instead, their opinions were based on a re-analysis of an epidemiological study. The trial court granted defendant's summary judgment and found that "causation may be shown only through reliance upon epidemiological evidence." *Daubert v. Merrell Dow, Inc* 727 F.Supp. 570, 573 (1989). In *Daubert*, the plaintiffs did not present statistical data that was either published, or subjected to peer review to indicate with some degree of certainty that there was a link between Bendectin and limb reduction.

The *Daubert* trial court reviewed the testimony of eight experts who offered opinions that Bendectin caused limb reduction birth defects. The trial court found that none of the eight experts based their opinions on epidemiological studies. The trial court then held that "expert opinion which is not based on epidemiological evidence is not admissible to establish causation because it lacks the sufficient foundation necessary under FRP 703. *Id.* at 575.

The U.S. Supreme Court upheld the Court of Appeals' support of the granting of summary judgment and rejected the plaintiffs' claim that the eight experts' opinion testimony was admissible by finding that there was no genuine issue of fact with respect to causation. The Supreme Court established what is now known as the *Daubert* standard. The *Daubert* standard established that rather than relying upon the scientific community and individual to police themselves, trial judges would be charged with "gatekeeping" responsibilities to determine the admissibility of all scientific testimony and evidence. The *Daubert*

standard governs the admissibility of expert testimony and opinion in federal court and provides the following factors to consider when determining admissibility:

1. whether the methodology can be (and has been) tested;
2. whether the theory or techniques has been subjected to peer review and publication;
3. the known or potential rate of error; and
4. “general acceptance” of the theory or methodology within a relevant scientific community.

A. “Gatekeeping Obligations” in Federal Court

The gatekeeping obligations were first introduced in *Daubert*, when the Supreme Court gave trial judges the responsibility of functioning as “gatekeepers” to exclude unreliable expert testimony. The responsibility of gatekeeping was further clarified in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *Kumho* was a case that involved a vehicle driven by Patrick Carmichael where the tire blew out killing one passenger and severely injuring others. A lawsuit by the survivors and decedents were brought against *Kumho Tire Co.*, claiming that the blow out of the tire was caused by a defect in the manufacturing and design of the tire. The plaintiffs introduced the deposition testimony of a tire failure expert who claimed that there were certain indicators on the tire suggesting that the tire was defective. The expert’s opinion was not determined by any test, but rather, was based solely on visual observation. The defendants argued that the methodology presented by plaintiffs’ expert did not meet the *Daubert* standard of reliability and asked the court to grant summary judgment. The trial court applied the *Daubert* standard, and found insufficient indications of the reliability of the expert’s methodology and summary judgment was granted. The 11th Circuit overruled the trial court reasoning that *Daubert* only applied to the testimony of scientific experts, not technical experts and therefore, the factors laid out in *Daubert* should not have been applied to the tire expert. The United States

Supreme Court held that Daubert's reasoning required the trial court to act as the gatekeeper for testimony by any expert, not just scientific experts.

The decisions of the Court that were set forth in *Daubert* and *Kumho* resulted in amendments to Fed. Rule Evid. 701 in 1993 and Fed. Rule Evid. 702 in 2000. The Rule 701 amendment incorporate the Court's *Daubert* decision. Rule 701 now "makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standard of Rule 702 and the corresponding expert witness disclosure requirements of Fed. Rule Civ. Proc. 6 and Fed. Rule Crim. Proc. 16"³

The purpose of the amendment was to further reflect and clarify the *Daubert* standard and the new responsibility of trial judges as gatekeepers. *Kumho* also introduced general standards that were to be applied to assist with the assessment of reliable expert testimony in determining admissibility. In other words, *Kumho* clarified that as far as the court's scrutiny is concerned, there was no distinction between testimony of "scientific" and testimony of "technical" and "other specialized" knowledge when determining the expert's reliability. *See* Fed. Rule Evid. 702.

B. "Gatekeeping Obligations" of Scientific and Expert Testimony in State Court

The *Daubert* standard applies to federal courts and has been adopted by some state jurisdictions. However, California, Arkansas, Arizona, New York and North Carolina have rejected the *Daubert* standard and apply either the Frye standard of "general acceptance" or some combination of factors tailored by the court.

In *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), the plaintiff was involved in a motorcycle accident where he sustained a neck injury that left him a paraplegic. The plaintiff claimed that the injury was the result of a defective chin guard on his Arai helmet. The plaintiff introduced the

³Federal Rule 701, Advisory Committee Notes, 2000 Amendments

opinion of four experts to support his claim. The trial court, acting as a *Daubert* gatekeeper, determined that none of the experts had performed testing relevant to the causation issues, nor could they demonstrate that their opinions were generally accepted in their designated fields of expertise, and therefore excluded their testimony and granted summary judgment to the defendants.

The North Carolina Court of Appeals held that the trial court's exclusion of the testimony "was neither arbitrary nor an abuse of discretion" and affirmed the order of the trial court. *Howerton v. Arai Helmet, Ltd.*, 158 N.C.App. 316, 581 S.E.2d 816 (2003)

The case was heard by the North Carolina Supreme Court which addressed the core issue of whether or not North Carolina had adopted *Daubert* and the "gatekeeping" responsibilities directed by *Daubert*. The North Carolina Supreme Court reasoned that "one of the most troublesome aspects of the *Daubert* gatekeeping approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidences in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*." The North Carolina Supreme Court further held that gatekeeping obligations "imposed an unreasonable and unnecessary burden on the lower courts. The North Carolina Supreme Court expressed concern that "trial courts asserting sweeping pre-trial *gatekeeping* authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." Therefore, the case was reversed and remanded.

C. Considerations for Plaintiff Counsel

When considering the use of an expert witness, a plaintiff counsel must

take into account the cost of hiring a professional expert, the cost of depositions, the estimated time required for expert review, and other expenses associated with the case. It is also important for the plaintiff counsel to thoroughly investigate the background of the potential expert to determine whether or not the expert has had prior experience with deposition testimony, and whether or not the expert has ever been excluded as a witness. Despite the expert's qualifications, the expert's experience in providing deposition testimony is a very critical component for preparing a case. It is also important that the expert be familiar with the legal process and with the so-called 'magic words' of what to say, and what not to say during deposition, in order to avoid inadmissibility of evidence.

Furthermore, and more importantly, it may be critical as to whether or not the plaintiff's expert opinions are admitted into evidence, if the case is filed in federal or state court.

D. Considerations for Defense Counsel

E. Impact of Daubert and Kumho Tire on Judges and Experts

Daubert and *Kumho* had a tremendous impact on trial judges and experts, and generated both positive and negative responses from the legal and scientific community. The positive response has been that as a result of gatekeeping obligations, many judges have taken their new responsibility seriously, and are attending schools to gain scientific knowledge in an effort to better understand the science so that they may provide more informed rulings.⁴ On the other hand, some trial court judges have been criticized for not having sufficient knowledge of the science, therefore, making critical and wrong decisions regarding the admissibility of evidence which have subsequently led to several cases being overturned on appeal. Initially, judges approached their gatekeeping analysis by trying to apply every factor outlined in *Daubert* to determine the admissibility of

⁴Baldas, *Judges Going to School for Training in Science*, The National Law Journal, July 25, 2006.

scientific evidence. *See supra*. However, over the years, the courts, through experience have learned that *Daubert* is not a “definitive checklist” but a checklist of factors that may be considered when weighing the reliability of scientific evidence. Although the courts have evolved and have become more sophisticated in both their understanding and evaluation of scientific evidence, there are still opponents who hold the position that the gatekeeping responsibility of the trial court imposes a burden on the court system and infringes upon the constitutional function of the jurors.

F. Qualifications of Experts

An expert is qualified if their testimony is grounded in an accepted body of learning or experience in the expert’s field, and if he or she meets the criteria as defined by Fed. Rule Evid. 702 “If scientific, technical, or other specialized knowledge [of an expert] will assist [jury] to understand evidence or to determine a fact in issue; and If the [expert] possesses sufficient knowledge, skill, experience, training, or education, [then the expert] may testify...in the form of an opinion..., if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the [expert] has applied [reliable] principles and methods...to the facts of the case.” *See Fed. Rule Evid.702*

The North Carolina Rule of Evidence 702, in part, mirrors the Federal Rule of Evidence 702. However, there are two major distinctions. First, North Carolina did not adopt the limiting criteria of Fed. Rule 702. N.C. Rule 702 and does not require that opinion testimony be 1) based upon sufficient facts or data, 2) the production of reliable principles or methods, or 3) based upon reliable principles or methods. In North Carolina “it is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession.” *State v. Phifer*, 165 N.C. App. 123, 225 S.E.2d 786 (2004). Medical malpractice issues are however, a different animal and are discussed separately below.

State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984), a murder case that was based on circumstantial evidence where the State offered the expert testimony of Dr. Louise Robbins, a footprint expert in the field of physical anthropology. Dr. Robbins was hired to give her expert opinion as to whether a bloody bare footprint at the crime scene was identical to that of defendant. At the time of trial, this particular technique offered by Dr. Robbins consisted of comparing the size of the footprint with the internal bone structure of the foot. This technique in footprint comparison differed from the traditional footprint analysis of ridge detail which is the same technique that is used for fingerprinting. Dr. Robbins' technique was novel and unique, and its application was not the traditional method used in the United States, but had been used more frequently in England and Germany. Dr. Robbins' expert opinion was based on her credentials and her reliance on the work that she had done over the years while developing her skills in the field of physical anthropology and footprint analysis. This was a case of first impression and the scientific method relied upon by Dr. Robbins had not been recognized or generally accepted because it was in its infancy.

The defendant argued that Dr. Robbins was not qualified because she did not have the requisite skill, and that her technique was unreliable and not generally accepted. The defendant argued that there was an 'abuse of discretion' by the trial court to allow Dr. Robbins' testimony. In essence, the accused argued that the trial court did not act as a proper gatekeeper in excluding evidence. The North Carolina Supreme Court found that there had not been an 'abuse of discretion' and stated that "whether or not an expert qualifies is ordinarily within the exclusive province of the trial judge...a finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it," and that "there was evidence to support the trial judge's finding that Dr. Robbins was qualified to testify about the subject footprints." *Id.*

The second difference between the Federal and North Carolina versions of Rule 702 is that in 1995 North Carolina amended Rule 702 to include

subsections 702(b)-(h). The amended rule specifically applies to the standard and requirements of expert witnesses with regard to medical malpractice actions. The purpose for the amendment was to prohibit testimony on the appropriate standard of care in medical malpractice cases by an expert who is not also: 1) a licensed health care provider; 2) and either a specialist in the same specialty as health care provider, if the defendant health care provider is a specialist, or a general practitioner or an instructor in the general practice of medicine, if the defendant health care provider is a general practitioner; and 3) able to show that he or she devoted a majority of their professional time in the year that immediately preceded the date of the event that is the basis for the malpractice action to the same subject as is the basis of the action. *See* N.C. Rule Evid.702(a)-(h).

Physicians Beware: In medical malpractice cases, a physician expert who offers testimony against other physicians may also be subject to peer review. A peer review medical board or medical ethics organization may review and evaluate a physician expert's testimony prior to and after trial to determine if a physician expert is misrepresenting the 'standard of care' or if the physician's testimony is considered unethical. If the physician's testimony is found to be a misrepresentation or unethical, he or she may be subjected to disciplinary action by the medical board, and in some instances, physicians have lost their license to practice. The possible occurrence of a disciplinary action and/or the loss of one's medical license has had a chilling effect on some medical physicians. *In re Lustgarten*, N.C. App., 629 S.E.2d 886 (2006), a case involving the death of a neurological surgery patient.⁵ Dr. Lustgarten, as plaintiffs' expert physician, testified that he had difficulty believing the defendant doctor's notation in the patient's chart that there was no elevated pressure on the patient's spinal fluid,

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The complete procedural history of how Dr. Lustgarten's license was first revoked, and then reinstated, is available on the North Carolina Medical Boards' web site (www.ncmedboard.org) under "for the public/media" button. Choose look a licensee by name, enter the last name Lustgarten, and then you are able to view each document in the Boards' file after selecting Dr. Lustgarten's profile.

and further that the defendant doctor would have to explain his reasons for making the notation. After the trial, the North Carolina Medical Board found that Dr. Lustgarten had misrepresented the standard of care and that he had accused another physician of falsifying records with no direct evidence to support his testimony. The Board initially revoked Dr. Lustgarten's license but later changed it to a year long suspension. The North Carolina Court of Appeals reversed and ordered the state to dismiss the suspension. The North Carolina Court of Appeals held that "Dr. Lustgarten had a good faith evidentiary basis for his testimony, and that Dr. Lustgarten had testified that the notation in the medical records was 'faulty,' but it was the defendant's attorney who insisted on using the phrase "falsifying medical records." *Id.* This case is a clear example as to why physician experts are reluctant to testify against other physicians, and why some efforts by medical boards and vindictive defendants may have a chilling effect on future doctor's willingness to offer expert opinion or testimony in medical malpractice cases.

Several members of the medical community have openly objected to the practices of medical peer review boards and have argued that peer review with regard to a physician expert witness is unconstitutional. Some physicians have gone so far as to challenge peer review statutes in court.

G. How to Show Research Verifying the Methodologies and Theories Your Experts Rely Upon

"Federal Rules of Evidence 702 was amended to impose a requirement that the proponent of expert testimony demonstrate that the testimony is the product of reliable principles and methods that are reliably applied to the facts of the case."⁶ Scientific research, theories, data, and methodologies are verified and

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Imwinkelried, *Defining 'Reliable Principles and Methods' of Experts*, New Jersey Law Journal, April 11, 2003.

relied upon through statistical and research data that is presented in scientific publications. Publications submitted to scientific journals are one of the main sources of information that is at the disposal of the scientific community. It is through these publications that research, theories, and methodologies are first presented to the general public, as well as to the scientific community. The publications are subject to peer review, and the information provided is a necessary and important step for gaining “general acceptance” in the scientific community.

A Google search of almost any medical term, disease or operative procedure will generate results directing the user to authoritative articles in peer reviewed journals. Most journals are searchable on Medline, a service of the U.S. National Library of Medicine. Individual articles from most medical journals require a fee (usually \$25 per article.) A visit to your local medical library may save you some expense if you are looking for articles in popular journals. Medical school text books are also a useful tool to determine published theories and standards of care. Most medical text books are available at Amazon.com and other web sites, but they can be expensive.

H. Threshold the Expert Must Meet

The threshold that an expert witness must meet is that the proffered testimony should be relevant and reliable. When considering relevancy and reliability of proffered testimony, one should bear in mind two particular aspects concerning its admissibility. One aspect pertains to the gatekeeping responsibility of the trial court judge who has an obligation to admit or exclude evidence based on its relevance and reliability. The other consideration is the abusive discretion standard of review that is applied to the trial court’s decision on the issue of admissibility of proffered testimony of expert witnesses. For a discussion on these two issues, see *General Electric Co. v. Joiner*, 522 US 136, (1997). In that case, Robert Joiner was an employee at Water & Light Department of

Thomasville, Georgia in 1973. Joiner was an electrician and worked with the City's electrical transformers, which used a mineral-based dielectric fluid as a coolant. While working in this capacity, the job would often require him to place his hands and arms in the liquid to make repairs, and sometimes he would get the fluid in his eyes and mouth. In 1983 it was discovered that some of the transformers were contaminated with polychlorinated biphenyls (PCBs), which had been known to be hazardous to one's health. In 1991, Joiner was diagnosed with small cell lung cancer. Joiner then filed suit against General Electric and Westinghouse Electric who manufactured the transformers, claiming that his cancer was caused by the exposure of PCBs and their derivatives, polychlorinated dibenzofurans (furans) and polychlorinated dibenzodioxins (dioxins). Joiner's expert witnesses submitted to depositions and testified that PCB's, furans, and dioxins can promote cancer, and that Joiner's cancer was likely the result of exposure to these chemicals. The District Court ruled that "there was a genuine issue of material fact as to whether plaintiff had been exposed to PCBs, but granted summary judgment for defendants on the grounds that (1) there was no genuine issue as to whether he had been exposed to furans and dioxins, and (2) his experts' testimony had failed to show that there was a link between exposure to PCBs and small cell lung cancer and the opinion testimony was therefore inadmissible because it did not rise above subjective belief or unsupported speculation. Upon review, the 11th Circuit applied a "stringent standard" as opposed to an "abusive discretion" standard and held that the District Court had erred in excluding the expert testimony. The United States Supreme Court then reviewed the case on whether a stringent or abusive discretion standard was proper. The Supreme Court ruled that the abusive discretion was appropriate when determining if the trial court properly excluded expert testimony or opinions. By determining that an abusive discretion standard applied, it is more difficult to overturn a trial courts exclusion or admission of expert opinion testimony.

The Supreme Court then addressed whether or not the trial court had erred by excluding plaintiffs' expert testimony. The Supreme Court held that the trial court did not err when it excluded the expert's testimony due to its lack of reliability. The plaintiffs' expert opinions were based upon a study that involved mice that were exposed to PCB in order to show a link between the cancer cells of mice and that of plaintiff. The Supreme Court found the study to be unreliable and stated that the "District Court did not abuse its discretion in excluding expert scientific testimony offered by [Joiner] as evidence that his cancer resulted from exposure to PCBs, based on studies indicating that infant mice developed cancer after receiving massive doses of PCBs injected directly into their peritoneums or stomachs; [Joiner] was an adult human being with far less alleged exposure to PCBs, and he developed different type of cancer than that developed by mice." *Id.* The importance of the Joiner case is that it shows how the federal courts have a wide latitude of discretion when determining the admissibility of expert testimony, and how crucial it is for expert witnesses to meet the reliability test of their proffered testimony in order to avoid the exclusion of evidence.

I. Admissibility of Expert Reports

Federal Rule of Civil Procedure 26 governs Depositions and Discovery. The federal rule governing Disclosure of Expert Testimony is outlined in Fed. Rule Civ. Proc. 26(a)(2) which states, in part, that "disclosure, with respect to a witness who is retained or specifically employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness forming the opinions; any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing

of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Litigants must make sure that expert reports and other material for trial preparation is disclosed in a timely manner to avoid the court’s exclusion of the report. *See* Fed. Rule Civ. Proc. 26(a)(2)

According to North Carolina Rule of Civil Procedure Rule 26 (b)(4)(a)(1), “ a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” With regard to expert fees and expenses, N.C. Rule 26 (b)(4)b. provides that “unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery; and (ii) ... the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” In a medical malpractice action, “the judge shall direct the attorneys to appear for a discovery conference and establish an appropriate schedule for designating expert witnesses” so that all parties can be in compliance with the designated deadline. *See* N.C. Rule Civ. Proc. 26 (f1). Unlike the Fed. Rule Civ. Proc. 26(a), the N.C. Rule Civ. Proc. 26 does not require that experts submit an expert report, but instead, expert opinions are discoverable by interrogatories, or as may otherwise be ordered by the court (report or deposition). Rarely, however, is an order ever required to obtain an expert’s deposition after they are identified in an interrogatory answer. If a party fails to identify an expert witness as ordered by the court, they could face sanctions, possibly dismissal of action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial. *See* N.C. Rules Civ. Proc. 26 (f1)(4)

IV. ATTACKING OPPOSING EXPERT TESTIMONY

A. How to block Admission of Opposing Expert Testimony

There are several approaches that litigants use to block admission of opposing expert testimony. Pre-trial, the litigant can file a motion to strike, motion in limine, or request a *Daubert* hearing to challenge the reliability of the expert's testimony. However, blocking admission of expert testimony is not always preferred, so litigants often choose to postpone their pre-trial attacks until the commencement of the actual trial through objections, motions to strike, voir dire of experts in some circumstances, cross-examination, introduction of contradictory evidence, or on appeal to request an entry of a judgment as a matter of law.

B. Cross-Examining Opposing Experts - Questioning Techniques that work

When cross-examining a witness, the real witness is the attorney. Cross-examination is the means by which the cross-examining attorney is allowed to "testify" and to introduce evidence to contradict what the witness stated in direct examination. The purpose of cross-examination is to (1) elicit information from the witness to clarify, elaborate, or discredit a point that has already been made by the witness on direct examination; (2) to impeach the witness' credibility if the witness' testimony is inconsistent with the evidence; and (3) to show bias, prejudice, or interest, on the part of the witness. Whatever the motivation or goal is of the cross-examining attorney, the main objective is to elicit information from the witness that will better serve the jury in understanding the issues of the case.

Cross-examination can be difficult to predict. However, there are certain steps that can be taken to prepare for an effective cross-examination. When planning cross-examination it is critical for the attorney to (1) know the facts of the case; (2) be intimately familiar with the witnesses' deposition transcript; (3) diagram a strategy; (4) investigate the background of the witnesses; and (5) keep it brief.

C. Challenging the Expert's Evidence

In complicated litigation it often comes down to the "battle of the experts."

How well you challenge an expert's evidence depends on how well you are prepared. It is imperative that the attorney is well acquainted with the expert's deposition or expert report, and that the attorney has cross referenced each fact which the expert has relied upon, with the facts as they are presented at trial. It is also important that the attorney look beyond the testimony and the resume of the expert witness in order to gain additional information that may prove helpful to their case. Search the internet, read articles, books, and papers authored by the expert. The more knowledge you have, the better questions you can ask, and the more prepared you are for cross-examination of an expert witness at trial.

D. How to Illustrate the Invalidity of the Expert's Methodologies

To illustrate the invalidity of an expert's methodology, introduce contradictory evidence through the proffered testimony of other experts, publications, statistical data, peer review or any other evidentiary proof that would indicate that the expert's methodology is either no longer considered the 'standard of use' and/or is not 'generally accepted' in their particular field of expertise.

VI. EVIDENCE, EXPERTS AND HEARSAY IN THE COURTROOM

A. Hearsay Rule

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. Rule Evid.801(c)

The "Hearsay Rule," in both the Federal and State Rules of Evidence Rule 802 states: "Hearsay is not admissible except as provided by these rules." North Carolina adds "or by statute" while the Federal rule adds similar exceptional language. If the court determines that a particular statement, either oral or written is in fact hearsay, then that statement is inadmissible as evidence, unless it falls within an exception, either Fed. Rule Evid. 803, or Fed. Rule Evid. 804.

The objective of the Hearsay Rule is to exclude untrustworthy evidence

from entering the courts in an effort to make sure the parties receive a fair trial and that the legal principle of fundamental fairness guaranteed by the Fourteenth Amendment of the U.S. Constitution is achieved. The Hearsay Rule according to the North Carolina Rule of Evidence 802 is essentially identical to the Federal Rules of Evidence 802.

B. Hearsay Exclusions and Exceptions

The law of evidence is comprised of a system of exclusions which reject certain out-of-court statements that fail to satisfy accepted standards of reliability. The general hearsay exclusionary Rule is outlined in Fed. Rules 801, 802, 803 and 804, and the N.C. Rules 801, 802, 803 and 804.

Federal Rule 801 states that a prior statement by a witness and an admission by a party opponent are not hearsay, and therefore not excluded by the Hearsay Rule. North Carolina Rule 801 only states that an admission by a party opponent is not hearsay and therefore not excluded.

Both Federal and State Rule 803 provide 23 different sub-sections that outline specific exceptions to the inadmissibility of the Hearsay Rule regardless of the declarant's availability in court. Although the numerated exceptions are admissible, it is important to understand that the statements are still considered hearsay.

Federal and North Carolina Rules 804, govern hearsay evidence that is not excluded by the hearsay rule where only when the declarant is unavailable as a witness. These exceptions are: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; and (4) statement of personal or family history. Federal Rule 804 includes a fifth exception: forfeiture by wrongdoing, while North Carolina's fifth exception is a "catch all" entitled "Other Exceptions". *See* Federal and N.C. Rules 804(b).

C. Admissibility of Hearsay Evidence

According to Federal Rules of Evidence 402 "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States,

by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” Rule 403, excludes relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay waste of time, or needless presentation of cumulative evidence.”

The Hearsay Rule also excludes all hearsay that does not fall under one of the exceptions. The admission of hearsay evidence must lay the proper foundation to show how each piece of evidence in the form of a statement, either written, recorded, or oral, falls within one of the exceptions before the statement is attempted to be offered into evidence.

D. Electronic Evidence and Hearsay

The laws governing electronic evidence hearsay is in the early stages of development. In this new age of legal technology regarding animation, videoconferencing, and electronic filing, the law has not fully evolved as rapidly as the technology. However, the evidentiary hurdles regarding legal technology still have to be tackled. There is no written law in the Federal or State Rules of Evidence that specifically address the issue of computerized electronic evidence and hearsay. Therefore, courts tend to rely on Fed. Rule Evid. 403, and The Hearsay Rule by applying a balancing test when weighing the relevant probative value against unfair prejudice, such as confusion of the issues, misleading the jury and undue delay.

It is important to note that the electronic evidence contained on computer records, computer files, e-mail, tape back-ups, hard drives, floppy discs, flash discs, and even PAD’s are all statements under the Hearsay Rule and must fall under a hearsay exception to be admissible. The most likely exception will be record of regularly conducted activity exception, also known as the business exception.

In addition to Rule 403 and the Hearsay Rule, there are two other rules

that one must consider that could potentially pose a problem with regard to the admissibility of electronic evidence. That is, the Federal Rules of Evidence 611 concerning Mode and Order of Interrogation and Presentation, and Federal Rules of Evidence 901 concerning Authentication and Identification requirements. Fed. Rule Evid. 611(a) entitled “Control by court” provides that “the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. Fed. Rule Evid. 901(a) provides “The requirement of authentication and identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

However, the consensus regarding legal technology is mixed and the verdict is still out as to whether or not it presents a benefit or a burden on the court system. There are proponents who believe that this wave of new evidentiary technology, for example, animation, is a useful tool in assisting the jury to better understand the issues presented at trial. On the other hand, opponents contend that certain technology, such as videoconferencing is unconstitutional because it deprives a party of procedural due process. In any event, litigators are frequently using videoconferencing, animation, and the e-filing system for filing pleadings, and judges and lawyers are adjusting to the challenges of this new technology. However, it has been suggested that if an attorney decides to venture into this world of electronic evidence that they also have a back-up plan available, just in case technological problems occur.

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