Must a Trial Judge Act as a Gatekeeper Even if Not Asked to Do So?

Author : Jeff Welty

Categories : Evidence, Uncategorized

Tagged as : Daubert, expert testimony, expert witnesses, Rule 702

Date : June 13, 2017

Here's a question that arose during a recent class: Suppose that a party in a criminal case seeks to introduce forensic evidence from a discipline of questionable validity, such as bite mark analysis. The lawyer on the other side isn't aware that the technique has been the subject of scientific criticism and doesn't object. Must the trial judge nonetheless assess the reliability of the proposed testimony before admitting it?

Although courts nationally don't agree, I think the better answer in North Carolina is yes. This post explains why.

Rule 702. The starting point for questions about expert witness is G.S. 8C-702, or evidence Rule 702. It provides that an expert witness may testify if the testimony is based upon sufficient facts or data, the testimony is "the product of reliable principles and methods," and the witness has applied those methods "reliably to the facts of the case." The rule effectively mirrors the holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), where the Supreme Court ruled that, under the federal evidence rules, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" in light of several factors enumerated by the Court.

***Daubert* hearings.** Judges often implement Rule 702 by conducting hearings regarding the reliability of proposed expert testimony. These hearings are called "*Daubert* hearings," and they fulfil what is commonly described as the "gatekeeping" function of the trial judge. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (stating that a trial judge has a "basic gatekeeping obligation" to ensure that expert testimony is relevant and reliable); Fed. R. Evid. 702 (commentary on 2000 Amendments) ("In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.").

What if there is no objection? *Daubert* hearings are often triggered by a party's objection to proposed testimony. But what if there is no objection? Must a trial judge still assess the reliability of proposed expert testimony? A leading treatise explains that courts nationally disagree:

> Rule 702 directs a court faced with a proffer of expert testimony to determine preliminarily whether the testimony is reliable . . . Failure to raise an objection could be considered a waiver, although *Daubert* suggests the court may still have an obligation to ensure the reliability of the testimony prior to its admission, even in the absence of a formal challenge. . . . *Kumho Tire* noted that a trial court could "avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted," which suggests that the trial court is to engage in at least a cursory assessment, however minimal, to ensure reliability. At the same time, however, *Kumho Tire* also stated that "where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question," the trial judge should determine whether that testimony is reliable. *Kumho Tire* does not specify whether that challenge must come from a party or may be raised sua sponte. Thus . . . *Kumho Tire* provided no real guidance as to when the court's gatekeeping obligations attach. As a result, there is disagreement as to whether such a preliminary assessment is triggered by the proffer of expert testimony, or only on an objection from the opposing party that calls the testimony sufficiently into question.

David F. Herr, Ann. Manual Complex Lit. § 23.351 (4th ed. May 2017 update).

My research confirms the split of authority:

- *Cases requiring an objection.* Several cases hold that an objection is required to trigger the gatekeeping process. *See State v. Shingleton*, 790 S.E.2d 505 (W. Va. 2016) ("[T]he petitioner argues, without any supporting legal authority, that the trial court should have held a *Daubert* hearing sua sponte. Certainly, this Court has never imposed such a blanket requirement on trial courts, and our research reveals that other courts have also declined to impose such a duty."); *Mescenti v. Becker*, 237 F.3d 1223 (10th 2001) (ruling that *Daubert* does not "overrid[e] the general requirement of a timely objection to the evidence" and that no sua sponte *Daubert* analysis is required); *Tharp v. Com.*, 40 S.W.3d 356 (Ky. 2000) ("We decline to speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing sua sponte constitutes palpable error."); *State v. Cameron*, 885 N.W.2d 611 (Wisc. Ct. App. 2016) (collecting cases and stating that "courts have expressly rejected [the defendant's] claim that the trial court's obligation to act as a gatekeeper under *Daubert* requires it to conduct a *Daubert* admissibility analysis even if there is no objection to the testimony.").
- *Cases not requiring an objection.* Other cases support the idea that a judge must perform a gatekeeping function even without an objection. *Hoult v. Hoult*, 57 F.3d 1 (1st 1995) ("We think *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection," though such an inquiry need not involve "explicit on-the-record rulings regarding the admissibility of expert testimony"); *Chapman v. State*, 18 P.3d 1164 (Wy. 2001) (agreeing that "as gatekeepers of expert testimony, judges must always perform some form of reliability analysis," though noting that an explicit hearing need not be conducted absent a request).

North Carolina case law suggests that a trial judge should determine the reliability of all expert testimony. The North Carolina case that is most closely on point suggests that an objection is not required. In *State v. Hunt*, __ N.C. App. __, 792 S.E.2d 552 (2016), the court considered an arson case in which a fire department investigator testified for the State. He opined than an accelerant had been used to set the fire. He was never qualified as an expert and the defense did not object to his testimony. On appeal, the defendant argued that the trial judge erred in not conducting a *Daubert* hearing and assessing the reliability of the investigator's testimony. The court of appeals determined that "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts." It reached that conclusion in part by relying upon Justice Scalia's concurring opinion in *Kumho Tire*, which states that "trial-court discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function." If a trial judge's decision to admit expert testimony is reviewable for plain error even without an objection, trial judges appear to have a responsibility to consider *Daubert* and reliability even absent an objection. *See also* Herr, *supra* ("Considering *Daubert's* mandate for trial judges to exercise their obligation as gatekeeper, the better view is that judges have an independent duty to challenge expert testimony whenever questions of validity and reliability exist.").

A *Daubert* determination may be informal. It should be noted that a trial judge's consideration of *Daubert* does not necessarily require a formal hearing or an explicit ruling. The Supreme Court, interpreting federal Rule 702, stated that a

trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. . . . Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases. . . .

Kumho Tire, 526 U.S. at 152. If obviously reliable testimony is offered, a trial judge may admit it without fanfare or formality. The court of appeals suggested that this may have been what happened in *Hunt*, stating that the trial judge may have determined that the investigator's "testimony was of an ordinary type and a reliability proceeding was not

necessary, as, by virtue of his position as a fire investigator, the reliability of his testimony that accelerants were used to accelerate the fire was properly taken for granted." Accordingly, it found no plain error.

At a minimum, a judge *may* conduct a *Daubert* hearing even without an objection. Even if a judge is not *required* to consider the reliability of proposed expert testimony absent an objection, it appears to be well-settled that a trial judge *may* consider the reliability of such testimony – and indeed, may conduct a full-fledged *Daubert* hearing – whether or not an objection is made. *See, e.g., Kirstein v. Parks Corp.*, 159 F.3d 1065 (7th Cir. 1998) ("We have . . . upheld a judge's *sua sponte* consideration of the admissibility of expert testimony."); *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794 (N.D. Ill. 2005) ("The Supreme Court in *Daubert* stressed the trial judge's obligation to act as a gatekeeper to ensure that expert testimony is reliable. . . . That goal is of such obvious and transcendent importance that judges can act sua sponte to prohibit testimony that does not pass muster under *Daubert*."); David L. Faigman et al., 1 Mod. Sci. Evidence § 1:8 (2016-2017 Edition) ("*Daubert* apparently permits judges to exclude expert testimony as invalid even in the absence of an objection by the opponent of the evidence."). Thus, if a trial judge is confronted with expert testimony of doubtful reliability, the judge would be wise to consider *Daubert*, and perhaps to ask the parties to address the reliability issue.