

The Sea of Expert Testimony: Staying Afloat

by Emily Frost and Marc Knisely



Do you need expert testimony?

- Tex. R. Evid. 702.
- Test: is expert's knowledge and experience beyond that of "average juror" and does testimony help trier-of-fact understand evidence or determine fact issue? *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360-61 (Tex. 2000) (per curiam).
- Where not needed, expert testimony not admissible. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 619-20 (Tex. 1999) (in intentional infliction of emotional distress case, admission of psychologist's testimony that defendant's conduct was "outrageous" was error).

Getting Expert Testimony In: What Are the Requirements?

- Expert must be **qualified** “by knowledge, skill, experience, training, or education.” Tex. R. Evid. 702.
 - *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996) (possession of medical degree does not qualify physician to offer expert testimony on every medical question).
- Expert’s testimony must be **reliable**.
 - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *E. I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

3 Kinds of Reliability



Connective Reliability

Methodological Reliability

Foundational Reliability

Foundational Reliability

- Tex. R. Evid. 705.
- *General Electric Co. v. Joiner*, 522 U.S. 136, 144-45 (1997) (animal studies on which plaintiff's experts relied did not support his contention that exposure to PCBs had contributed to his cancer).

Methodological Reliability

- *Robinson*, 923 S.W.2d at 558-59.
- Whether the theory has been or can be tested
- Whether the theory has been subjected to peer review and/or publication
- What the rate of error is and whether there are standards or controls
- Whether the theory is generally accepted
- **Practice tip:** Prepare your experts for/question opposing experts about each factor.

Connective Reliability

- *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).
- Whether the expert's reasoning is sound—analytical gap?
- No ipse dixit.
- **Practice tip:** read articles cited by expert.

The Expert Fight: How to Preserve Error and Avoid the “W” Problem



Preserving Error: Trying to Get Expert Testimony In

- Make an offer of proof. Tex. R. Evid. 103.
- The offer can be counsel's summary of the proposed evidence. *In re N.R.C.*, 94 S.W.3d 799, 805-06 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

Preserving Error: Keeping Expert Testimony Out

- At trial: object that testimony is unreliable and therefore **inadmissible**.
- On appeal: argue **unreliable and therefore no evidence**.

Objection: Admissibility

- Pre-Trial Motion to Exclude Testimony
 - In state court, this may be enough. Tex. R. Evid. 104; *Marvelli v. Alston*, 100 S.W.3d 460, 470 n.3 (Tex. App.—Fort Worth 2003, pet. denied).
 - In federal court, this is enough. Fed. R. Evid. 103(a); *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002).
- During trial
 - Motion to strike after cross-examination is okay. *Kerr-McGee v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004).
 - Be specific. *Compare Scherl v. State*, 7 S.W.3d 650, 652 (Tex. App.—Texarkana 1999, pet. ref'd) (objection to intoxilyzer evidence on basis that it was inadmissible under Rule 702, Daubert, Kelly, and Hartman insufficiently specific), and *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002) (“I’m going to make an objection based upon the failure of this witness’s methodology to meet the reliability standards as articulated by the Supreme Court in Gammill versus Jack William Chevrolet as applying to all expert testimony.”).
 - Reliability objection does not cover qualifications. *Kroger Co. v. Betancourt*, 996 S.W.2d 353, 361 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).
- Standard of Review: Abuse of Discretion.

Because you argued unreliable and therefore inadmissible at trial

- You can argue that testimony is unreliable and therefore no evidence on appeal.
- Benefit: de novo review.
- *Missouri Pac. R.R. Co. v Navarro*, 90 S.W.3d 747, 750 (Tex. App.—San Antonio 2002, no pet.); *see also Goodyear Tire & Rubber Co. v. Rios*, 143 S.W.3d 107, 113 (Tex. App.—San Antonio 2004, pet. denied).

What if you didn't object to reliability at trial?

- It's not a perfect world.
- Remember Ronnie Cammareri

Last Hope: Lack of Reliability Appears on Face of Record

- To prevent trial by ambush, reliability challenge disguised as legal sufficiency challenge NOT permitted. However, no objection necessary if lack of reliability appears on face of record. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 412 (Tex. 1998).
- *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004)

We therefore conclude that when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct its analysis. However, when the challenge is restricted to the face of the record—for example, when expert testimony is speculative or conclusory on its face—then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.

- Get creative—“analytical gap” sounds a lot like speculative and conclusory.
- Rule 705: lack of “underlying facts or data” sounds speculative and conclusory, too.

You can do it.

- Feel free to call with questions.
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