Challenging Experts in Texas State Court

by
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Experienced trial attorneys know that it is important to carefully prepare for every witness, but that an expert witness requires special attention. Testimony by an expert can play a pivotal role in the outcome of a case. An observation made by a federal judge forty years ago still rings true today:

> Challenging an expert and questioning his expertise is the lifeblood of our legal system—whether it is a psychiatrist discussing mental disturbances, a physicist testifying on the environmental impact of a nuclear power plant, or a General Motors executive insisting on the impossibility of meeting Federal anti-pollution standards by 1975. It is the only way a judge or jury can decide whom to trust.

Chief Judge David L. Bazelon, U.S. Court of Appeals for the District of Columbia, quoted in the *Dallas Times Herald*, May 13, 1973. With the importance that both judge and jury place on expert testimony, it is wise for counsel to spend extra time on experts.

Unfortunately, as trial approaches, time is a scarce resource for a litigator. An organized approach to reviewing expert testimony can help make sure that any extra effort is time well spent. This article provides a general overview for counsel to follow when reviewing and challenging the proffered testimony of an expert in Texas state court.

I. The Rule and the Burden.

The admission of expert testimony is governed by Rules 702 to 705 of the Texas Rules of Evidence. Rule 702 permits a witness qualified as an expert by knowledge, skill, experience, training, or education to testify on scientific, technical, or other specialized subjects if the testimony would assist the fact finder in understanding the evidence or determining a fact issue. TEX. R. EVID. 702. A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and based on a reliable foundation. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). A party can successfully challenge an expert by knocking out either one of these prongs—for example, not disputing an expert's qualifications but disputing the reliability of the opinions offered. *Gharda USA, Inc., v. Control Solutions, Inc.*, No. 12-0987, 2015 WL 2148058 (Tex. May 8, 2015). Regardless of whether and how counsel ultimately decides to approach attacking specific expert

testimony, approaching review of any expert in this same two-step fashion is a good way for counsel to make sure not to skip an important part of the process.

A challenge to the admissibility of an expert, while technically in Texas a *Robinson* challenge, is often referred to as a *Daubert* challenge, in reference to *Robinson*'s federal counterpart, *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). While not controlling, federal authorities are often persuasive when considering a challenge to, or defense of, expert testimony in Texas state court, and counsel should look to both state and federal case law when considering whether to make a challenge in any specific case. The case law on expert witnesses and challenges to expert testimony is significantly developed. No matter what type of case is involved, counsel is likely to find similar state or federal case law, either in Texas or from around the nation, discussing the standards for expert testimony in such cases. So developed is the case law on expert witnesses, the lack of similar case law could itself be telling.

If a challenge is filed to admission of all or part of an expert's opinions, the burden shifts to the opposing side to prove that their witness is qualified under the rules. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex.1996). But, as with most motions, counsel should be careful not to file a motion to exclude any expert before becoming convinced of the need. Filing a weak motion to exclude only gives the opposing party a pretrial chance to educate the judge on the merits of their side of the litigation. A challenge under Rule 702 requires the trial court to serve as "gatekeeper" to the evidence, and the admission of an expert is a matter within the trial court's discretion. *Id.* Nothing is gained by convincing the court, pretrial, that the jury should hear from the other side's expert. Instead, counsel should make a reasoned call on the question of whether to challenge an expert, only after following a systematic review of the opinion and the law.

II. Any *Robinson/Daubert* analysis should begin with determining if the witness is qualified to testify as an expert and if the opinion they seek to offer is actually an expert opinion.

A. Is the "expert" qualified?

The first question that counsel should ask in reviewing the testimony of a purported expert is whether that person is an expert at all. The rules require that all expert witnesses be qualified. Rule 702 allows a person to testify as an expert only if they are "qualified as an expert by knowledge, skill, experience, training, or education." TEX. R. EVID. 702. "A completely unqualified expert using the most reliable of tests should not be allowed to testify." *Rushing v. Kansas City S. Ry.*, 185 F.3d 496, 507 (5th Cir. 1999). A witness's lack of knowledge, skill, experience, training, and education regarding the issue in the case can

serve as an insurmountable obstacle to any attempt to qualify him as an expert. *See Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372 (5th Cir. 2000). If the proffered "expert" witness is unqualified, the substance of the opinion is immaterial.

What it takes to make an expert qualified depends on the specifics of the individual case. In deciding whether an expert is qualified, the trial court must "ensur[e] that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion." *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 719 (Tex.1998), *quoting Broders*, 924 S.W.2d at 152-53. The question for the Court is not the proffered witness's general competence, but rather, can the party specifically demonstrate that the witness has sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case. *Kumho Tires Co., Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999). In *Gammill*, the Supreme Court of Texas held that an engineer with experience in designing and testing fighter planes and missiles was not a qualified expert to give an engineering opinion about the design or manufacturing of automobiles. *Gammill*, 972 S.W.2d at 719. "In the present case, we have no difficulty in holding that the district court did not abuse its discretion in excluding [the engineer's] testimony. Just as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case." *Id.*

This does not mean that every expert must have a specialized degree in the exact issue that they seek to testify about. In *Roberts v. Williamson*, the Supreme Court of Texas rejected a challenge to the qualifications of a pediatrician, who was not a neurologist, to render an opinion on the nature and effect of a newborn's neurological injuries. 111 S.W.3d 113 (Tex. 2003). In doing so, the Court made clear that the record established that the witness, although not a neurologist, had extensive experience and expertise regarding the specific causes and effect of the injuries at issue. *Id*. at 121-22. The difference in outcome was the result of the counsel being able to demonstrate the expert's qualifications to render the specific opinions he did, in the context of the particular case.

In each case, counsel should review the qualifications of the expert against the facts of the case and first ask whether the individual is qualified based on knowledge, skill, experience, training, or education to testify about the specific issues in the case. If the answer is "no," then a challenge is appropriate.

Even if the witness might be qualified as an expert as to some opinions, counsel should make sure that the witness is qualified to offer any and all of the opinions sought to be introduced. Just because a witness starts out testifying as a qualified expert on a particular subject, it does not follow that they continue to be qualified regardless of what they testify about. In *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*,

the Eighth Circuit took exception to the district court allowing an individual, who was testifying as a qualified hydrologist, going on to testify on the standard of care in warehousing. 254 F.3d 706 (8th Cir. 2001). As the court explained, "[o]nce initial expert qualifications and usefulness to the jury are established, however, a district court must continue to perform its gatekeeping role by ensuring that the actual testimony does not exceed the scope of the expert's expertise." *Id.* at 715. As the court recognized, "[t]he real question is, what is he an expert about?" *Id.* Counsel should start each *Robinson/Daubert* inquiry by answering this basic question.

B. Are they really testifying as an expert?

It isn't enough for counsel to make sure that a proffered expert is qualified to be an expert; counsel should also make sure that they are acting as an expert in the case. Even if a witness does have the necessary credentials to serve as an expert in a particular case, his or her testimony would still be inappropriate if it is not really an expert opinion. An expert witness is one whose "knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. "That a witness has knowledge, skill, expertise, or training does not necessarily mean that the witness can assist the trier-of-fact." *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). In each case, counsel should ask whether the opinion being offered really qualifies as an expert opinion.

Expert testimony, by definition, must be something that the average juror would not understand or know without assistance. Rule 702 does not allow for someone to testify as an expert on common sense.

> Expert testimony assists the trier-of-fact when the expert's knowledge and experience on a relevant issue are beyond that of the average juror and the testimony helps the trier-of-fact understand the evidence or determine a fact issue. When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. Thus, "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance."

Id. (citations omitted). In each case, the question is whether the expert assists the trier of fact on an issue that "involves matters beyond jurors' common understanding." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex.2006). If so, then the testimony is proper grounds for an "expert." If not, counsel should consider seeking to exclude the witness.

III. Even if the witness is qualified to testify as an expert, their opinion still has to be reliable.

Just because someone is an "expert" and they have an opinion about the issues in the case, does not mean they have the right to share their opinion with the trier of fact. All expert testimony must be shown to be reliable before it is admitted. *Gammill*, 972 S.W.2d at 726. To be admitted, each material part of an expert's theory must be reliable. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). Counsel should consider challenging the inclusion of any unreliable expert opinion.

Determining reliability does not decide whether the expert's opinions are correct, but whether the analysis used to form those opinions is reliable. *Gharda USA, Inc.*, 2015 WL 2148058, at *6. To determine whether expert testimony is reliable enough to be admitted, "courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions." *Camacho*, 298 S.W.3d at 637. Counsel should go through this same process in determining whether the proffered expert opinion articulates objective standards of reliability that could be considered by the trier of fact. If not, the opinion should be challenged.

The courts have articulated guideposts for evaluating proffered expert testimony. *Daubert* instructs the trial court to look for "good grounds" for determining the reliability of expert testimony. *Id*. 509 U.S. at 593-94. The Texas Supreme Court has articulated six non-exclusive factors that a trial court may consider in making a threshold determination of admissibility of scientific opinion testimony under Rule 702, including:

1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies on the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;
5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. the non-judicial uses which may have been made of the theory or technique.

Robinson, 923 S.W.2d at 557. While the court has outlined these factors generally, it has recognized that the factors that will control in any particular case will vary depending on the facts of that case. *Id.* And in some instances, the *Robinson* factors cannot be fairly applied to opinion testimony that is not scientific in nature. *Gammill*, 972 S.W.2d at 727.

And regardless of whether expert testimony can satisfy the articulated Robinson factors, the expert's opinion must be based on probability, not possibility. *Gharda USA, Inc.*, 2015 WL 2148058, at *6.

The proper approach is to assess whether there is any "analytical gap" that would call into question the reliability of the opinion. *Id.* "Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in the record, and the expert's ultimate opinion." *Id*. Analytical gaps may include circumstances in which the expert unreliably applies otherwise sound principles and methodologies, the expert's opinion is based on assumed facts that vary materially from the facts in the record, or the expert's opinion is based on tests or data that do not support the conclusions reached. *Id.* If any of these are true, the opinion should be challenged as unreliable.

Experienced counsel will recognize problems that are often present in the opinions of proffered experts. When reviewing an expert opinion, counsel should consider whether any of the telltale flaws are present.

A. "Because I said so!"

Even the most qualified expert cannot testify based on the "because I said so" approach. "[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness." *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex.1999). The Texas Supreme Court has made it clear that an expert cannot testify based simply on his own unsupported opinion. *Havner*, 953 S.W.2d at 712. An expert's bare opinion or bald assurance of validity are not enough. *Id*. 711-12. Instead, the court must look behind the expert's own claims to determine whether it is based on independently reliable data. *Id.*, at 713. An expert must be excluded as unreliable when he "has offered nothing to suggest that what he believes could have happened actually did happen." *Gammill*, 972 S.W.2d at 728.

Counsel should look for this issue to arise when the evidence seems to be equally weighted. The rules do not allow plaintiffs to bolster their own version of the facts by the mere subjective opinion of an "expert." Where more than one possibility exists, an expert cannot, without support other than the claims of his client, simply choose the explanation most advantageous to his client. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987); *see also, Oglesby v. General Motors Corp.*, 190 F.3d 244, 251 (4th Cir. 1999). If this practice were allowed, then the expert's testimony would be nothing more than party's testimony "dressed up and sanctified as the opinion of an expert." *Viterbo*, 826 F.2d at 424. If the expert admits that all of the evidence is consistent with one of multiple probabilities, he cannot testify to the contrary.

In *Gammill*, the Texas Supreme Court rejected similar expert testimony, explaining that where the evidence was equally consistent with the plaintiff wearing or not wearing the seat belt, the expert "has offered nothing to suggest that what he believes could have happened actually did happen. His opinions are little more than 'subjective belief or unsupported speculation.'" 972 S.W.2d at 727-28. Counsel should make sure that, in choosing one competing explanation over another, any opinions by an expert are supported by reliable evidence that allows him or her to reach the conclusion they do.

B. "Tests? We don't need no stinkin' tests!"

Counsel should always look to see if an expert has reached opinions based on the same testing standards that would be followed by similar experts outside of the litigation context. While testing is not an "absolute prerequisite" to the admission of expert testimony, the rules require that experts adhere to the same standards of intellectual rigor that are demanded in their professional work. *Gammill*, 972, S.W.2d at 725, *quoting Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990 (5th Cir. 1997). An expert's opinion can be determined to be unreliable when "the record is devoid of any scientific testing or peer-reviewed studies confirming the hypothesis." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 802 (Tex. 2006). The failure of a purported expert to perform proper testing can result in his opinions being unsupported assumptions, and thus no evidence at all. *Gharda USA, Inc.*, 2015 WL 2148058, at **7-8.

An expert's failure to perform the necessary tests before reaching an opinion undermines any reliability in his or her theory. An expert who forms an opinion before he begins his research is biased and lacking in objectivity, and his opinion lacks reliability. *Viterbo*, 826 F.2d at 423 n.2. Scientific analysis is turned on its head when, instead of reasoning from known facts to reach a conclusion, the purported expert reasons from an end result in order to hypothesize what was needed to be known. *Mitchell v. Gencorp, Inc.*, 165 F.3d 783, 783 (10th Cir. 1999). As the Ninth Circuit has noted:

> [S]cientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method.

Claar v. Burlington N. R.R., 29 F.3d 499, 503 (9th Cir. 1994). When an expert fails to offer evidence of a valid methodology, or any objectivity, it should render his conclusions completely unreliable, and counsel should consider seeking to exclude this opinion from trial.

C. "All men are mortal. My dog is not a man. Therefore, my dog is immortal."

In evaluating the opinions offered by an expert, counsel should make sure, not just that the underlying testing or supporting authority are reliable, but that the conclusion itself is logically supported. Just because an expert begins with a reliable principle, it does not follow that the final conclusion will be reliable. The Texas Supreme Court has made it clear that expert testimony will be deemed unreliable and inadmissible when "there is simply too great an analytical gap between the data and the opinion proffered." *Gammill*, 972 S.W.2d at 726, *quoting Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997). "Several post-*Daubert* cases have cautioned about leaping from an accepted scientific premise to an unsupported one." *Moore*, 151 F.3d at 279. If significant, unaccounted-for gaps exist in the underlying authority relied on by an expert and the opinion actually rendered, it should not be admitted. *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 835-37 (Tex. 2014).

When evaluating the opinions offered by an expert, it is often helpful for counsel to logically work through the structure of the opinion, forwards and backwards. If logical gaps exist in the expert's theory, counsel should consider challenging admission of the expert.

IV. The expert is qualified . . . the opinion is reliable . . . but does anyone really care? Not if the opinion is irrelevant to the issues at hand.

Once counsel is convinced that an expert is both qualified and the opinions reliable, there is one remaining question that must be asked: "is it relevant?" Even a qualified expert who offers reliable testimony is not guaranteed admissibility under Rule 702. The testimony must still be relevant. *Daubert*, 509 U.S. at 597; *Robinson*, 923 S.W.2d at 555. Evidence must be both relevant and reliable to be admitted under Rule 702. *Gammill*, 972 S.W.2d at 720-21. The relevancy requirement of Robinson incorporates the traditional relevancy analysis of the Texas Rules of Evidence 401 and 402, and "is met if the expert testimony is 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). "Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury." *Robinson*, 923 S.W.2d at 556.

A good way for counsel to answer this question is by use of a proposed jury charge. The same logic applies in bench trials, and for many reasons it is a good idea to prepare a jury charge early in the litigation, regardless of who is the trier of fact. With charge in hand,

for each opinion offered by an expert, counsel should ask whether it is relevant to assisting the jury in answering a fact question in the litigation. Experts can form opinions based on the opinions of other experts in the case, *Gharda USA, Inc.*, 2015 WL 2148058, at *9, so the question is whether the opinion will directly assist the jury in answering a question presented or is support for another expert's opinion that does. If the answer to this question is "no," then counsel should consider filing a motion to exclude.

V. Conclusion

Ironically, the decision to challenge admission of an expert is much more art than science. Multiple considerations go into the decision about whether, when, and how to do so. That said, a systematic approach by counsel to reviewing proffered expert opinions in each case can help make that decision easier.