Challenging the State’s Expert Under New Rule 702(a)

James A. Davis
Davis and Davis, Attorneys at Law, PC
215 North Main Street
Salisbury, NC 28144
(704) 639-1900

This paper is derived from a number of CLEs, consulting with and observing great lawyers, and, most importantly, trial experience examining medical examiners, DNA geneticists, ballistics and handwriting experts, pharmacologists, chemical analysts, psychiatrists, psychologists, and more in approximately 100 jury trials ranging from capital murder, personal injury, domestic, to civil tort trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, trafficking, and myriad other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God’s grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

I. Former Rule 702(a):

Previously, Rule 702(a) allowed a qualified person to testify in the form of an opinion “if scientific, technical or other specialized knowledge” would “assist the trier of fact to understand the evidence or determine a fact in issue.” Broadly construed by the courts, a peanut farmer qualified.

II. New Rule 702(a):

Now, if “specialized knowledge” will assist the trier of fact, a witness “qualified as an expert by knowledge, skill, experience, training, or education,” may testify in the form of an opinion “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.

Caution: Special rules apply to HGN testing and DRE testimony under Rule 702(a1).

III. Effective Date:

Amended N.C. R. Evid. 702(a) applies to “actions arising on or after” October 1, 2011.

In a criminal case, the date of indictment determines which rule applies. Former Rule 702(a) applies to indictments obtained before October 1, 2011. The new rule applies to new or superseding indictments obtained on or after October 1, 2011. *State v. Walston*, 747 S.E.2d. 720 (N.C. App. 2013) (amended Rule 702(a) applies on date of the superseding indictment, not the original indictment).

IV. Method of Examination of Your Expert:

Background.

Education.

Employment.

Licensed in area of expertise?

Published?

Appeared or consulted with the courts?

Qualified as an expert? Ever denied? Expert for State and defense?

Describe the area of expertise.

Tender as an expert.

Know defendant?

How?

Follow a standard procedure? Describe it.

Tell what you did with defendant.

Summarize your findings.

Opinion.

V. The Basics:

The new rule is about relevance and reliability.

The basic premise: If the expert (a) applied reliable methodology (b) to the facts of the case (c) in a reliable manner, it is admissible.
The tension: Junk science makes the proceedings fundamentally unfair violating the defendant's due process rights versus excluding reliable expert testimony violates the defendant's due process rights to present a full defense.

My basic cross-examination model: After you have prepared cross-examination and know your theory(ies) of the case (1) if no harm, ask no questions; (2) disarm the witness with a pleasant style; (3) listen, and consider exploring, unexpected responses; (4) lead the witness; (5) ask short fact questions; (6) use your style; (7) elicit basic, then favorable material, on the subject; (8) ask questions the expert cannot refute; (9) loop favorable responses into your next question; (10) simplify the expert's responses; (11) ask the expert about prior statements/testimony; (12) quit when you receive concessions or discredit the witness; (13) save the ultimate question for closing argument; (14) simplify the law and facts for the judge; (15) remember the jury is always watching you; and (16) never let them see you sweat.

Methods of impeachment: (1) prior inconsistent statement; (2) impeachment (self-contradiction); (3) contradiction; (4) first aggressor (victim); (5) prior bad acts; (6) convictions; (7) character impeachment (lack of truthfulness); (8) mental incapacity; (9) perceptual incapacity; (10) personal knowledge; (11) learned treatises; and (12) bias, interest, motive or prejudice.

Use the expert's articles, his employment with and history of testimony for the State, and publications by other experts in the field against the testifying expert. State v. Whaley, 362 N.C. 156 (2008) (criminal defendants must be afforded wide latitude to cross examine witnesses regarding credibility); State v. Williams, 330 N.C. 711 (1992) (a witness may be examined on any matter relevant to any issue in the case, including credibility); State v. Hunt, 324 N.C. 343 (1989) (if witness either denies or testifies differently from a prior inconsistent statement, you may impeach the witness with the substance of the prior inconsistent statement).

Common evidence rules: N.C. Rule Evid. Rules 404(a)(1), (2), and (3); 404(b); 405; 602; 607; 608(b); 609; 611(b); 613; & 803(18).

VI. Practice Strategies:

Insure the prosecution has complied with notice requirements under N.C. Gen. Stat. §15A-903(a)(2). Prosecution must give notice to defendant of any expert witness the State reasonably expects to call as a witness, include a report of examinations or tests conducted, furnish the expert's curriculum vitae, expert's opinion, and the underlying basis for that opinion, all within a reasonable time prior to trial. TIP: Discovery notice requirements only apply to cases within the original jurisdiction of superior court. N.C. Gen. Stat. §15A-901.
File motions that matter. Craft them with precision. Distill the law and key facts. Quickly show the judge why you are right.

Do your own research on the subject. Consult with other experts in the field. Get your expert’s view of the State’s expert’s analysis and opinion. Then frame your cross-examination.

Have your expert listen to relevant pretrial/trial testimony.

Call the State’s expert in advance. Some will talk to you, alerting you to unseen problems or fertile areas of cross. Some will not talk with you, a fact that tilts the judge’s view once learned.

Consult with other experienced attorneys, including the Appellate Defender, Capital Defender, Institute of Government, IDS, and great trial lawyers.

Consider a “Motion for a Rule 702(a) Hearing.” Voir dire the expert to examine qualifications, obtain answers to risky questions or unclear issues, and test the three prong requirement under the new rule.

Ask the court to hear from your expert before it rules on the prosecution’s expert. Consider submitting your expert’s affidavit for the court’s consideration prior to ruling.

Critically analyze the expert report. Insure the expert does not testify beyond the scope of his expert status or the scope of his report.

If appropriate, consider stipulating to the report. Jurors are impressed with skilled experts. This is a good tactic if the report leaves you room to argue.

If the expert uses anything to refresh his recollection, ask the court for permission to review the expert’s notes/materials before you begin your cross.

When examining an expert, generally frame the examination to gain admissions. Lead the witness. Listen to the answers. I repeat: listen to the answers. Nuggets come unexpectedly.

Style your cross-examination using closing argument themes. Craft closing argument with quotes, concessions, and principles gleaned from cross.

Recast the expert’s technical terms/esoteric language into plain and simple terms.

Do not write out your cross-examination. I use bullet-point, topic reminders in the right hand margin. This technique allows you to listen.
If the expert is evasive and nonresponsive, be more patient than with a lay witness. Keep redirecting and simplifying. The judge gets it sooner; juries get it later.

If the expert is arrogant, capitalize and contrast. Pause for effect, ask for forgiveness, and ask the expert to help you (and the jury) to understand. But be genuine, not obsequious.

Do not quarrel with the expert. Be humble and gracious. The jury will love you — and learn with you.

Generally, a question that permits an explanation is too long or too complex.

The jury expects conflict. Just be the likeable participant.

Ask the judge for a moment to review your materials before ending your examination. Scan your notes. Take a moment with your client. A valuable technique.

Stop when you either obtain concessions or discredit the witness. End well.

Argue the specific language/requirements of the rule. There is no discretion to admit without meeting the rule. Tell the court it is a hot topic for appellate review.

Lodge state and federal constitutional objections: confrontation clause/sixth amendment, effective assistance of counsel, fundamental fairness, due process, etc. This reverses the standard of appellate review.

Be mindful of rebuttal testimony.

Be the most reasonable person in the courtroom.

Remember: (1) judges are reluctant to grant a suppression motion. Be prepared, make your point, and show why you are right; (2) educate the judge on the law. Empower the gatekeeper to protect the system; (3) prosecutors believe they will win and often prepare minimally with witnesses, on the facts, and the law; (4) a general notice may not comport with statutory requirements, failing to trigger timing requirements and limiting expert evidence; (5) ask the trial judge to hear and rule on the motion pre-trial. This will allow reconsideration of a denial during trial. State v. Woolridge, 357 N.C. 544 (2003); (6) the judge must rule on your motion during the session the motion is heard unless the parties agree to a ruling out-of-session; (7) request specific findings and conclusions of law in the order. Absent a request, the record is presumed to support the judge’s ruling. Estrada v. Burnham, 316 N. C. 318 (1986); (8) object to introduction of the evidence at trial. Failure to do so waives appellate review. State v. Williams, 355
N.C. 501 (2002); and (9) renew your objections post trial. For practical advice on suppression motions, See JAMES A. DAVIS, MOTIONS TO SUPPRESS: STATEMENTS, PROPERTY AND IDENTIFICATION, (2010), presented at the 2010 Regional Training for Criminal Defenders I: Trial Preparation, October 8, 2010.

VII. Case in point:

In a recent Superior Court DWI prosecution, Paul Glover was excluded as an expert witness. The order is attached herewith as Exhibit A. A copy of the transcript is available through IDS at http://www.ncids.com/forensic/motions/motions.shtml

The method I used to examine Mr. Glover was as follows:

Asked the court to release the defendant before voir dire to eliminate observations of defendant.

Covered academic background (BS and Masters Degrees in biology from FSU).

Covered work history (generally in lab research, a police officer, and 17th year with State of N.C.; emphasized he is currently a police officer).

Covered prior acceptance by state and federal courts as an expert (310 to 320 times; tendered as expert in various fields of expertise; testified nine times for the defense).

Covered current occupation (head of Forensic Tests for Alcohol Branch within DHHS; trains officers on breath tests using instruments; conducts training on SFST’s and DRE’s; oversees permit issuance of chemical analysts who draw blood for alcohol and drug tests; and trains judges, prosecutors, and law enforcement officers in the testing and effects of alcohol and drugs).

Asked if he was a research scientist (yes).

Asked if in three previous jobs he did any studies of alcohol (no).

Asked if he had heard any testimony in the instant case (no).

Requested the factual basis he was relying on to provide an opinion (rough knowledge based on conversations with the prosecutor and review of charging documents).

Requested factual basis for time of alcohol consumption either before, during, or after driving (he says he would start at end point of .30 breath test at 9:19 p.m. and work backwards).

Requested again the factual basis to render an opinion (male, 130 lbs., review of officer’s DWIR form, history of alcohol use, preventive maintenance was current, no statements by defendant).

Asked if he spoke with the officer (no).
Asked again if there were other facts which helped him render an opinion (he began to discuss rate of elimination, etc.; I redirected).

Asked if he knew the type of alcohol consumed (no).

Asked if he was testifying regarding a particular theory, retrograde extrapolation or another (he did not know).

Asked why he was here (because he was faxed information and subpoenaed to come, and he may be used on direct or rebuttal).

Asked if prepared a report (no).

Asked if he had ever been denied expert status (yes; one time in Brunswick County).

Asked if he was a medical doctor (no).

Asked if he had a degree in a related discipline like physiology or pharmacology (no).

Asked if he had a doctorate in those fields (no; he says he is certified by the Forensic Toxicology Certification Board as a diplomate in alcohol toxicology).

Asked which fields of expertise he expected to apply in the instant case (lots of them; page fourteen of transcript).

Asked about process of alcohol consumption, absorption, and elimination.

Asked if he agreed there is an absorption phase (yes).

Covered factors that affect absorption (food, etc.).

Asked if there is a peak alcohol concentration (yes; between 15 and 90 minutes; normally expect about 45 minutes).

Asked if he agreed there is a large degree of variability in absorption (it is very difficult to measure; there is some variability).

Asked about articles and research in medical journals on ethanol metabolism (he gets his information from reading journals).

Quoted hypotheses, findings, and statements from reliable authorities and journals on rates of absorption (e.g., factors include concentration of alcohol, speed of consumption, rate of gastric emptying, etc.).

Asked about elimination rates (he quoted State v. Cato and a rate of .0165).

Asked about NHTSA training standards (he does not personally do NHTSA training).

Asked about NHTSA comparisons of beer, wine, and liquor consumption with similarly-sized, same gender individuals and resulting alcohol concentrations.
Questioned him about a number of published studies, medical journal articles, and expert opinions, asking him who were reliable authorities in the field, what articles he found reliable, and why. Used quotes from persons he deemed reliable authorities to show disagreement within the field, even on retrograde extrapolation.

Asked if blood, breath, or urine testing was more reliable (he did not know what I meant by reliable).

Asked him to show the court any authority supporting his position (none).

Asked if he used the scientific method (yes).

Walked through the scientific method (i.e., establish an objective, gather information, form a hypothesis, design the experiment, perform the experiment, verify the data, interpret the data, repeat) (he agreed).

Asked to admit there are variables that would change his opinion (yes).

Identified variables (food, gender, etc.).

Asked to admit that, without making a single assumption, he could not tell the defendant’s BAC at the time of driving (agreed he could not).

Asked to admit he recently testified on a theory of odor analysis (yes).

Asked about his hypothesis on odor analysis and opinion of a specific alcohol concentration (.16 to .18).

Asked if the appellate court said it was a novel scientific theory (yes).

Asked if the appellate court said it was unreliable (he did not believe so).

Refreshed his recollection of the court’s holding and findings.

Asked if he had received peer review (he asked what I meant; stated there is no peer review unless you publish).

Asked if he had published (published in a newsletter, etc.).

Asked to name any reputable authorities in the field who had done a peer review on him (none).

My argument: I contended inadequate or wrong facts; unexplained or no theory; the specific requirements of amended Rule 702(a); the proposed expert’s recent testimony in support of what the appellate court described as a novel theory; the purpose of voir dire; case at bar was an absorption case in which the proposed expert could not help the trier of fact; the lack of indices of reliability, including no established techniques, visual aids, independent research, or peer review, all of which would lead the jury to sacrifice its independence and accept scientific hypothesis on faith; a prior example in my practice of expert exclusion when the proposed expert was simply a conduit for his
research; and my concern Mr. Glover’s testimony would include facts not admitted in
evidence and be a backdoor approach to the rule forbidding expert evidence on
credibility of a witness.

Sidebar: Mr. Glover may (1) discuss the difference between social drinking (drinking
slowly over time) and a bolus dose (drinking fast as in slamming shots); (2) state a
bolus dose hastens peak alcohol concentration, possibly as fast as 15 minutes; (3)
discriminate between experienced drinkers (prior DWI’s) and recreational drinkers (the
occasional consumer); and (4) state the alcohol elimination rate he uses (.0165) is
favorable to the defendant.

VIII. Case Law:

*State v. Pennington*, 327 N.C. 89 (1990) (in determining whether an expert’s method
of proof is sufficiently reliable for expert testimony, the court should focus on indices
of reliability including the expert’s use of established techniques, professional
background in the field, use of visual aids, independent research, and more, so the jury
is not asked to sacrifice its independence by accepting scientific hypotheses on faith).

(holding Mr. Glover’s odor analysis was so unreliable the trial court abused its
discretion in admitting his testimony). A good summary of the legal analysis of
amended Rule 702(a).

of amended Rule 702(a) the trial court did not abuse its discretion by excluding
defendant’s expert testimony on the “use of force” doctrine. The court noted the current
amended language implements the standards set forth in *Daubert*). See also, *Wise v.

consider, among other things, whether a theory can be or has been tested, has been
subjected to peer review and publication, is generally accepted as reliable in the
relevant scientific community, and the known or potential rate of error).

IX. Summary:

Prepare, research, consult, and try cases. Do offers of proof, and make a complete
record. Be neutral in your case and expert evaluation. Do not be afraid of prosecutors,
judges or court precedent, if you believe you are right. It appears the path to admission
of experts just got steeper. I leave you with words of hope and inspiration from Joe
Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear
the message. Together, let’s go make a difference.
“A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end.”

Epilogue: “The day may come when we are unable to muster the courage to keep fighting . . . but it is not this day.”

Attributed to: The Lord of the Rings: Return of the King (2003).