

Making and Defending a Daubert Challenge of a Mental Health or Drug Expert

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Three Kinds of Testimony

- Factual Observations
- Lay Opinion
- Expert Opinion

TRE 602. Lack of Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has **personal knowledge** of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

TRE 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) **rationally based** on the witness's **perception**;
- (b) **helpful** to clearly understanding **the witness's testimony** or to determining a **fact in issue**; and
- (c) **not** based on scientific, technical, or other specialized knowledge **within the scope of Rule 702**.

Rule 702. Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

FRE Advisory Committee on FRE 701:

“[Rule 701] 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.”

“A person with specialized knowledge may testify about his or her own observations under Rule 701 of the Rules of Evidence and may also testify about the theories, facts, and data used in his or her area of expertise under Rule 702. TRE 701, 702. A person who has professional social work training and experience, for example, can testify as both a lay and an expert witness.”

Rogers v. Dep't of Family & Protective Servs., (Tex. App.—Houston [1st Dist.] 2005, pet. dismissed w.o.j.)

“A witness may qualify to give testimony under both Rule 702 governing expert witnesses and Rule 701 permitting a lay or non-expert witness to offer opinions or inferences if the witness’s testimony is based on first-hand knowledge.”

Harnett v. State (Tex. App.--Austin 2000, pet. ref’d)

“[N]ot all witnesses who are experts necessarily testify as experts. A witness may have special knowledge, skill, experience, training, or education in a particular subject, but testify only to matters based on personal perception and opinions....

Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd. (Tex. 2011)

Lay Opinion must be:

1. **rationally** based on **personal knowledge**, and
2. **helpful** to (i) clearly understand **the witness's testimony** or (ii) determine a **fact in issue**.

Expert Opinion

1. a witness **qualified** by knowledge, skill, experience, training, or education may give opinions if
2. the **scientific, technical, or other specialized knowledge** will **help** the trier of fact to (i) understand **the evidence** or (ii) determine a **fact in issue**.

Rule 703 Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Recap of Lay v. Expert Opinion

Lay Witness

Personal knowledge evidence
Rationally based on perception
Helpful to clear understanding of
witness's testimony or issue
Lay predicate before opinion

Expert

Reasonably reliable inadmissible
Based on expertise
Helpful to understand evidence or
determine fact in issue
State opinion w/o laying predicate

EXPERT'S QUALIFICATIONS

Is the Witness Qualified As An Expert?

Does the expert possess knowledge and skill not possessed by people generally? *Broders v. Heise* (Tex. 1996)

Are the issues beyond the grasp of an average juror? Dean John F. Sutton, Jr. (1993)

Knowledge, Skill, Experience, Training, or Education

"It is almost impossible to lay down any definite guidelines for determining knowledge, skill or experience required in a particular case or of a particular witness."

Rogers v. Gonzales (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.)

"Special knowledge" may be acquired by virtue of the witness's experience.

Reece v. State (Tex. App.—Houston [1st Dist.] 1994, no pet.)

"Licensure, or certification in the particular discipline is not a per se requirement."

Harnett v. State (Tex. App.--Austin 2000, pet. ref'd)

EXPERT'S METHODOLOGY

Scientific Testimony: Federal

Daubert v. MerrellDow Pharmaceuticals, Inc. 509 U.S. 579 (1993)

“The test for admissibility of expert **scientific** testimony is not whether the principles have ‘general acceptance’ in their field, but rather whether the expert’s opinion is based on ‘scientific knowledge,’ meaning derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation.”

Scientific Testimony: Texas

E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995)— A non-exclusive list of six factors to determine reliability of **scientific** evidence:

- (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.

Non-Scientific Testimony: Texas

Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d713, 725-26
(Tex. 1998)

“[W]hether an expert’s testimony is based on scientific, technical or other specialized knowledge, ... the ... court [should] evaluate the methods, analysis, and principles relied upon in reaching the opinion ... and 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.’”

Social Sciences Testimony: Texas

Nenno v. State (Tex. Crim. App. 1998)—standards for “soft sciences”:

- (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.

EXPERT'S UNDERLYING FACTS OR DATA

Underlying Facts or Data

- TRE 705(c) provides that “[a]n expert’s opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.”
- The court has a gatekeeping function regarding the sufficiency of the underlying facts or data.
- The standards for gatekeeping facts are not elaborated as well as the standards for gatekeeping reliability of methodology.
- Is there sufficient information to support an opinion?
- Is the information relevant to the issue to be determined?

Relevancy Requirement or “Fit”

Gammill v. Jack Williams Chevrolet, Inc. (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.”

Recap of Requirements for Expert Testimony

1. Qualifications
2. Reliable methodology
3. Sufficient facts or data
4. Relevance of data/opinion
5. Helpful to trier of fact

What a Lawyer Needs to Know Regarding Mental Health and Drug Experts

Expert

Mental Health

Alcohol/Drugs

Fields

Law, psychology, counseling

Law, law enforcement,
chemistry, biology, protocols

Steps to Reaching an Expert Psychological Opinion

- Gathering data
- Developing hypotheses
- Ruling hypotheses in or out
- Looking for convergence of data
- Reaching conclusions

Dangers in Reaching an Expert Psychological Opinion

- Cognitive Bias
- Heuristics (mental shortcuts)
- Hasty Generalization
- Poor fit with issue to be decided

How Relevant is the Psychologist's Opinion?

- Psychological theories are not designed to answer legal questions.
- Psychological tests are designed for other purposes.
- There is little scientific support for tying psychological principles to the best interest of a child
- Is the “Last Mile” merely ipse dixit?
- Is this a world where clinical experience trumps data crunching?

Issues Regarding Mental Health Experts

1. Licensing
2. Statutory Requirements for Child Custody Evaluations
3. Psychological Testing
4. Mental Disorders (DSM-V)
5. Syndromes
6. Clinical Interviews (structured vs. unstructured; child)
7. General Psychological Principles vs. Specific Issues in Case

Prohibited Areas Where Psychological Experts Should Not/Cannot Go

1. Therapist vs. Forensic Expert (Dual Roles)
2. There are no experts in truth-telling
3. Recovered Memory
4. Behavior “consistent” with a class (such as victims of child or spousal abuse)

Alcohol and Drug Testing

1. Sample Integrity
2. Sample Identification
3. Testing and Analysis
4. Interpretation
5. Timing
6. Screening vs. Confirmation Testing
7. Qualifications of everyone involved
8. Were protocols followed every step of the way?

Types of Alcohol and Drug Tests

1. HGN Test
2. Urine
3. Sweat
4. Saliva
5. Blood
6. Hair
7. Breath (Intoxilyzer, Soberlink)

PRESERVING ERROR ON ADMISSION OR EXCLUSION OF EVIDENCE

To Preserve Error on Admission of Evidence, you must:

1. Timely object or move to strike, and
2. State the specific ground for objection

To Preserve Error on Exclusion of Evidence, you must:

1. Offer the evidence on the record, and
2. Make an offer of proof outside presence of the jury as soon as practical and before the charge is read to the jury
3. Get court reporter to take possession of rejected exhibits

Motion in Limine

A motion in limine prohibits references to specific issues without first obtaining a ruling on the admissibility of those issues outside the presence of the jury. *Southwest Country Enters., Inc. v. Lucky Lady Oil Co.*, (Fort Worth 1999, pet. denied).

A court's ruling granting a motion in limine is not a ruling on the admissibility of the evidence. *Waldon v. City of Longview*, (Tyler 1993, no writ).

It is axiomatic that motions in limine do not preserve error. *Webb v. State*, (Tex. Crim. App. 1988).

Repeated Offer of Inadmissible Evidence

"With two exceptions, the law in Texas requires a party to continue to object each time inadmissible evidence is offered. The two exceptions require counsel to either (1) obtain a running objection, or (2) request a hearing outside the presence of the jury."

Ethington v. State, (Tex.Crim.App.1991)

TRE 103(b), Hearing Outside Presence of Jury

When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal.

THE END