EXPERT WITNESSES

INTRODUCTION

The value of an expert witness in today's litigation cannot be seriously disputed. Indeed, expert testimony is a critical part of any case. There is little wonder, then, that Texas appellate courts have focused on experts more than almost any other subject in recent years. This article is intended to give practitioners an overview of the rules governing expert witnesses, discovery issues involving experts, and law related to challenging experts and their opinions.

THE RULES GOVERNING EXPERTS

In federal court, expert testimony is governed by Federal Rules of Evidence 702 through 706. Rule 702—Testimony of Experts—provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the 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.

Under the federal rules, a testifying expert is any witness a party may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The Federal Rules of Civil Procedure make a distinction between experts retained or specially

employed to provide expert testimony in the case—or one whose duties as the party's employee regularly involve giving expert testimony—and other experts.[1]

In state court, expert witnesses are governed by rules 702 through 706 of the Texas Rules of Evidence, which generally follow, but do not mirror, their federal counterparts. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the 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.

State rules define an expert as a "person with knowledge of relevant facts" *only* if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.[2] Further, under state rules, a testifying expert is an expert who may be called to testify as an expert witness at trial.[3] The Texas rules make a further differentiation between experts retained by, employed by, or otherwise subject to the control of the responding party and other experts.[4]

EXPERT REPORTS

Both the federal and Texas rules contain provisions regarding expert reports. The purpose of expert reports is to afford fair notice of a retained experts' expected testimony. This section addresses what should be included in expert reports under the federal rules, the general Texas rules, and as statutorily mandated for medical malpractice and other health care claims.

1. Expert Reports Under the Federal Rules

In federal court an expert report must be submitted for every retained testifying expert witness. The disclosure of each expert witness must be accompanied by a written report prepared and signed by the witness. The deadline for the disclosure of expert witnesses and production of reports is usually set forth in the court's scheduling order. In the event the date is not set by court order or the parties' stipulation, the initial expert disclosure must be made at least 90 days before the date set for trial.[5]

The report must contain a complete statement of all opinions to be expressed by the expert and the basis and reasons therefore.[6] The purpose of this requirement is to "avoid the disclosure of sketchy and vague expert information."[7] A simple preliminary opinion is insufficient to satisfy the requirements of the federal rules.[8]

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[1] FED. R. CIV. P. 26(a)(2)(B).

[2] TEX. R. CIV. P 192.3(c).

[3] TEX. R. CIV 192.7(c).

[4] TEX. R. CIV. P. 194.2(f). At least on Texas state court has ruled that it is permissible for a party to cross designate as its expert the expert designated by the opposing party. Hooper v. Chittlaluru, 222 S.W.3d 103 (Tex. App.—Houston[14th Dist.] 2006, pet. denied).

[5] FRCP 26(a)(2)(C)(i); *see, c.f.,* Sherrod v. Lingle, 223 F.3d 605, 612–13 (7th Cir. 2000) (court order setting deadline for "all discovery" included deadline for disclosure of expert reports).

[6] FRCP 26(a)(2)(B)(i).

[7] Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 549 (5th Cir. 1996).

[8] *See, e.g.*, Space Maker Designs, Inc. v. Weldon F. Stump & Co., Inc., 2003 WL 21805274 (N.D. Tex. 2003) (noting that the rules require a complete statement of all the views to be expressed by the expert, and a short two page report listing questions the expert would need to address in order to reach specific conclusions with no factual predicates falls short of that standard).

In addition to a complete statement of opinions, the report must disclose the data or other information considered by the witness in forming her opinions.[9] This requirement includes all materials furnished to the expert to be used in forming her opinion, regardless of whether or not the expert ultimately relied on all of the materials to form the opinion.[10]

The report must also contain the qualifications of the expert 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.[11] The list of cases should include enough information so that the opposing party may identify and locate each case, such as the case name and number and the court, county (or district), and state where the case was filed. Simple identification of these cases is sufficient; there is no requirement to produce copies of earlier reports or transcripts of the expert's previous testimony.

Practice Point: Advise your expert to heavily substantiate his or her report. The report should show that the expert considered both the good and bad facts. If some data has been excluded, explain why the data is not needed or is inaccurate. Use phrases that emphasize that the methodology is generally accepted by the scientific community. For example, an expert may say, "This method is routinely used by scientists in this field," then cite examples in peer reviewed literature.

[9] FRCP 26(a)(2)(B)(ii).
[10] *See* In re Pioneer Hi-Bred Int'l, 238 F.3d 1370, 1375 (Fed. Cir. 2001).
[11] FRCP 26(a)(2)(B)(iv-vi).

2. Expert Reports Under the Texas Rules

Unlike the federal rules, the Texas rules do not require a party to automatically produce an expert report upon disclosing a testifying expert. Nevertheless, upon request the other party is entitled to copies of reports prepared by or for the expert in anticipation of the expert's testimony.[12]

The requirements for an expert report under state rules are less exacting than under the federal rules. Upon a party's request for disclosure, or a court's pre-trial order, the party producing the expert should disclose the following:

- the expert's name, address, and telephone number;
- the subject matter on which the expert will testify;
- the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them,
- all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
- the expert's current resume and bibliography;

One of the main differences between the two rules is that the Texas rule only requires the lawyer to give the general substance of the expert's opinions and a brief summary for the basis of those opinions. The primary goal of the expert report is to fully disclose the substance of and basis for the expert's mental impressions.[13] There is no requirement for a comprehensive report written by the expert.

[12] TRCP 192.3(e)(6).
[13] Mauzey v. Sutliff, 125 S.W.3d 71, 84 (Tex. App. – Austin 2003, pet. denied).

3. Heightened Statutory Requirements Under Texas Law

Despite the generally more relaxed requirements regarding expert reports under the Texas rules, attorneys should be aware that several causes of actions have statutorily enhanced expert disclosure requirements.

For instance, a plaintiff must produce an expert report in any lawsuit filed against a licensed architect, registered professional surveyor, licensed professional engineer, or any firm in which such a licensed professional practices.[14] In such cases, attorneys should take special note that the petition (whether a lawsuit or arbitration complaint) must be filed with an affidavit by an expert witness holding the same license and practicing in the same area of practice as the defendant.[15] The affidavit "shall set forth specifically at least one negligent act, error, or omission claimed to exist for each such claim."[16] Failure to file the affidavit with the complaint will result in the claim's dismissal.[17] Whether that dismissal is with or without prejudice is left to the trial court's discretion.[18]

Most importantly, medical malpractice cases and other health care liability claims have strict requirements and deadlines for expert reports.[19] Health care liability claims include such disparate causes of action as claims against hospitals based upon how their doctors are credentialed, as well as suits against ambulance services, optometrists, chiropractors and assisted living facilities.[20]

A plaintiff in a medical malpractice case must serve an expert report on each party within 120 days of filing the petition.[21] The report must provide a fair summary of the expert's opinions regarding (1) applicable standards of care; (2) the manner in which the care rendered by the physician or health care provider failed to meet the standards; and (3) how the failure to meet that appropriate standard caused the injury, harm or damages claims.[22] In addition to the report, the plaintiff must produce the curriculum vitae of each expert.[23]

Not only must the report disclose the opinion's substance, the report must also demonstrate that the expert is qualified to render the opinion. For instance, in order to provide an expert opinion in a claim against a doctor, the testifying expert must both be practicing medicine at the time of the testimony as well as at the time the claim arose.[24] Additionally, the report should show that the expert has training in the "area of medical practice relevant to the claim."[25] Similar limitations on who is qualified to provide an expert report apply to health care liability claims against non-doctors.[26] Of course, these requirements are further subject to the threshold constraints expressed in Texas Rule of Evidence 702.

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[14] TEX. CIV. PRAC. & REM. CODE ANN. § 150.001(1) & 150.002(a).
[15] *Id*. at § 150.002(a).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *See* Tex. CIV. PRAC. & REM. CODE ANN. § 74.351.
[20] *See* George C. Hanks, Jr. & Rachel Polinger-Hyman, *Redefining the Battlefield: Expert Reports in Medical Malpractice Litigation After HB 4*, 67 Texas Bar Journal 936, 938 (December 2004).
[21] *Id*. at § 74.351(a).
[22] *Id*. at § 74.351(r)(6).
[23] *Id*. at § 74.351(a).
[24] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.401(a) (incorporated by reference in § 74.351).
[25] *Id*. at 74.401(c).
[26] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402 (also incorporated by reference in § 74.351).

Should the plaintiff fail to file and serve the expert report within 120 days, the trial court "shall" enter an order dismissing the claim with prejudice and awarding attorney's fees and costs to the defendant.[27] This deadline has been strictly enforced by Texas courts.[28] Once served, a defendant has 21 days to object to the substance of the report.[29]

Courts employ an "objective good faith" standard to determine the adequacy of an expert report. A trial court "shall grant" a motion to dismiss "only if it appears . . . that the report does not represent an objective good faith effort to comply with the definition of an expert report . . .."[30]

The central inquiry under this standard asks whether the report addresses the appropriate standard of care, the breach thereof, and the causation of the plaintiff's injuries "with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit."[31] The report must be sufficiently reasoned so as not to be conclusory.[32] If a court determines that a report fails to satisfy the objective good faith standard, the court has the discretion to grant one curative 30-day extension.[33]

EXPERTS AND DISCOVERY[34]

1. Written Discovery

Although a party must identify the names and addresses of its testifying experts, under federal rules, facts known or opinions held by a consulting expert are not discoverable by interrogatory or deposition, absent exceptional circumstances.[35] Exceptional circumstances are situations in which it is impracticable for the party to obtain facts or opinion on the same subject by other means. In those instances, a party may obtain discovery of and from a consulting expert.[36] For instance, "[c]ases allowing discovery often involve information about since-destroyed materials or situations in which the expert might also be viewed as a fact witness regarding matters at issue."[37]

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[27] *Id*. at § 74.351(b).

[28] *See, e.g*., Smith v. Hamilton, 2007 WL 1793754 (Tex.App.—Beaumont June 21, 2007, no pet. hist.) (despite the fact that the plaintiff *filed* the expert report within 120 days, and despite the fact that the defendant *had not yet answered* the suit by the time the 120 days expired, the court dismissed the claim because the defendant *had not yet been served* with the expert report!).

[29] *Id*. at § 74.351(1) *See, e.g., Smith*, 2007 WL 1793754 (noting that the 21 day deadline is to object to sufficiency of the report; the defendant has no obligation to object to the failure to serve the report); Poland v. Grigore, 249 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2008,) *affirmed by* Poland v. Ott, 278 S.W.3d 39 (Tex. App.—Houston [1st Dist.] 2008, pet. denided) (same).

[30] *Id*. at § 74.351(1)

[31] American Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 875 (Tex. 2001).

[32] *See, e.g.*, Bowie Mem. Hosp v. Wright, 79 S.W.3d 48, 52 (Tex. 2002) ("the expert must explain the basis of his statements to link his conclusions to the facts.").

[33] *Id*. at § 74.351(c). *But see* In re Miguel Samonte, Jr., 163 S.W.3d 229, 238 (Tex. App. – El Paso 2005, orig. proceeding) ("Where a report totally omits one of the three required elements, the trial court has a ministerial duty to dismiss the lawsuit with prejudice and has *no discretion* to do otherwise.") (emphasis added).

[34] This Section is drawn largely from LOEWINSOHN & FARQUHAR, EXPERTS—AN OVERVIEW, 22ND ANNUAL ADVANCED EVIDENCE AND DISCOVERY COURSE, STATE BAR OF TEXAS (April 16–17, 2009).

[35] FED. R. CIV. P. 26(b)(4)(B).

[36] FED. R. CIV. P. 26(b)(4)(ii).

[37] C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2032, p. 453 (2d ed. 1994); *see also In re Terra Int'l, Inc*., 134 F.3d 302, 304 (5th Cir. 1998) (orig. proceeding).

Unlike the state rules, however, an opposing party may use interrogatories, requests for production, depositions and all other discovery tools to discover information about the expert his opinions if he is one who is required to produce a written report, as previously discussed.[38] If the testifying expert is not retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, you should consider seeking the information through other discovery methods, such as interrogatories and requests for production. Additionally, you should seek to discover all drafts of the expert report and all communications with anyone related to the opinions. Recent amendments to the Rule

Under Texas rules, the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have *not* been reviewed by a testifying expert are not discoverable.[39] If, however, a testifying expert has reviewed the consulting expert's mental impressions or opinions, the opposing party may discover the same information about the consulting expert that may be discovered about a testifying expert. But that information cannot be obtained through a Rule 194 request for disclosure because that is limited to testifying experts. Therefore, it is necessary to request information about the consulting experts whose mental impressions or opinions have been reviewed by a testifying expert through interrogatories, requests for production, and other types of discovery. A party may not be ordered to allow the opposing party to attend or record tests conducted by consulting only experts.[40] The "consulting expert privilege grants parties and their attorneys a sphere of protection and privacy in which to develop their case."[41]

Discovery about and from a testifying expert may only be obtained through a Rule 194 request for disclosure, oral deposition of the expert and by a report prepared by the expert.[42] Rule 192.3(e) permits discovery of: (1) Name, address and telephone number; (2) the subject matter on which the expert will testify; (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired; (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them; (5) the bias of the witness; (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of testimony; and (7) the expert's current resume and bibliography.

Alternatively, in the event a party does not wish to incur the expense of creating a report, it may tender its retained expert for deposition.[43] However, a party who wishes an expert to have the benefit of an opposing party's expert's opinions before being deposed may trigger designation by providing a report.[44] If the expert has not prepared a written report, a trial court may order that the expert's opinion be reduced

[38] *See* FED. R. CIV. P. 26(a)(2)(B).
[39] TEX. R. CIV. P. 192.3(e).
[40] Gen. Motors. Corp v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997).
[41] Id.
[42] TEX. R. CIV. P. 195.4.
[43] TEX. R. CIV. P. 195 cmt. 3.
[44] Id.

into a written report or other tangible form and produced.[45]

To obtain documents from a non-party expert for impeachment purposes, the party seeking discovery must first present evidence raising the possibility that the expert is biased.[46] *In re Wharton*, 226 S.W.3d at 457.

2. Depositions

Under the Federal Rules, any person who has been identified as an expert whose opinions may be presented at trial may be deposed.[47] If a written report is required by Rule 26(a)(2)(B), the deposition may be conducted only after the report is provided.[48] In Federal court, the party seeking discovery pays the expert a reasonable fee for time spent in responding to discovery, absent manifest injustice.[49]

Texas Rules require that parties seeking affirmative relief must make an expert who is retained by, employed by, or otherwise in the control of that party available for deposition if no report was furnished "reasonably promptly after the expert is designated."[50] If the deposition cannot—due to the actions of the tendering party—reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. If a report is furnished when the expert is designated, the party does not need to make the expert available until after all other experts have been designated.

Parties not seeking affirmative relief must make experts retained by, employed by, or otherwise in that party's control available for deposition "reasonably promptly" after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.[51]

More detailed information from both retained experts and non-retained experts may be obtained through depositions of the experts. A notice of deposition often includes, among other things, a request for: (1) all depositions given by the expert; (2) copies of all treatises, books, and other materials on the subject the expert reviewed, is relying on or considers authoritative; (3) the expert's entire file; (4)copies of all drafts of the report if one is produced; (5) all communications with anyone relating to the case; (6) billing statements and fee agreements relating to the case; and (7) all documents, tangible things, physical models, reports, compilations of data or other material reviewed by, or prepared for the expert for the opinion.

In a Discovery Level 2 case, if one side designates more than two experts, an opposing side may have an additional six hours of deposition time for each additional expert designated. TEX. R. CIV. P. 190.3(b)(2).

At the deposition obtain a clear statement of each opinion held by the expert and the facts which the expert believes support that opinion. Ascertain whether the expert intends to do any additional work on the case. It can be helpful to find out if the

[45] Loftin v. Martin, 776 S.W.2d 145, 147 (Tex. 1989) *overruled on other grounds by* Candian Helicopters Ltd. v. Wittig, 876 S.W.2d 304 (Tex. 1994).

[46] The personal financial information of the expert is generally not discoverable to prove bias. *In re Wharton*, 226 S.W.3d 452, 456 (Tex. App.—Waco 2005, orig. proceeding).

[47] FED. R. CIV. P. 26(b)(4)(A).

[48] Id.

[49] FED. R. CIV. P. 26(b)(4)(C).

[50] TEX. R. CIV. P. 195.3(a).

[51] TEX. R. CIV. P. 195.3(b).

expert arrived at the opinion before or after reviewing documents and/or depositions or other discovery products as opposed to arriving at the opinion solely based on a conversation with counsel.

The Texas Rules provide that the party who retained the expert pays for the expert's time in preparing for, giving, reviewing and correcting the deposition.[52] It can be helpful to have your own consulting expert with you as you depose the opposing expert. This is particularly true if the area is a technical one with which you are not familiar. Your expert may be able to spot a misleading or untrue answer that you can explore at the deposition or suggest questions or interpret jargon. Be sure to give notice that this person will be attending as required by the rules governing notices of deposition.[53] The Federal Rules do not contain a similar provision. Rule 26(2)(c)(E) permits a court to enter a protective order designating the persons who may be present. The Advisory Committee Note to the 1993 revisions states that "[t]he revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party."

CHALLENGING EXPERTS

The *Daubert/Robinson* challenge remains one of the most important aspects of the litigation process. Complex cases can be won or lost in a *Daubert/Robinson* challenge. As one commentator has noted, while the trial lawyers may be the "peacocks" of the courtroom, "often these days it's a tweedy professor, explaining some impossibly arcane subject in plain English, who may make the difference."[54]

In Texas, the factors for the reliability of expert testimony were originally articulated by the Texas Supreme Court in *E.I. DuPont de Nemours & Co. v. Robinson*.[55] Like *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[56] before it at the federal level, *Robinson* represented the beginning of a new era in Texas regarding expert witness testimony. It presented a new analytical framework for courts to apply and litigants to consider when proffering experts to help their case in litigation. As the Court stated, the goal of *Robinson* was to "ensure that expert testimony shows some indicia of reliability."[57]

Nearly thirteen years after *Robinson*, jurisprudence in this area is still developing. Even *Robinson* on its face encouraged a flexible application, implicitly suggesting that later courts would do much of the heavy lifting regarding the development of this area of law.

This ongoing development has produced much uncertainty and inconsistency as to what makes an expert's testimony reliable. Some practitioners have even commented that the "battle of the experts" in the *Daubert/Robinson* era has "evolved into a complex expert crisis."[58] While the term "crisis" may be overstating things, the

[52] TEX. R. CIV. P. 195.7.
[53] TEX. R. CIV. P. 199.2(b)(4).

[54] Jonathan D. Glater, *More and More, Expert Witnesses Make the Difference*, N.Y. TIMES, Aug 19, 2005, at C7.
[55] E.I. DuPont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
[56] Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993).
[57] *Robinson*, 923 S.W.2d at 556.
[58] Sofia Adrogue & Alan Ratliff, *The Care And Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts*, 47 S. TEX. L. REV. 881, 908 (2006).

admission or exclusion of expert testimony remains a high stakes affair with no clear path to victory for those proffering or challenging experts.

OVERVIEW OF THE *DAUBERT* TEST

Daubert is the foundation for the current theory of acceptance of expert analysis. The United States Supreme Court, interpreting Federal Rule of Evidence 702, overruled the long-used "general acceptance" standard for scientific expert evidence, originally set forth in *Frye v. United States*.[59]

Daubert held that the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[60] The Supreme Court did not give a definitive checklist or test, but instead gave a list of factors to consider:[61]

(1) Whether the theory or technique can be or has been scientifically tested;
(2) Whether the theory or technique has been subject to peer review and publication;
(3) The error rate of a particular technique; and
(4) Acceptance of the theory in the scientific community.

The Court further instructed that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.[62]

[59] *Daubert*, 509 U.S. at 588.
[60] Id. at 592.
[61] Id. at 593
[62] Id. at 596

OVERVIEW OF THE *ROBINSON* TEST

Texas Rule of Evidence 702 allows expert testimony if (1) the witness is qualified by knowledge, skill, experience, training, or education; (2) the proposed testimony is scientific, technical, or other specialized knowledge;[63] and (3) the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.[64]

Thus, in addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation.[65] The trial court is responsible for making the preliminary determination of whether the proffered testimony is both relevant[66] and reliable.[67]

Robinson court sets out six factors the trial court may use in making the threshold admissibility determination under TRE 702. The first four factors match those set out in *Daubert*. The *Robinson* factors are as follows:

(1) The extent to which the expert's theory has been or can be tested,
(2) Whether the theory has been subjected to peer review and/or publication,
(3) The technique's potential rate of error,

[63] Expert testimony must generally involve "scientific, technical, or other specialized knowledge" and not only general knowledge and experience that is within the province of the jury to decide. GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 620 (Tex. 1999).
[64] *Robinson*, 923 S.W.2d at 556.
[65] Id.
[66] The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. *Robinson*, 923 S.W.2d at 556.
[67] Id. (citing TEX. R. EVID. 104(a) (the trial court is to decide preliminary questions concerning the admissibility of evidence)).

(4) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community,
(5) The extent to which the technique relies upon the subjective interpretation of the expert, and
(6) The non-judicial uses which have been made of the theory or technique.

Importantly, the *Robinson* court emphasized that this list was non-exhaustive, and that trial courts may consider other factors.[68] Many lower courts initially held that because the Robinson factors specifically discussed scientific testimony, they were inapplicable to non-scientific testimony. The Texas Supreme Court has since made clear that a trial court should consider the *Robinson* factors when doing so will be helpful in determining reliability of an expert's testimony, *regardless of whether the testimony is scientific in nature or experience-based*.[69]

One area where the Robinson factors are not always helpful is in determining the admissibility of non-scientific or experience based evidence.[70] The analytical gap test, which is often applied to nonscientific or experience based evidence, excludes evidence when "there is simply too great an analytical gap between the data and the opinion proffered."[71]

Care should be taken in the application of the analytical gap test. Merely stating the expert's testimony is based upon experience it not enough. As pointed out by the Texas Supreme Court in *Gammill*, "If [skill and experience] were all Rule 702 required, merely establishing the witness's qualifications would show the relevance and reliability of the testimony every time."[72]

The Court went on to say that there are many instances "when the relevance and reliability of an expert witness's testimony *are* shown by the witness's skill and experience."[73] For example, an experienced car mechanic's diagnosis of problems with a car's performance may well be reliable without resorting to engineering principles.[74]

"If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable."[75] If expert opinions are based upon unreliable underlying data they are inadmissible and, thus, no evidence.[76]

APPLICATION OF THE *ROBINSON* FACTORS AND ANALYTICAL GAP TEST

Deciding which test to use can be difficult. A proponent of non-scientific or experience based evidence should be prepared to defend the expert utilizing the *Robinson* factors or to argue why the *Robinson* factors are not helpful in determining admissibility. Remember that the focus of a *Robinson* challenge is "solely on the underlying principles and methodology, not on the conclusions they generate."[77]

[68] *Robinson*, 923 S.W.2d at 557.
[69] Mack Trucks v. Tamez, 206 S.W.3d 572, 578 (Tex. 2006) (emphasis added).
[70] Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998) (instructing courts not to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect).
[71] Id. at 726.
[72] Id. at 722.
[73] Id.
[74] Id.
[75] Merrell Dow Pharms. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).
[76] Id.
[77] Id. at 557 (quoting *Daubert*, 509 U.S. at 595).

Conversely, opponents of the testimony should use the *Robinson* factors to point out any shortcomings in the expert's testimony. If the opponents can link the *Robinson* reliability factors to the expert they are seeking to exclude, then that expert is subject to attack on *Robinson* grounds. Strict application of the *Robinson* factors can be brutal, as the Texas Supreme Court proved in two recent cases:

1. *Mack Trucks v. Tamez*[78]

In *Mack Trucks*, the plaintiff's decedent was the driver of a tractor-trailer hauling crude oil. The truck overturned and the driver was killed in the resulting fire. The trial court applied the *Robinson* factors to exclude a plaintiff's expert. The disputed expert was a specialist in post-collision, fuel-fed fires. He testified that the fire was caused by the tractor's battery once it came in contact with fuel from the truck.

The appellate court held that the *Robinson* factors applied to scientific expert testimony, but that the analytical gap test applied to opinions that were based upon an expert's knowledge, training, or experience. The appellate court then concluded that the trial court erred when it excluded the expert's testimony.

The Texas Supreme Court rejected this bright line separation between the tests, stating that the *Robinson* factors should be used in any case "when doing so will be helpful in determining reliability of an expert's testimony, regardless of whether the testimony is scientific in nature of experience-based."[79] The Court said that it was clarifying its holding in *Gammill*, and that it did not mean to imply in *Gammill* that a trial court should never consider *Robinson* when evaluating nonscientific experts. Instead, the Court made clear that the touchstone for applicability of the *Robinson* factors is not whether a challenged expert's testimony is scientific, but whether the factors would be helpful in determining reliability.

One other important lesson to be learned from *Mack Trucks* is its procedural ruling about the scope of appellate review from a *Daubert/Robinson* ruling. After plaintiff's expert was excluded, the plaintiff moved for reconsideration of that ruling, attached the excluded expert's opinions to a summary judgment response, and later made a bill of exception in support of the motion for reconsideration.[80]

On appeal, the court of appeals relied on the bill of exception and the motion for reconsideration to hold that the trial court abused its discretion in excluding the expert. In the Supreme Court, the defendant argued that evidence presented after the expert had been stricken could not be considered. The Supreme Court agreed with the defendant, holding that it was error for the court of appeals to consider testimony offered only in the bill of exception, after the expert had been excluded.[81]

The Supreme Court's message is clear: an attorney should not hold back on a response to a *Daubert/Robinson* motion for fear or missing the opportunity to make the best record. Strategic decisions to withhold a full presentation of the expert's reliability and opinions are perilous.

2. *Cooper Tire & Rubber Co. v. Mendez*

[78] Mack Trucks v. Tamez, 206 S.W.3d 572 (Tex. 2006).
[79] Id. at 579.
[80] Id. at 576.
[81] Id. at 576-77.

While *Mack Trucks* clarified when *Robinson* should be applied, the Supreme Court also put a more methodical application of the *Robinson* factors on display in another 2006 case, *Cooper Tire & Rubber Co. v. Mendez*.[82] After the trial court and appellate court determined that a causation expert was reliable by using the analytical gap test, the Texas Supreme Court engaged in a thorough and detailed application of the *Robinson* factors and reversed the lower courts' admission.

Cooper Tire was brought by the plaintiffs following a car crash. The plaintiffs theorized that the tire tread separated due to a manufacturing defect, and the tread separation in turn caused the rollover, resulting in deaths and injuries to the occupants of the vehicle. The plaintiffs proffered an expert who had worked for many years at the Dunlop Tire Company in England, in its technical department, tire examination lab, and technical service section, where he examined tires including tires that had failed and subsequently wrote a book on tire failures. He conceded that he was not a chemist, an engineer, or a tire designer.

The expert presented a lengthy hypothesis to support his opinion that a manufacturing defect caused the separation and the accident. He opined that the tire separated because the skim stock was contaminated with hydrocarbon wax. He testified that the tread separation did not originate at a nail hole in the tire because he detected "polishing" in other portions of the tire's layers, indicating that the separation started elsewhere. The expert also asserted that the presence of "liner marks," left by the canvas or other material on which rubber is placed before vulcanization, was further visual proof of his theory. The presence of these marks, in his opinion, indicated faulty adhesion. He also offered reasons that the tire did not fail due to the nail, excessive vehicle weight, under-inflation, or ordinary wear.

The trial court admitted this expert testimony, and was affirmed on appeal. The appellate court described the *Robinson* factors, but then refused to apply them. The court cited *Gammill* for the proposition that *Robinson* need not be applied to nonscientific experts. Instead, the court proceeded to describe the method by which the expert reached his conclusion and then announced that it was reliable under the analytical gap test from *Gammill*. The court stated that the expert was reliable because he presented "thorough information concerning his methodology, and (made it) clear that his expertise rested on his many years of experience in tire examination for Dunlop and as an independent tire failure analyst."[83]

The Supreme Court reversed the appellate court and held that the expert's theory of wax contamination was unreliable. The Court determined that this theory amounted to no more than "subjective belief or unsupported speculation." The Court initially stated that the *Robinson* factors did not provide a perfect template, and would be used for guidance. However, this rather tepid introduction of *Robinson* was not representative of what the Court's actual analysis would be.

The Court's methodical application of the *Robinson* factors effectively crucified the plaintiff's expert. The Court analyzed each factor and noted the challenged

[82] Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 799 (Tex. 2006).

[83] Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 397 (Tex. App.—El Paso 2004) *rev'd by Mendez*, 204 S.W.3d 797 (Tex. 2006).

expert's failure to meet each one. Specifically, the Court noted that "the record [was] devoid of any scientific testing or peer-reviewed studies confirming the hypothesis that wax contamination causes radial tire belts to separate." The Court also gave no weight to the expert's own book, which of course touted his wax contamination theory, as a valid peer review. The Court also considered the fact that the expert had not "done any type of mathematical calculation with respect to anything in this case," and noted that the record was devoid of proof that his theory was generally accepted in his field. Finally, the Court observed that the plaintiffs offered no proof that the wax contamination theory had any recognition in the non-litigation context.

The Court then proceeded to attack the expert under the analytical gap test. The Court pointed out that the expert relied on unreliable evidence for his theory on how the wax was introduced into the tire, and then stated it was not required to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect.

3. *Ford Motor Company v. Ledesma*

Mack Trucks clarified the scope of applicability of the *Robinson* factors, and *Cooper Tires* showed just how damning those factors can be when critically applied to any expert. That is not to say that the analytical gap test is dead. To the contrary the Texas Supreme Court utilized the test in *Ford Motor Company v. Ledesma*.[84] The main issue in *Ledesma* was an alleged error in the jury charge. However, the court dealt with the defendants' allegation of unreliable expert testimony first because excluding the testimony would require the Court to reverse the decision in favor of the defendant.[85]

Ledesma claimed a defect caused the drive shaft to fail and as a result he lost control of the truck, hitting a parked car. Ford claimed that Ledesma was speeding when he lost control and that the drive shaft was dislodged by the force of the accident.

Ledesma's expert, a metallurgical and mechanical engineer, opined that the drive shaft separated because the legs of the u-bolts fastening the drive shaft to the truck were uneven. The Court listed the six Robinson factors, then declined to apply them, recognizing that the factors are not exclusive. After a review of the expert's testimony, the Court concluded that the testimony did not present a case where "there is simply too great an analytical gap between the data and the opinion offered."[86] The court concluded that Ford's complaints went to the weight of the evidence, not its admissibility.

4. Whirlpool Corp. v. Camacho

In addition, in *Whirlpool Corp. v. Camacho*, defendants challenged the admissibility of the plaintiff's expert's opinion as not reliable and challenged the legal sufficiency of the evidence to support the jury submission of a design defect on the basis that the expert's testimony was the only support for the submission and that his testimony "was not reliable, was based on unfounded assumptions, and was conclusory."[87] The trial court overruled these objections and the Corpus Christi court of appeals affirmed. The appeals court, however, limited its review to the

[84] Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007)

[85] Id. at n.2

[86] Id.

[87] Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 636 (Tex. 2009).

admissibility of the testimony due to reliability. The appeals court stated, "[T]he analytical gap test is the appropriate way to analyze the [Plaintiffs'] expert testimony because such testimony in the instant case is based on the experience of the testifying expert."[88]

But the Texas Supreme Court found that the court of appeals did not conduct the proper review in refusing to apply the Robinson factors. Indeed, citing *Mack Trucks*, the court concluded that the proper standard of review for a legal sufficiency challenge to testimony based on scientific testing and methodology required the court of appeals to evaluate the expert's testimony by considering both the *Robinson*-type factors and examining the record for existence of analytical gaps under *Gammill*. The court noted that the "[t]he proponent of the [expert] testimony must satisfy its burden regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony wrong."

5. Transcontinental Ins. Co. v. Crump.

Similarly, in *Transcontinental Ins.Co. v. Crump*, the Texas Supreme Court held that both the *Robinson* and *Gammill* analyses must be applied to expert testimony.[89] In that case, Charles Crump died of injuries allegedly sustained while at work. His wife applied for workers' compensation death benefits. After an administrative proceeding, the hearing officer found that indeed Crump's work related injury was the producing cause of his death and awarded death benefits to Crump's wife.

Transcontinental Insurance, the employer's workers' compensation carrier, sought judicial review. Transcontinental offered the testimony of Dr. Hunt, who opined that the work related injury was not the cause of Crump's death. Mrs. Crump offered Dr. Daller to rebut Hunt's opinion. Transcontinental objected to Dr. Daller's testimony on the basis that the testimony was not founded on reliable evidence and therefore legally insufficient evidence of causation.

The Texas Fourteenth Court of Appeals held that it was appropriate for the trial court to evaluate only whether there was an analytical gap between Dr. Daller's opinion and the bases on which his opinion was founded.[90] Indeed, the Court of Appeals stated that "where Dr. Daller's opinion was based on his experience and training in his field, we consider whether there is an 'analytical gap' between the expert's opinion and the bases on which the opinion was founded."[91]

The Texas Supreme Court, however, disagreed with the appeals court's limited evaluation of Dr. Daller's opinion and with Crump's argument that the application of the *Robinson* factors was tempered because Dr. Daller used a reliable medical technique to support his expert opinions. The Court stated:

> This is the approach adopted by the court of appeals below, which refused to apply [*Robinson*] at all. We have held the opposite to be true: "[T]he relevance and

[88] Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 96 (Tex. App.—Corpus Christi 2008) *reversed by Camacho*, 298 S.W.3d 631 (Tex. 2009).
[89] Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010).
[90] Transcontinental Ins. Co. v. Crump, 274 S.W.3d 86 (Tex. App.—Hous.[14th] 2008) *reversed by Crump*, 330 S.W.3d 211 (Tex. 2010).
[91] Id. at 97.

> reliability requirements of Rule 702 [apply] to all expert evidence offered under the rule, even though the criteria for assessing relevance and reliability must vary, depending on the nature of the evidence." *Gamill*, 972 S.W.2d at 727; *see also Camacho*, 298 S.W.3d at 638. The mere fact that differential diagnosis was used does not exempt the foundation of a treating physician's expert opinion from scrutiny—it is to be evaluated for reliability as carefully as any other expert's testimony. Both *Robinson* and *Gammill* analyses are appropriate in this context.[92]

Thus, although the *Robinson* factors are not a definitive checklist for every single expert, the Court has certainly indicated that it does not want lower courts to be so quick to shrug them off. The *Robinson* factors should be considered in *every* case, regardless of whether the testimony is scientific in nature or based on the expert's experience.

PRACTICE POINTERS

This article will conclude with a series of practice pointers to help you win or successfully withstand a *Daubert/Robinson* challenge. Whether you are bringing or opposing expert testimony, keep in mind four central concerns in evaluating the expert and the expert's testimony:

- Is the expert qualified and do the actual qualifications of the expert enable that expert to assist the trier of fact with regard to controverted issues?
- Is the expert's opinion supported by reliable methodology?
- Is the expert's opinion based upon reliable data?
- Is the expert's opinion so confusing or prejudicial that it should be excluded under Rule 403?[93]

1. Presenting and Defending Experts

Discuss *Daubert*/*Robinson* with your expert up front.[94] An expert can be best prepared to withstand an attack under *Daubert/Robinson* if he or she understands the grounds for exclusion. Explain up front that you will need to work closely together to meet *Daubert*/*Robinson* standards. Also consider giving the expert a *Daubert*/*Robinson* package of some of the greatest hits in this area:

1. Federal
   - FRCP 26(a)(2) [Disclosure of Expert Testimony]
   - FRE 702 [Testimony by Experts] and 703 [Basis of Opinion Testimony by Experts]
   - *Daubert* and *Kumho Tire* decisions
   - Decisions in expert's field
   - Examples of good expert reports.

2. Texas
   - TRCP 194
   - TRE 702 [Testimony by Experts] and 703 [Basis of Opinion Testimony by Experts]
   - *Robinson*, *Havner* and *Gammill* decisions
   - Decisions in the expert's field.

Investigate your own expert. Before retention of an expert, ask the expert to

[92] *Crump*, 330 S.W.3d at 216–17.

[93] Linda J. Burgess & James G. Ruiz, *Strategies on Expert Discovery*, *in* the State Bar of Texas 17th Annual Advanced Evidence & Discovery Course, Chap. 12, pg. 1 (2004).

[94] DaubertOnTheWeb.Com, Tactics, http://www.daubertontheweb.com/tactics.htm (last visited Feb 27, 2007).

demonstrate to you that the method he will use to form an opinion rests on a scientifically reliable foundation. If the expert can prove it to you, you may be able to prove it to the judge. If the expert cannot prove it to you, get another expert. Also you should get an affidavit from the expert stating that he or she has never been the subject of a successful *Robinson* challenge. If the expert has been the subject of a successful challenge, get a transcript—opposing counsel will.[95] Find out if the expert uses the methodologies in everyday practice. Avoid, if possible, experts who work only in litigation.

Use the pretrial practice to lay the groundwork early. Use Interrogatories and Requests for Production to start laying the groundwork for responding to Daubert Challenges.[96] Example requests include:

- INTERROGATORY NO. ____: Please list those expert witnesses (if any) identified by whom you contend are not qualified to render opinions under the standards set forth in *Robinson v. E.I. Dupont Denemours*, 923 S.W.2d 549 (Tex. 1995), or in any subsequent opinion by the Supreme Court of Texas which you contend extends the holdings of *Robinson* and state:
  a. The identity of the expert;
  b. The substance of the opinion;
  c. Describe the basis of your contention that the expert is not qualified;
  d. Describe the basis of your contention that the opinion is not reliable.
- REQUEST FOR PRODUCTION NO. ____: All materials, including but not limited to, prior testimony or reports and case law, which you intend to use with regard to your contention, if any, that an expert designated by any party to this suit is not qualified to render opinions or that any opinion rendered by any expert designated by any party to this suit is not reliable under the standards set forth in *Robinson v. E.I. Dupont Denemours*, 923 S.W.2d 549 (Tex. 1995), or of any subsequent opinions by the Supreme Court of Texas that you contend extends the holdings of *Robinson*.

Consider putting *Daubert*/*Robinson* in the pretrial order.[97] Putting a deadline in the scheduling order will prevent the opposing party from attempting to challenge the expert shortly before trial or at trial. In any case you want all *Daubert/ Robinson* challenges to be completed before the discovery cut-off so there is time to find a new expert, if necessary. A scheduling order may state:

An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within ___ days of receipt of the written report of the expert's proposed testimony, or within ___ days of the expert's deposition, if a deposition is taken, whichever is later.[98]

Pay close attention to the expert testimony. The lawyer should help the

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[95] Larry G. Black, *Daubert Challenge through the Eyes of the Litigator and the Expert*, in the State Bar of Texas Suing and Defending Government Entities Course, Chap. 18, pg 2 (2004).

[96] Hon. Joseph M. Cox & George Quesada, *Advanced Procedural Tactics*, in the State Bar of Texas 21st Annual Advanced Personal Injury Law Course, Chap. 28, pg. 2 (2005).

[97] DaubertOnTheWeb.Com, Tactics, http://www.daubertontheweb.com/tactics.htm (last visited Feb 27, 2007).

[98] *See e.g.*, Local Court Rules for the Western District of Texas, Appendix B.

expert meet the *Daubert/Robinson* requirements both in drafting the expert report and when offering testimony. Keep the following in mind when helping the expert prepare:

- *Include the methods and resources relied upon.* The expert should use methodology generally accepted by other experts in that field. Question your expert about the methodology employed. Who uses the methodology? Does the expert use the methodology in his/her everyday work? Does the opponent use this methodology? It is not enough for the expert to say that the methodology or conclusion is valid "because I say so and I'm the expert" or "because I have vast experience in this field."[99]

- *Rule Out Alternative Causes.* An expert should consider all possible causes of the plaintiff's injury, then rule out possible causes until only the most likely cause remains.[100] Failure to consider all possible causes may result in the exclusion of the expert's testimony.[101]

- *Calculations/Supporting Data Are a Plus.* Include mathematical calculations to demonstrate and/or support an expert's theory can preclude a very likely area of attack from opposing counsel.[102] As seen in *Cooper Tire*, the absence of mathematical calculations when a Court inquires about them can hurt your expert.

- *Divide the testimony into subparts.* If the expert's ultimate theory is novel or controversial, split the testimony into subparts or mini-conclusions that support the expert's more controversial ultimate theme, which may be inadmissible.[103] See *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (expert's calculations of hedonic damages were controversial and inadmissible, but expert was still able to testify as to the meaning of hedonic damages).

Admit that there could be disagreement. It is helpful to try to argue for the admissibility of your expert by admitting that there is room for disagreement with the expert's theory. However, the jury is the proper body to decide who is right. If you can convince the court that your opponent is really just unhappy with the conclusions of your expert and is trying to have the court make a credibility decision, you are helping your cause. Along these lines, pay close attention to the challenges made by your opponent to look for areas where your expert's final opinion is criticized as opposed to his or her methodology.

Prepare for the deposition. If opposing counsel takes the deposition of your expert, expect that he or she will have a good working knowledge of the field, will have investigated the expert and will have picked apart any statement made by or about the

[99] *Cooper Tire & Rubber Co.*, 204 S.W.3d at 801. (holding an expert can not rely on his own book and articles to verify his conclusions).

[100] Smith, Craig T., *Peering into the Microscope: The Rise of Judicial Gatekeeping After Daubert and Its Effect on Federal Toxic Tort Litigation*, 13 B.U. J. SCI. & TECH. L. 218, 225 (Summer 2007).

[101] *Robinson*, 923 S.W.2d at 558-559 (holding that the trial court did not abuse its discretion by excluding the expert's testimony because the expert did not exclude other possible causes, even though he admitted in his deposition that many other possible causes existed).

[102] *See Ramirez* 159 S.W.3d 897 (Tex. 2004).

[103] DaubertOnTheWeb.Com, Tactics, http://www.daubertontheweb.com/tactics.htm (last visited Mar. 28, 2011).

expert. A deposition checklist is a good place to start for a list of relevant questions opposing counsel is likely to ask. However, also expect detailed questions about the expert, the expert reports, methodology, etc. Have a good working knowledge of the field. Additionally, the opponent may attempt to get the expert to restate the findings of the expert report. Avoid this. It only opens the door for inconsistencies in the expert's testimony. If the answer to the question is addressed in the expert report in paragraph 5, have the expert say so.

Watch the Record. If you are defending an expert, you should have something in the record to defend every step of an expert's opinion. The Supreme Court took a keen interest in the lack of record support for the expert's hypothesis in *Cooper Tire*, and eventually reversed the trial court's decision to admit. The more publications, studies, charts, etc. that you can include to support your expert at every step, the better off you'll be.

Defending a *Daubert* Challenge.

- First make sure that the challenge is specific. A judge should not entertain challenges that merely state the proffered testimony is unreliable without listing any reasons.
- Send any challenge to the expert. The expert will know better than anyone how to defend his or her report.
- Get affidavits from other experts agreeing that the methodology used is sound. Your expert may know of others who can review the report.
- Gather all peer reviewed literature and court cases approving of the methodology.
- File your own challenge. Failing to attack the opposing party's expert may give the false appearance that the opposing expert's methodology is sound and above reproach.
- Don't forget to look at other Daubert opinions written by your judge.

2. Excluding or Cross Examining Experts

Decide whether to take an expert deposition. An attorney must weigh the benefits and risks of taking an expert deposition. Some factors against taking an expert deposition include:

- Disclosing strategies for cross examination at trial;
- Educating the witness and opposing counsel;
- Giving the expert the opportunity to expand opinions beyond those in the original report.[104]

Thus, if an attorney's goal is to "surprise" the expert, skipping the expert deposition may help accomplish that goal. Without a deposition, the attorney and the attorney's cross-examination strategies will remain unknown to the expert.[105]

However, unless an attorney conducts a deposition, much of the expert's opinions and methodology will remain unknown to the attorney. Unless a deposition is taken, the attorney will not know whether he or she has opened the door to evidence that might otherwise be precluded.[106] Thus, if the expert is important to the opposing party and the report suggests questionable methodology, taking the deposition is probably worth the drawbacks.[107]

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[104] Burgess, *supra* note 94, at 2.
[105] Id.
[106] Id. (citing FRCP 37(c)(1) [Failure to Disclose]; TEX. R. CIV. P. 193.6 [Failing to Timely Respond—Effect on Trial]).
[107] Id.

Another factor weighing in favor of taking an expert deposition is to fully probe the data relied upon by the expert in forming his or her opinion. Discovering that the expert relied on inadmissible data in discovery will allow the attorney to decide how far to probe the experts basis during cross examination. See discussion on cross examination below.

Prepare for the deposition. If you decide to take the expert's deposition, prepare carefully. Investigate the expert before the deposition. An investigation may include:

- Taking to your own expert;
- Talking to lawyers who have previously deposed the expert.
- Collect and review deposition testimony the expert has given in other cases.
- Read what the expert is written on the topic.
- Run a Lexis/Westlaw search on the expert. You may find the expert was previously the subject of a *Daubert/ Robinson* challenge.
- Run a Lexis/Westlaw search on the testing method, equipment or other specific data used by the expert.
- Run a general internet search on the expert.[108]

Also become familiar with the technology used by the expert. A lawyer may also consult the Reference Manual on Scientific Evidence published by the Federal Judicial Center.[109] The manual explains some common scientific terms and statistical methodology.[110]

Timing of the expert challenge. The best time to bring a challenge is after it is too late for the opposing party to designate a new expert. Therefore, striking an expert just before trial or during trial may be the most devastating to you opponent.[111] Remember that testimony that does not satisfy Daubert "is . . . legally, no evidence," and cannot support a verdict.[112] Be very careful when using this tactic. Consider whether the court is likely to grant a continuance in order to give the opposing party time to find a new expert. Additionally, the judge may have little tolerance for such tactics. Also look closely at local rules.[113]

Attack the gap. As shown above, the *Gammill* analytical gap test has become exceedingly popular in Texas courts. When preparing your challenge, find analytical gaps in the expert's method or application of that method and point them out. Look for steps in that expert's analysis where there aren't calculations or data to back up conclusions. Expert opinions based on an unreliable factual foundation will not be admitted.[114]

It is also well settled that an expert's bare opinion will not pass the reliability stage,[115] so point out where the expert has failed to connect the dots between the data relied on and the opinion offered.

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[108] Id. at 4.

[109] Id.

[110] A full copy of the manual is available at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/610.

[111] Burgess, *supra* note 94, at 8.

[112] Id. (citing *Havner*, 953 S.W.2d 706, 714, 730).

[113] Id.

[114] *See Ramirez*, 159 S.W.3d at 912 (holding an expert's theory inadmissible where there were no scientific tests or calculations to support the theory); *Havner*, 953 S.W.2d at 714 (reasoning that an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology).

[115] *Ramirez*, 159 S.W.3d at 906 (Tex. 2004).

Get to know your *Robinson* factors, particularly in light of the Supreme Court's decisions in 2006. As discussed above, the Supreme Court held in *Mack Trucks* that if the *Robinson* factors are shown to be helpful to a reliability analysis, they are applicable. The days of expert proponents picking and choosing between the tests are gone. The onus is now on the defense lawyer to link the *Robinson* factors with the court's reliability analysis. Proponents of experts would prefer the analytical gap test to the scrutiny of the six *Robinson* factors, because it is less strenuous. As we saw in *Cooper Tire*, the *Robinson* factors can be particularly harsh when methodically applied. Thus, it is well worth the lawyer's time to find a link and advocate their application.

There is no "fit." Create distance between the expert's expertise and the case facts—essentially there is no fit between the expert's method and the facts of *this* case. This is like distinguishing legal authority, only easier, since one expertise is rarely broad enough to encompass every type of case that could arise. This is an argument that can be made no matter how well-qualified the proffered expert is.

Don't open the door to otherwise excluded evidence during cross examination. Under the federal rules an expert may rely on inadmissible data to form an opinion or make an inference. But, the inadmissible data shall not be disclosed by the proponent to the jury unless the judge determines the probative value substantially outweighs the prejudicial effect.[116]

However, as noted by the advisory committee, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment.

Therefore, during a cross examination the opponent must be careful not to open the door to otherwise excluded evidence. A detailed deposition of the expert, including the data relied upon by the expert will help the attorney decide what underlying expert data should be questioned.

Under the Texas rule, when the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.[117]

Thus, it is easier to for a proponent of the evidence to get otherwise inadmissible evidence into trial through the expert in Texas. The federal rule requires that the inadmissible evidence *substantially* outweigh the prejudicial effect. Texas only requires that the danger of misuse *outweigh* the value of the evidence as an explanation or is unfairly prejudicial.

Therefore, it is the responsibility of the opposing party to raise an objection to the introduction of inadmissible facts. [118]

[116] FED. R. EVID. 703.

[117] Tex. R. Evid. 705.

[118] Burgess, *supra* note 94, at 3; Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins., 127 S.W.3d 50, 57 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Object! To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered.[119] Although, in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009), the Supreme Court held that no objection to the admissibility of the expert testimony was required to preserve the error where the proffering party's expert's conclusory opinion could not be considered probative evidence on its face, one should not rely on this "facially conclusory" argument and should always object to the admissibility of the opposing expert's opinion.

Moreover, a ruling on a motion in limine does not preserve error for appeal.[120] The federal rules have an exception if there is a definitive ruling.[121]

[119] Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).
[120] *Acord v. General Motors Corp*., 669 S.W.2d 111, 116 (Tex. 1984).
[121] *See* Fed. R. Evid. 103.

APPENDIX ___—CASE SUMMARIES

Case	Court	Description
Federal		
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).	USSC	The trial court is the "gatekeeper" and must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The factors the trial court should consider when determining whether evidence is relevant and reliable include: 1. Whether the theory or technique can be and has been tested, 2. Whether the theory or technique has been subjected to peer review and publication, 3. The theory or technique's known or potential rate of error, and 4. Whether the theory or technique has gained "general acceptance" in the relevant scientific community.
Texas		
E.I. DuPont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).	TXSC	The Texas version of *Daubert*. The court adopted a list of factors which a trial court may consider when evaluating the reliability of an expert's testimony. The list is not exhaustive: 1. The extent to which the expert's theory has been or can be tested, 2. The extent to which the technique relies upon 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 have been made of the theory or technique.

Case	Court	Description
Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).	TXSC	Held that expert opinions based upon unreliable underlying data are inadmissible. An expert's opinion may be excluded as unreliable in the following situations: 1. If the foundational data underlying opinion testimony is unreliable. 2. If the underlying data is sound but the expert draws conclusions from that data based on flawed methodology. 3. When the expert's reasoning is flawed, as above, any inferences drawn from the flawed analysis will also be unreliable. Under these circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.
Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998).	TXSC	Urged trial courts to look closely for analytical gaps between the facts of a case and the opinions of non-scientific, experience-based experts. The case ultimately caused confusion as to whether the *Robinson* factors or a less stringent "analytical gap test" applied to non-scientific experts.
Mack Trucks v. Tamez, 206 S.W.3d 572 (Tex. 2006).	TXSC	Clarified *Gammill*. Held the *Robinson* factors should be used in any case "when doing so will be helpful in determining reliability of an expert's testimony, regardless of whether the testimony is scientific in nature of experience-based." If a lawyer can show that the *Robinson* factors are helpful to the reliability analysis, they should be utilized.
Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797 (Tex. 2006).	TXSC	Excluded the experience-based experts after a very methodical application of the *Robinson* factors.
Whirlpool Corporation v. Camacho, 298 S.W.3d 631 (Tex. 2009).	TXSC	Proper review of a legal sufficiency claim involving scientific based evidence or methodology requires both *Robinson* and *Gammill* evaluation.
Transcontinental Insurance Co. v. Crump, 330 S.W.3d 211 (Tex. 2010)	TXSC	Must apply both Robinson and *Gammill* to experts' medical opinion based on experience.