Distinguishing Facts, Lay and Expert Opinions

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CHAPTER 18

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Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas
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Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (1999) (2 Volume Set)

Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)

Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal, 41 SOUTH TEXAS LAW REVIEW 111 (2000)

Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

Characterization of Marital Property, 39 BAY. L. REV. 909 (1988) (co-authored)

Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines, 13 ST. MARY'S L.J. 477 (1982)

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State Bar's Advanced Family Law Course

Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000)

State Bar's Marriage Dissolution Course

Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000)

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Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Adv. Evidence & Discovery Course

Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000)

State Bar's Advanced Appellate Course

Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000)

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Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

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Judge Brown is active in the community. He has been on the board of Houston Habitat for Humanity since 1995, served as its vice president during the Jimmy Carter work project in 1998, served as the chair of its long-range planning committee and will become its president in July 2000. He has served as a volunteer for the Spring Branch Sports Association since 1992 and has worked as a coach, director and commissioner for baseball, basketball, soccer and softball. He is also a Sunday school teacher and elder at his church.

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Member, Education Committee, 1990–1992;
Financial Aid Committee, 1992 – 1994;
Ad Hoc Curriculum Study Committee, 1993–1995;
Master Plan Committee, 1996–1997;
Committee of Trustees, 1996–1997;
Coordinator, Diversity Awareness Organization, Steering Committee, 1993 – 1995
Hamilton Park United Methodist Church; Administrative Board, 1992 – 1998;
Chair, Finance Committee, 1995 – 1998
The Child Care Group; Board of Trustees, 1999-Present
African American Museum, 1994 – present; Board of Directors
Jack and Jill of America Foundation; Board of Directors, 1990 - 1994
The Center for Non-Profit Management, Inc.; Board of Directors, 1992
North Texas Public Broadcasting Corporation;
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Born in Baton Rouge, Louisiana on October 17, 1948.

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Distinguishing Facts, Lay and Expert Opinions ©

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I. SCOPE OF ARTICLE. This article considers the distinction between fact testimony, lay opinions under Rule 701, and expert opinions under Rule of Evidence 702. The article discusses differences between the roles of lay witnesses and expert witnesses. In this article, FRE = Federal Rules of Evidence. TRE = Texas Rules of Evidence.

II. FACT TESTIMONY. There are a number of rules of evidence relating to fact witnesses.

A. COMPETENCY. TRE 601 relates to the competency of witnesses, generally. Under Rule 601, witnesses are normally competent to testify, except for insane persons, children or other impaired persons who appear not to possess sufficient intellect to answer questions, and parties litigating against representatives of a deceased or incompetent person (the "dead man rule"). Rule 601 provides:

> **Rule 601. Competency and Incompetency of Witnesses**
>
> (a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:
>
> > (1) Insane persons. Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.
> >
> > (2) Children. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.
>
> (b) "Dead Man's Rule" in Civil Actions. In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

B. PERSONAL KNOWLEDGE REQUIRED. TRE 602 requires all witnesses, except experts, to have personal knowledge about what they say. TRE 602 provides:

> **Rule 602. Lack of Personal Knowledge**
>
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has

> personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

III. LAY OPINIONS.

A. TRE 701. TRE 701 governs opinions by lay witnesses in Texas courts. The Rule reads:

> **Rule 701. Opinion Testimony by Lay Witnesses**
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

TRE 701has some parallels to TRE 702, which suggests that there is a gate-keeping function for the trial court with regard to lay opinions. A lay opinion must be rationally based on a perception of the witness. The court should engage in an assessment of the reasoning process in arriving at the lay opinion, and if an opinion does not seem to the court to be rational then it should be excluded. And a lay opinion must be helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. This helpfulness requirement is analogous to TRE 702's requirement that expert testimony assist the trier of fact.

B. FRE 701. FRE 701 was amended effective December 1, 2000. New FRE 701 reads:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The amendment to FRE 701 clarifies the distinction between a lay opinion and an expert opinion. It should be noted that even an expert may give an opinion under Rule 701, where the opinion is not based on scientific, technical, or other specialized knowledge that are properly the province of Rule 702.

It is instructive to read the advisory committee's comment to the December 2000 amendment to FRE 701:

> 2000 Amendments
>
> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony." and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process") See also United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").
>
> The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g, United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could

testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." Asplundh Mfg. Div. v. Benton Harbor Eng' g, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. See, e.g., Lightning Lube, Inc. v. Witco Corp. 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. See, e.g., United States v. Westbrook, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. United States v. Figueroa-Lopez, supra.

The amendment incorporates the distinctions set forth in State v. Brown, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In Brown, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in Brown noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

C. CASE LAW.

1. U.S. v. Williams Case. *United States v. Williams*, 212 F.3d 1305, 1313 (D.C.Cir. 2000), said:

> The Office of Legal Education of the Executive Office for United States Attorneys provides guidelines to establish a proper foundation for the opinion testimony of a skilled lay observer:
> 1. That the witness has, on prior occasions sufficient in number to support a reasonable inference of knowledge of or familiarity with a subject, observed particular events, conditions, or other matters.

2. That the witness on a certain occasion observed a specific event, condition, or matter of the same nature as previously observed.

3. That on the basis of his knowledge or familiarity with the event, condition or matter, he has an opinion as to the event, condition or matter involved in the case.

4. That the statement of the opinion will be helpful to a clear understanding of the testimony of the witness [or] the determination of a fact in issue.

2. U.S. v. Riddle Case. *United States v. Riddle*, 103 F.3d 423, 428-29 (5th Cir. 1997), said:

> Before Meier began his testimony, the parties and the court agreed that the prosecution had not designated him as an expert and that he would not be offering expert testimony. Counsel for the government told the court that "what I want this witness to talk about are the specific facts that he observed." This would include such things as accounts of Meier's interaction with bank officials during his examinations and personal observations of bank records and practices.
>
> With this assurance, the trial court allowed the government to proceed. However, with each new trial day the government pushed to squeeze as much as possible from this "lay witness." The result is clear, certainly now, that during Meier's two-and-a-half days on the stand, he wielded his expertise as a bank examiner in a way that is incompatible with a lay witness. In connection with his examination of TNB-Post Oak, Meier explained that "[a]ccording to 12 C.F.R. 32.5, when repayment is expected from only one source, then all of the advances must be combined, again, coming from that one source." Over the defense's objections, Meier expressed his opinion that it was not "prudent" for a bank to rely on repurchase agreements issued by banks selling participations rather than on the creditworthiness of borrowers. The next day, Meier expressed his view that bank officers should discuss OCC circulars when the bank receives them and that the OCC expects officers such as Riddle to know the contents of circulars. The defense objected at length to Meier's testimony about the OCC's position on whether a bank director may bring loans to his bank. In response, the court reminded that Meier was not an expert, but that his reports had been available for some time and that his testimony should come as no surprise to the defense. "Even if you do consider him an expert," the court noted, "it seems to me that we have satisfied the requirements of the rule."
>
> Meier continued to draw on his specialized knowledge as a bank examiner. He testified that it was imprudent "to have the buyback letter stand separate and apart from the participation certificate itself with neither referencing the other." He asserted that TNB-W violated OCC regulations when it failed to record the fact that Riddle received proceeds from its purchase of participations. He even speculated that unsafe and unsound lending practices, including loans to insiders, caused TNB-W's failure.
>
> Under Fed.R.Evid. 701, a lay opinion must be based on personal perception, must "be one that a normal person would form from those perceptions," and must be helpful to the jury. Soden v. Freightliner Corp., 714 F.2d 498, 510-12 (5th Cir.1983) (quoting Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 263 (5th Cir. 1980)). We have allowed lay witnesses to express opinions that required specialized knowledge. In Soden, a witness in charge of truck maintenance testified that, based on his experience, step brackets caused the punctures in a fuel tank that had been brought into his repair yard. We held that the district court did not abuse its discretion when it allowed the plaintiff to introduce such lay opinion testimony. "No great leap of logic or expertise was necessary for one in Lasere's position to move from his observation of holes in Freightliner fuel tanks at the location of the step brackets, and presumably caused by them, to his opinion that the situation was dangerous." Id. at 512. Other circuits have construed Rule 701 even more broadly. See Wactor v. Spartan Transp. Corp., 27 F.3d 347, 351 (8th Cir.1 994) (admitting under Fed.R. Evid. 701 the opinions of lockmen, "based as they were upon their years of personal experience, their personal inspection of the lockline, their participation with Wactor in the stoppage of the barges, and their positions as the sole eyewitnesses to the wrapping, fouling, and breaking of the line"); Williams Enterprises v. Sherman R. Smoot Co., 938 F.2d 230, 233-34 (D.C. Cir. 1991) (allowing an insurance broker who had personal knowledge of an insured's business to offer lay opinion testimony on the cause of an increase in the insured's premiums); United States v. Fowler, 932 F.2d 306, 312 (4th Cir. 1991) (admitting lay opinion evidence as to

whether a certain government official would know whether classified budget documents were available to contractors).

Meier, however, went beyond the lay testimony in Soden, as well as the testimony in cases from other circuits. He did not merely draw straightforward conclusions from observations informed by his own experience. Instead, he purported to describe sound banking practices in the abstract. He told the jury how the OCC viewed certain complex transactions. And he asserted a causal relationship between Riddle's alleged wrong-doing and the ultimate failure of TNB-W. He functioned not as a witness relaying his own observations so much as a knowledgeable bank examiner who could provide the jury with an overview of banking regulations and practices and who could authoritatively condemn Riddle's actions. He did not offer testimony that a lay person would have been able to offer after conducting the examinations. The district court erred in allowing Meier's testimony under Fed.R.Evid. 701.

The government insists that Meier was nothing more than a fact witness because his review of TNB-W files and the 1985 and 1986 examinations gave him personal knowledge of their contents. It is true that "[t]he modern trend favors the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination." Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980). Based on this rule, Meier could draw specific conclusions from his work on the 1984 and 1987 examinations, such as that Riddle did not heed Meier's 1984 advice on self-dealing. See United States v. Leo, 941 F.2d 181, 192-93 (3d Cir.1991) (allowing an auditor to relate the basis for his opinion that the defendant had altered purchase order dates in a government contract); United States v. Grote, 632 F.2d 387, 390 (5th Cir. 1980) (allowing an IRS official to compare a defendant's tax returns by characterizing some as "acceptable" and some as "unacceptable"), cert. denied, 454 U.S. 819, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981). But latitude under Rule 701 does not extend to general claims about how banks should conduct their affairs. Meier's opinions that TNB-W operated imprudently and that its imprudence caused it to fail depend on an expert's understanding of the banking industry.

3. U.S. v. Anderskow Case. *United States v. Anderskow*, 88 F.3d 245, 254 (3d Cir. 1996), said:

> We have held that lay opinion testimony can be based upon a witness' "knowledge and participation in the day-to-day affairs of his business," Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1175 (3d Cir. 1993), and upon a witness' review of written documents. United States v. Leo, 941 F.2d 181, 193 (3d Cir.1991); Teen- Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403-04 (3d Cir.1980). Alevy's testimony revealed that he had contact with Anchors by telephone and via facsimile on a weekly basis in the fall of 1991. Most of this correspondence concerned loan schedules that had been promised to borrowers. In explaining the workings of the Trust and the roles of its various members, Alevy testified that he would provide schedules containing false information to Anchors so that he could pass them along to the borrowers. We think that in light of the weekly correspondence by telephone and facsimile between Alevy and Anchors, Alevy had sufficient first-hand knowledge such that his opinion was "rationally based" on his perceptions. Lightning Lube, Inc., 4 F.3d at 1175; Leo, 941 F.2d at 193; Teen-Ed, Inc., 620 F.2d at 403-04.

4. Securiton Case. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2nd Cir. 1995), said:

> Fed. R. Evid. 701 permits a lay witness to testify to an opinion "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Accordingly, a president of a company, such as Cook, has "personal knowledge of his business . . . sufficient to make . . . [him] eligible under Rule 701 to testify as to how lost profits could be calculated." In re Merritt Logan, Inc., 901 F.2d 349, 360 (3rd Cir. 1990). A company president certainly is capable of projecting lost profits where the projection is based on evidence of decreased sales. See Teen-Ed, 620 F.2d at 403-04.

5. U.S. v. Saccoccia Case. *United States v. Saccoccia*, 58 F.3d 754, 780 (1st Cir.1995), *cert. denied*, 517 U.S. 1105, 116 S.Ct. 1322, 134 L.Ed.2d 474 (1996), said:

> Appellant's third sally alleges error in Shedd's explanation that his initial testimony about Duenas' statement was based on an overall impression from several hours of conversation. Although a witness is generally not permitted to testify about his subjective interpretations of

> what has been said by another person, he may do so if his opinion is rationally based on his perception and is helpful either to an understanding of his testimony or to the determination of a fact in issue.

6. Lightning Lube Case. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993), said:

> We recognize that a trial court's determination of admissibility may be overturned only for clear abuse of discretion, Pollard v. Metropolitan Life Insurance Co., 598 F.2d 1284, 1286 (3d Cir.), cert. denied, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 171 (1979); see Hill v. Nelson, 676 F.2d 1371, 1373 (11th Cir. 1981). We reluctantly hold, however, that the trial court clearly abused its discretion in striking Baldwin's testimony insofar as he, based on his personal knowledge, testified to the percentage of downtime due to hearth problems. The record reveals that Baldwin, in his position as Supervisor of Production Control, had extensive personal knowledge of Joy's plants, its on-going heat treating processes, and the two furnaces in question. Baldwin testified in great detail to the work done by Joy at its Reno plant. App. at 42a-46a. He testified that he was directly involved with the negotiations for the furnaces, app. at 46a; Transcript of August 12 at 36-39, with the purchase and installation of the furnaces, app. at 46a; Transcript of August 12 at 39-44, and with the operation of the furnaces on a day-to-day basis, app. at 46a, 47a, 48a, 75a. He testified that as supervisor he attended production meetings where problems with capacity at any work center, including the two furnaces, were discussed. App. at 47a.[fn24] He specifically testified about the hearth problems, app. at 50a, 52a-55a, 59a-60a, and about his observations of what was happening in heat treating on a day-to- day basis, app. at 46a, 75a.
>
> This undisputed testimony indicates Baldwin had sufficient personal knowledge of Joy's heat treating facility to make an estimate of what amount of downtime was due to the hearth problems. His opinion was rationally based on his knowledge, as a personal observer, of Joy's furnace operation. His inability to state precisely why a furnace was inoperable at a particular time was the proper material for effective cross-examination rather than a basis to hold his testimony completely inadmissible.[fn25] See United States v. Jackson, 688 F.2d 1121 at 1125 (7th Cir. 1982). As long as a witness' opinion is rationally based on his perception, that testimony is not barred by Fed. R. Evid. 701.

7. Virgin Islands v. Knight Case. *Government of Virgin Islands v. Knight*, 989 F.2d 619, 629-30 (3d Cir. 1993), said:

> The requirement that a lay opinion be rationally based on the witness' perception requires that the witness have firsthand knowledge of the factual predicates that form the basis for the opinion. Fed.R.Evid. 701(a) advisory committee's note. The district court properly excluded the investigating police officer's opinion because he did not observe the assault. In contrast, the eyewitness obviously had first-hand knowledge of the facts from which his opinion was formed.
>
> Having met the firsthand knowledge requirement of Rule 701(a), the eyewitness' opinion was admissible if it would help the jury to resolve a disputed fact. The "modern trend favors admissibility of opinion testimony." Leo, 941 F.2d at 193 (quoting Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980)). The relaxation of the standards governing the admissibility of opinion testimony relies on cross- examination to reveal any weaknesses in the witness' conclusions. Fed.R. Evid. 701(b) advisory committee's note. If circumstances can be presented with greater clarity by stating an opinion, then that opinion is helpful to the trier of fact. See United States v. Skeet, 665 F.2d 983, 985 (9th Cir.1982). Allowing witnesses to state their opinions instead of describing all of their observations has the further benefit of leaving witnesses free to speak in ordinary language. See Stone v. United States, 385 F.2d 713, 716 (10th Cir. 1967), cert. denied, 391 U.S. 966, 88 S.Ct. 2038, 20 L.Ed.2d 880 (1968).

8. U.S. v. Leo Case. *United States v. Leo*, 941 F.2d 181, 193 (3d Cir. 1991), said:

> Kennedy testified about the conclusions he formed while investigating General Electric's purchasing department files. For example, after summarizing the documents, he explained how certain purchase order dates had been changed. His opinion testimony accordingly satisfied Rule 701(a)'s requirement that lay opinion testimony be "rationally based on the perception of the witness." Fed.R. Evid. 701(a). Our Court has specifically held that lay opinion testimony can be based upon a witness's review of business

> records. See Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403-04 (3d Cir. 1980); see also In re Merritt Logan, Inc., 901 F.2d 349, 359-60 (3d Cir. 1990); Eisenberg, 766 F.2d at 781.
>
> Rule 701(b) requires lay opinion testimony to be "helpful." Kennedy's testimony was helpful in allowing the jury to synthesize and understand the many documents contained in the thirty subcontract files that he had examined. The district court did not abuse its discretion in deciding that Kennedy's lay opinion testimony would be helpful to the jury in determining a fact in issue. This satisfies Rule 701's second prong.
>
> In Teen-Ed we stated that the "modern trend favors the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination." Teen- Ed, 620 F.2d at 403. Here, the district court gave Leo wide latitude to cross-examine Kennedy.

9. Eisenberg Case. *Eisenberg v. Gagnon*, 766 F.2d 770 (3rd Cir. 1985), said:

> A number of recent decisions have recognized that some lay witnesses are qualified to give a conclusion based on personal experience with documentary or physical materials. See, e.g., Soden v. Freightliner Corp., 714 F.2d 498, 510-12 (5th Cir. 1983) (service manager in charge of maintenance of trucks allowed to give opinion as to defect and its dangerousness); Joy Manufacturing Co. v. Sola Basic Industries, 697 F.2d 104, 110-12 (3d Cir. 1982) (worker allowed to testify as to proportion of downtime due to hearth problems); United States v. Grote, 632 F.2d 387, 390 (5th Cir. 1980), cert. denied, 454 U.S. 819, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981) (IRS agent could give opinion as to whether tax returns filed were acceptable or not); Teen-Ed v. Kimball International, 620 F.2d at 403-04 (accountant familiar with books could give lay opinion as to how lost profits should be calculated). See also United States v. Ranney, 719 F.2d 1183, 1189 n. 11 (1st Cir. 1983) (investors in heating oil futures could give lay opinion based on their personal knowledge about the value of the investment opportunity offered by defendants).

10. Fairow v. State Case. *Fairow v. State*, 943 S.W.2d 895, 901 (Tex. Crim. App. 1997), said:

> When conducting a Rule 701 evaluation, [FN6] the trial court must decide (1) whether the opinion is rationally based on perceptions of the witness and (2) whether it is helpful to a clear understanding of the witness's testimony or to determination of a fact in issue. See Rule 701. The initial requirement that an opinion be rationally based on the perceptions of the witness is itself composed of two parts. First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge. See Wendorf, Schlueter & Barton, Texas Rules of Evidence Manual, § VII, p. 5, (4th ed. 1995).
>
> The perception requirement of Rule 701 is consistent with the personal knowledge requirement of Rule 602. [FN7] It requires the proponent of lay-opinion testimony to establish that the witness has personal knowledge of the events upon which his opinion is based. Personal knowledge will often come directly from the witness's senses. See e.g. Smith v. State, 683 S.W.2d 393, 404 (Tex.. Crim. App. 1984) (police officer may give non-expert opinion regarding physical facts he has observed); Doyle v. State, 875 S.W.2d 21 (Tex.App.--Tyler 1994, no pet.) (prison guard allowed to give opinion testimony under Rule 701 based on "what he saw "); State v. Welton, 774 S.W.2d 341, 343 (Tex. App.---Austin, pet.ref'd) (police officer permitted to give non-expert opinion regarding intoxication based in part on smelling the odor of alcohol); Lape v. State, 893 S.W.2d 949 (Tex. App. Houston [14th] 1994) (abuse of discretion occurred when lay-witness not permitted to give an opinion on how sound traveled in her home) (all emphases added). It may, however, come from experience. See e.g. Austin v. State, 794 S.W.2d 408, 410-11 (Tex. App. -- Austin 1990, pet. ref'd)(police officer permitted to testify that, based on his personal experience, it was his opinion that "Swedish deep muscle rub" was a code for prostitution); Williams v. State, 826 S.W.2d 783, 785 (Tex. App.--Houston [14th] 1992, pet. ref'd)(using past experience, a police officer was permitted to testify, as either a lay-witness or an expert, that he interpreted the defendant's actions to be a drug transaction); Reece v. State, 878 S.W.2d 320, 325 (Tex. App. -- Houston [1st] 1994, no pet.)(based on training and experience, a police officer may testify under Rule 701 that a defendant's actions are consistent with someone

selling cocaine). If the proponent of the opinion cannot establish personal knowledge, the trial court should exclude the testimony. See e.g. Bigby v. State, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994) (holding that a lay witness may not testify as to his opinion on appellant's sanity when that opinion was based on the observation of others); McMillan v. State, 754 S.W.2d 422, 425 (Tex. App.--Eastland 1988, pet. ref'd) (holding that a lay-witness opinion based on hearsay was inadmissible).

11. Whalen Case. *Whalen v. Condo. Consulting and Mgmt. Servs., Inc.*, 13 S.W.3d 444, 448 (Tex. App.-Corpus Christi 2000, pet. denied), said:

> Lay opinion is adequate to prove causation where general experience and common sense enables a layman to determine, with reasonable probability, the causal relationship between the event and the condition.

12. Uniroyal Case. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 339 (Tex. 1998), said:

> [W]here the subject matter is not solely for experts, uncontroverted opinion testimony is not conclusive, regardless of whether it comes from an expert or a lay witness. The rule of McGalliard quoted above--that expert testimony is generally not conclusive---follows not because the testimony is from an expert, but because it is opinion testimony. Unless the subject matter is solely for experts, jurors are capable of forming their own opinions from the record as a whole. See Coxson, 179 S.W.2d at 945 (expert testimony is conclusive only where jurors "cannot properly be assumed to have, or be able to form, correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry").

IV. EXPERT TESTIMONY. TRE 702 and FRE 702 govern the admissibility of expert testimony. As explained below, TRE 702 and FRE 702 have been interpreted to require that, upon objection, the proponent of expert testimony must show that the expert is qualified, and that his/her opinion is reliable, relevant and will assist the jury.

A. TRE 702. TRE 702 governs expert testimony in Texas courts. The Rule reads:

> **Texas Rule 702. Testimony By Experts**
>
> 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.

B. FRE 702. FRE 702, amended effective December 1, 2000, governs expert testimony in federal courts. The Rule reads:

> **Federal Rule 702. Testimony by Experts**
>
> 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.

V. QUALIFICATIONS, RELIABILITY, RELEVANCE & HELPFULNESS. For expert testimony to be admissible, the expert must meet requirements relating to his or her qualifications, the reliability of his or her methodology, the relevance of his or her testimony to the issues to be decided in the case, and the expert testimony must assist the jury in deciding a matter they could not decide without expert evidence.

A. QUALIFICATIONS. Under Rule of Evidence 702, a person may testify as an expert only if (s)he has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case. *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). This requirement involves the expert's "qualifications." In gauging an expert's qualifications, it must be remembered that a person who is degreed or licensed in a particular field is not necessarily qualified to give expert testimony regarding all areas of that field. *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996).

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has

knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case. Courts sometimes evaluate the first prong, of adequate knowledge , skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993) [Westlaw cite 30 HOULR 797].

The second prong, assisting the trier of fact, requires that the witness's expertise go to the very matter on which the expert is to give an opinion. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), citing *Christopherson v. Allied Signal Corp.,* 939 F.2d 1106, 1112-1113 (5thCir.), *cert. denied*, 503 U.S. 912, 112 S. Ct. 1280, 117 L.Ed.2d 506 (1992). The test then for qualifications is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on the particular subject. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

In *Garnac Grain Co., Inc. v. Blackley*, 932 F.2d 1563 (8th Cir. 1991), a corporate client sued its auditors for malpractice and breach of contract for failing to adhere to Generally Accepted Auditing Standards (GAAS) with the result that the corporation did not catch an employee who was embezzling from the corporation. The trial court was affirmed in its exclusion of proposed expert testimony of the plaintiff's president and director of accounting that the accounting firm had failed to comply with GAAS, on the grounds that the witnesses were not qualified under FRE 702 to give expert testimony. Although the president had a business degree, he had never taken courses in auditing or internal controls, he had taken only a basic accounting course, and he was not a CPA. The director of accounting had attended only one year of college, had taken only a few noncredit night courses in auditing or internal controls, had had only a basic accounting course, and was not a CPA. The court also found that the witnesses' experience was not an adequate basis for expert testimony. However, the trial court was reversed for excluding the testimony of a professor at the University of Kansas who taught auditing courses for almost 40 years, but whose work experience consisted of four years at an auditing firm in the 1940's, and whose CPA license lapsed in 1981. The professor was deemed to have sufficient expertise despite his lack of work experience in the industry.

B. RELIABILITY. In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court held that FRE 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. *See Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for scientific expert testimony). Under Rule 702, the expert's opinion must be based on "scientific knowledge," which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Court used the word "reliability" to describe this necessary quality.

The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable and relevant. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider regarding reliability: (1) the extent to which the 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. *Robinson*, 923 S.W.2d at 557. *See America West Airline Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ) (somewhat unorthodox methods of mental health worker in arriving at DSM-III-R diagnosis did not meet the admissibility requirements of *Robinson*). The burden is on the party offering the evidence to establish the reliability underlying such scientific evidence. *Du Pont*, at 557.

In *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 11 S. Ct. 1167, 143 L.Ed.2d 238 (1999) (ruling below: 131 F.3d 1433 (11th Cir. 1997)), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id.*

The Texas Supreme Court has similarly applied the reliability requirement to non-scientific experts. In

Gammill v. Jack Williams Chevrolet, Inc.,972 S.W.2d 713 (Tex. 1998), the Supreme Court said:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [FN47]

Accord Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992) (in this case the Court of Criminal Appeals established a reliability requirement even before the U.S. Supreme Court decided *Daubert*); *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (in evaluating non-scientific expert, trial court should consider "(1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field").

Thus, Federal courts in Texas, and Texas courts in both civil and criminal cases, must determine the appropriate criteria of reliability and relevancy for all experts who testify, and as a preliminary matter must determine that those criteria are met before the expert is permitted to testify.

C. RELEVANCE. *Daubert* and *Robinson* contain a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998):

> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." 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. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case.

D. ASSISTING THE TRIER OF FACT. Rule 702 requires that the expert's testimony "assist the trier of fact." There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("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.") As noted in *Assiter v. State*, 58 S.W.3d 743, 751-52 (Tex. App.--Amarillo 2000, n.p.h.):

> Two themes are prevalent within the language of the rule allowing the use of expert testimony. First, the jury must not be qualified to intelligently and to the best possible degree determine the particular issue without benefit of the expert witness's specialized knowledge. Second, the use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror. See Duckett, 797 S.W.2d at 914. When the jury is equally competent to form an opinion about the ultimate fact issues as is the expert, or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam).

E. ADVISORY COMMITTEE COMMENT TO FRE 702 (2000) The lengthy Advisory Committee Comment to the 2000 Amendment to FRE 702 sheds light on the federal conception of the *Daubert* requirement.

> 2000 Amendments
>
> Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999). In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho clarified that this gatekeeper function applies to all expert testimony, not just testimony based

in science. See also Kumho, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the Kumho decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with Kumho, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See Bourjaily v. United States, 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in Kumho held that these factors might also be applicable in assessing the reliability of non- scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. In addition to Kumho, 119 S.Ct. at 1175, see Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in Daubert do not neatly apply to expert testimony from a sociologist). See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

Courts both before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the

most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Kumho Tire Co. v. Carmichael, 119 S.Ct.1167, 1175 (1999) (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."), Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. See Kumho, 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in Daubert stated: "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." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. See Kumho Tire Co. v . Carmichael, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 160 (3d Cir. 1999) (expert

testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.... The evidentiary requirement of reliability is lower than the merits standard of correctness." See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998) ("Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in Daubert declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Under the amendment, as under Daubert, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1171 (1999) ("We conclude that Daubert's general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court

simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education-- may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also Kumho Tire Co. v. Carmichael, 119 S.Ct . 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a

witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on " sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert' s testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. See Daniel J. Capra, The Daubert Puzzle, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with Daubert questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under Daubert, and it is contemplated that this will continue under the amended Rule. See, e.g., Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997) (discussing the application of Daubert in ruling on a motion for summary judgment); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of in limine hearings); Claar v. Burlington N.R.R., 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term " expert" injury trials).

The new FRE 702 was criticized in the following terms in Michael W. Shore & Kenneth E. Shore, *Civil Evidence*, 54 SMU L. Rev. 1167, 1171-72 (2001):

The Evidence Advisory Committee's (the "Committee") comment notes for revised Rule 702 state that "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert." [FN29] The Committee also explained that it was not attempting to set procedural requirements for Daubert proceedings and emphasized that trial courts shall enjoy broad discretion in fashioning their analytical methods. [FN30] On its face, however, the revised Rule 702 does add a component to a trial court's gatekeeper duties--a quantitative assessment of the foundations for the expert's opinions.

The three new factors will likely do little to clear up the confusion and inconsistency in Rule 702's application. The revised rule's first new factor, whether testimony is based upon "sufficient facts or data," adds unnecessary incentives for advocates to "pile up" foundation evidence, ensuring Rule 702's application will become more time-consuming and expensive. The Committee's notes say very little about this requirement other than it is a "quantitative rather than qualitative analysis." [FN31] Judges already look at the amount of data analyzed by an expert and then make their own determination, under an abuse of discretion standard, whether these facts or data are "sufficient." How has this change helped? It likely has only ensured that litigants will add excessive amounts of background data and "foundation" evidence to the trial record to ensure that their experts are quantatively qualified. This will add cost and time to an already burdensome and expensive process.

The second and third new factors in revised Rule 702 require the trial court to first determine the reliability of the principles or methods underlying the expert's testimony and then determine whether the expert has applied those principles or methods reliably to the facts of the case. Thus, the new rule essentially codifies the Daubert/ Kumho Tire analysis. Under Daubert, the trial court would analyze the relevance and reliability of the expert's testimony. [FN32] Under Kumho, the trial court was directed to first analyze the reliability of the principle or method, and then determine whether the expert "has applied the principles and methods reliably." [FN33]

VI. BASES OF EXPERT OPINION; ULTIMATE ISSUE.

A. TRE 703. TRE 703 relates to the bases of expert opinion testimony. TRE 703 provides:

> Rule 703. Bases of Opinion Testimony by Experts
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TRE 703 says that experts are not limited to personal knowledge in formulating opinions. Experts can answer hypothetical questions if experts can rely on inadmissible evidence, such as hearsay, in arriving at opinions.

B. TRE 704. TRE 704 permits an opinion to be stated on the ultimate issues in the case. TRE 704 provides:

> Rule 704. Opinion on Ultimate Issue
>
> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

1. Law Vs. Mixed Fact-Law Questions. Experts cannot testify what the law of the forum state is. Law of sister states and foreign countries is okay, but not law of Texas. *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied), was a contract case, involving scope of coverage under an insurance policy. The court of appeals ruled that an expert could not render an opinion on whether a particular event was or was not within the scope of an insurance policy. The court cited an earlier case which held that the question of "whether or not a legal duty exists under a given set of facts and circumstances is a question of law for the court." *See St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 284 (Tex. App.--Corpus Christi 1982, no writ). In *Texas Workers' Compensation Com'n v. Garcia*, 862 S.W.2d 61, 105 (Tex. App.--San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995), the appellate court held that expert testimony of a law professor as to the constitutionality of a statute was not admissible, since it was opinion testimony on a legal

issue. However, in *Transport Ins. Co. v. Faircloth*, 861 S.W.2d 926, 938-39 (Tex. App.--Beaumont 1993), *rev'd on other grounds*, 898 S.W.2d 269 (Tex. 1995), the appellate court held that expert testimony of a former Texas Supreme Court justice regarding the proper procedure for settling a personal injury claim of a minor child, and whether it had been followed in this instance, was admissible. And in *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied), a former OSHA compliance officer could testify whether a training regimen did or did not comply with OSHA regs, since that was a mixed fact law question involving the application of OSHA regs to the facts of the case.

In *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.--Corpus Christi 1990, no writ), a divorce case involving tracing of commingled separate and community funds, the appellate court held the trial court properly refused to let Wife's attorney cross-examine Husband's CPA as to the CPA's understanding of the community-money-out-first presumption under the *Sibley* case. However, the court noted a "host of legal problems" raised by the *Birchfield* rule permitting a witness to testify on mixed fact-law questions. Where the "law part" is debatable, one party's right to elicit expert testimony on mixed fact-law questions collides with the opponent's right to cross-examine, all in the context of the trial court's power to restrict cross-examination to avoid jury confusion.

The court, in *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, writ dism'd by agr.), explores the distinction between an expert testifying on mixed fact-law questions and pure law questions. The court posited the following definition of a mixed fact-law question:

> [A]n opinion or issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.

Id. at p. 134. Using this standard, it was not error to permit the expert to testify that Mary Carter agreements at issue in the case were against public policy.

In *Holden v. Weidenfeller*, 929 S.W.2d 124 (Tex.App.--San Antonio 1996, writ denied), the trial judge excluded expert testimony from a law school professor, who was Board Certified in Real Estate Law, based upon the pleadings, depositions, and documents on file in the case, as to whether an easement appurtenant, an easement by estoppel or a public dedication existed in the case. The appellate court held that the opinion offered was not one of pure law, but rather of mixed fact-law. However, since the trial was to the court without a jury, it was not an abuse of discretion to exclude the testimony since it was not "helpful to the trier of fact," as required by TRE 702. This is because the trial court, being a legal expert himself, was "perfectly capable of applying the law to the facts and reaching a conclusion without benefit of expert testimony from another attorney." *Id.* at 134.

See Fleming Foods of Texas, Inc. v. Sharp, 951 S.W.2d 278 (Tex. App.--Austin 1997, writ denied) (former Attorney General Waggoner Carr not permitted to testify that changes to the Texas Tax Code were substantive, since statutory construction is a pure question of law).

VII. FACTS, LAY OPINION, AND EXPERT OPINION. One witness can possibly testify to facts, to lay opinions, and to expert opinions. For example, an accountant who testifies that a set of books are the accounting records of a certain business is testifying as to facts. An accountant who states that a company's net taxable income has increased for each of the past five years and is likely to increase during the upcoming year is testifying to a lay opinion. An accountant who testifies that an audit was not done in compliance with generally accepted auditing standards (GAAS) is testifying to an expert opinion. A lay witness can testify to the first two items, but not the third–knowledge of GAAS is specialized knowledge that requires expertise.

Dean Sutton made the following observation in his 1993 article on the Texas Rules of Evidence:

> A witness' classification as a lay or expert witness under the rules can have significant consequences. Experts, when rendering opinions within their fields of expertise, have much more testimonial latitude than laymen. As discussed above, Rule 701 requires that a lay opinion satisfy the "helpfulness" test. Rule 702 imposes the similar, if not identical, prerequisite that an expert's opinion "assist" the trier of fact. Thus, the primary benefits available to an expert are contained in Rule 703, which relaxes the firsthand knowledge requirement for experts, and Rule 705, which suspends the common law requirement that the factual basis of an opinion be disclosed before its rendition. [footnotes omitted]

Sutton, John F., Jr., *Article VII: Opinions And Expert Testimony*, 30 HOUS. L. REV. 797, 819 (1993).

The line of demarcation between lay and expert testimony can be, to quote Dean Sutton, "blurred and confusing." As Dean Sutton noted:

> Generally, to testify on a particular matter, a witness must satisfy five fundamental prerequisites: he must have the ability and opportunity to observe as well as the abilities to understand, remember, and communicate his observation. The focus under Rule 702, and to an extent under Rule 701, is on the third requirement, the ability to understand observations. This ability necessarily derives in large part from the experience of the witness. [footnotes omitted]

Id. at pp. 819-20.

Dean Sutton, in his article, used the testimony of an accountant to exemplify how a expert can testify to certain matters under Rule 701 and others under Rule 702:

> A witness who is qualified as an expert may testify in three different ways: he may testify to his personal knowledge of the facts in issue, in which case he testifies to opinions under Rule 701; he may provide the factfinder with general back-ground information regarding the theory and principles relative to his field of expertise; and he may evaluate specific data and facts in issue in light of his experience in a particular specialized field, in which case he testifies to opinions under Rule 702. A witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 "expert." If his opinion rests on firsthand knowledge-that is, if it is rationally based on his own perceptions-then testimony under Rule 701 is also permissible. The greater his experiential capacity, the more likely his opinions will "help" the trier of fact under Rule 701, and the greater the likelihood that his testimony will "assist" the jury under Rule 702. For example, the plaintiff in *Teen-Ed, Inc. v. Kimball International, Inc.*, [620 F.2d 399 (3d Cir. 1980)], offered his tax accountant's testimony regarding lost profits. The trial court, proceeding under the erroneous assumption that only an expert could offer opinion testimony, excluded the evidence because the plaintiff had not designated the accountant as an expert before trial. The Third Circuit reversed, stressing that the proffered opinion was predicated entirely on the witness' firsthand knowledge of Teen-Ed's books. He was thus eligible under Rule 701 to give an opinion on lost profits based upon the inferences drawn from his knowledge of Teen-Ed's books. The court held that the accountant's potential qualifications as an expert did not prevent him from testifying within the narrower confines of Rule 701.
>
> To the extent that the defendant in *Teen-Ed* was able to cross-examine and rebut the accountant's opinion adequately, the decision is sound. In *Teen-Ed*, the fact that the accountant was a participant in the events to which he testified and not an expert hired to testify tends to excuse the trial court's failure to distinguish between lay and expert witnesses. An arbitrary and artificial distinction between lay and expert witnesses should not prompt exclusion of relevant, helpful information from witnesses with adequate experiential qualifications. [footnotes omitted]

Perhaps the key distinction between lay and expert testimony for purposes of liability relates to establishing the standard of care that applies to the defendant's conduct, and whether that standard was breached, and whether the breach caused damages to the plaintiff. Only an expert, and not a lay witness, can give this kind of testimony.

VIII. SPECIAL PROVISIONS FOR EXPERT TESTIMONY.

A. TRE 705. TRE 705 provides special rules governing the testimony of expert witnesses. Experts are permitted to give an opinion without first relaying the underlying information. Experts are subject to voir dire examination by opposing parties prior to rendering an opinion. The trial court has a gate-keeping function with regard to the validity of the facts or data underlying the expert's testimony. And, if the expert relies on inadmissible data, in deciding whether to permit the expert to testify to such inadmissible evidence before the jury, the trial court must balance the importance the inadmissible data to understanding the expert's opinion against the danger

that the jury will use the inadmissible data for an improper purpose. If such data is allowed before the jury, the trial court must upon request instruct the jury on proper use.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing test; limiting instructions. 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.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

It can be seen that TRE 705(b) offers a right to voir dire the expert about the underlying facts or data outside the presence of the jury. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient basis for his opinion. And TRE 705(d) establishes a balancing test for underlying facts or data that are inadmissible except to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

B. FRE 703. FRE 703 covers some of the same territory as TRE 705. FRE 703 (effective 12-1-2000) reads as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

END