

DEPOSING AND CROSS-EXAMINING EXPERT WITNESSES
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I. INTRODUCTION

Historically, experts were limited to testifying about matters beyond the understanding of the jury. However, the expert's role has been expanded by the increasing complexity of litigation, the increased use of technological evidence and the relaxed standards for qualification of experts.¹ The Federal Rules of Evidence and corresponding Texas Rules of Evidence previously allowed almost *anyone* (not just academicians, doctors and scientists) to qualify as an expert.² But in 1993, the United States Supreme Court concluded that the *Frye* rule,³ which limited expert scientific testimony to theories or methodologies "generally accepted in the scientific community," is superseded and expanded by the Federal Rules of Evidence.⁴

Effective and credible expert testimony is critical because expert testimony is frequently the only way to establish a cause of action. This is particularly true in product liability cases, malpractice cases, and other types of cases that rely heavily on specialized knowledge or technology.

II. PREPARATION

Any effective cross-examination of adverse expert witnesses necessarily begins with thorough preparation. The best cross-examination of an expert witness is usually 1) short;

¹ Fed. R. Evid. 702-705, Tex. R. Civ. Evid. 702-705.

² See Fed. R. Evid. 702; Tex. R. Civ. Evid. 702.

³ *Frye v. U.S.*, 293 F.2d 1013 (D.C. Cir. 1923).

⁴ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 2793 (1993); see *infra* at 9-11. The Texas Supreme Court adopted the reasoning of *Daubert* in *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

- 2) uses plain English so that the jury can understand and follow the logic of the questions;
- 3) uses only leading questions; and 4) does not permit or require repetition of direct testimony.

Although the usual considerations of cross-examination of witnesses apply equally well to experts, experts require *additional* preparation and involve other cross-examination and impeachment methods. The state and federal rules of civil procedure outline the information obtainable from expert witnesses and such information is crucial to appropriate cross-examination. Specifically, Texas Rules of Civil Procedure 192.3(e), 194.2(f), and 195 and Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4) set forth the information that a party must provide to its opponents about the expert witnesses it has retained. The Federal Rules require extensive disclosures, including a report that contains a complete statement of all opinions to be addressed by the expert and the bases for the opinions, all data on which the expert relied, the qualifications of the expert, including publications for the preceding ten years, the compensation being paid to the expert, and a listing of any other cases in which the expert has provided testimony for the preceding four years. The Texas Rules merely provide that the mental impressions and opinions of the expert are discoverable as well as any report or material prepared by the expert and any facts or document on which the expert relies in forming his opinion. Accordingly, in state court actions, the lawyer must be especially diligent in preparation for cross-examination of the expert witness. In order to be properly prepared to depose and cross-examine an expert witness, the following information should be obtained.

- a. Curriculum vitae - carefully study the curriculum vitae, and confirm the degrees allegedly obtained and memberships listed; scrutinize the publications attributed to the expert witness, and obtain copies of

relevant publications. Review organizations of which the expert is a member, and determine whether the organization has a position or publications regarding the area in controversy in your case; if so, obtain and review that information.

- b. A diligent search should be made for all previous deposition and trial testimony of the expert. Begin the search within your own law firm and by contacting other local lawyers. A search can be expanded to review brief banks compiled by trial lawyer groups such as the Defense Research Institute, Texas Association of Defense Counsel, or the Texas Trial Lawyers Association.
- c. Determine other lawsuits in which the expert has testified and contact the opposing counsel in those lawsuits to obtain deposition transcripts and general information about the testifying traits of the expert.
- d. Be certain that you understand the subject matter before attempting the expert's deposition. *Your* expert can be extremely helpful in this regard by explaining theories, defining technical terms and by assisting in the preparation of specific, technical questions. Additionally, read the technical literature to become well informed.

After gathering the pertinent information, including a copy of the expert's written report, forward the information to your client and your expert. Prior to the adverse expert's deposition, review his or her previous deposition and trial testimony for any statements or opinions contrary to the opinions anticipated in your lawsuit. Any contrary statements may be used during cross-examination to impeach the expert witness. Additionally, review the

publications prepared by the expert witness that are relevant to the subject matter of his testimony in your case. Search the articles prepared by the expert witness for any inconsistencies with his opinions in your case and use any such inconsistencies to impeach the expert. Finally, after scrutinizing and verifying the expert's curriculum vitae, use any misrepresentations contained therein for impeachment purposes.

In addition to your preparation, your own expert should be fully utilized in preparation for cross-examination of the opposing expert. Request that your expert critically review the adversary's expert report and identify any questions or problems he might have regarding formulas used by the expert; theories adopted by the expert; assumptions made by the expert; and charts, tables and/or figures relied upon by the expert. Ask your expert to prepare questions to ask the adverse expert during his deposition and, if appropriate, to attend the deposition with you.

III. CONSIDERATIONS FOR THE DEPOSITION

a. **Consulting vs. Testifying Expert Witness**

For discovery purposes, experts fall into two primary categories, consulting experts and testifying experts.⁵ Consulting experts assist with the preparation of the case but are not expected to testify at trial, while testifying experts are those experts who are "expected to testify at trial." The distinction between types of experts is vitally important because the classification governs the scope of discovery from experts.⁶ For example, the subject matter on which a testifying expert is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the

⁵ See Fed. R. Civ. P. 26(b)(4); Tex. R. Civ. P. 192.3(e) and 192.7(c) & (d).

⁶ See Fed. R. Civ. P. 26(b)(4)(A); Tex. R. Civ. P. 192.3(e) and 195.

basis of the mental impressions and opinions held by the expert are discoverable. However, the same information from a consulting expert need not be provided to the opposing counsel unless the testifying expert has reviewed the consultant's opinions and/or mental impressions.⁷

The Federal Rules of Civil Procedure differ slightly from the Texas Rules of Civil Procedure in terms of the type of information that must be provided by parties about their experts. Historically, the Federal Rules limited discovery regarding expert witnesses to interrogatories. However, "in practice, full discovery [was] the rule, and practitioners use[d] all available means of disclosure including both the discovery of experts' reports and depositions."⁸ Today, the rule provides that a "party may depose any person who has been identified as an expert whose opinions may be presented at trial."⁹ Facts known and opinions held by testifying expert witnesses are discoverable as well as the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.¹⁰ However, a party may *only* discover facts known or opinions held by a consulting expert as provided in Fed. R. Civ. P. 35(b) or upon a showing of "exceptional circumstances" *and* it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.¹¹ Additionally, the Federal Rules require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.¹²

⁷ Tex. R. Civ. P. 192.3(e).

⁸ Wright & Miller, Federal Practice and Procedure: Civil § 2031 (Supp. 1993).

⁹ Fed. R. Civ. P. 26b(4)(A).

¹⁰ Fed. R. Civ. P. 26(b)(4)(A).

¹¹ Fed. R. Civ. P. 26(b)(4)(B).

¹² Fed. R. Civ. P. 26(b)(4)(C).

The Texas Rules of Civil Procedure permit the discovery of documents and tangible things prepared by or for an expert in anticipation of the expert's deposition or trial testimony. The disclosure of materials prepared by or for a consulting expert is required if the testifying expert has reviewed the consulting expert's opinions or impressions. In contrast, the Federal Rules do not contain a provision similar to the Texas Rules regarding production of documents prepared by an expert. In fact, some federal courts have held that requests for reports of experts is beyond the scope of permissible discovery; however, the general rule in federal courts is that practitioners use all available means of discovery with experts.¹³

If a party intends to call an expert witness at trial in state court, that witness' identity and the substance of his expected testimony must be disclosed at least ninety (90) days prior to the end of discovery period for the party that has the burden of proof and sixty (60) days before the end of the discovery period for all other experts.¹⁴ In federal court, pursuant to Fed. R. Civ. P. 26(e)(1), there is no requirement of thirty days' notice; however notice must be reasonable, or in accordance with the court's docket control order.

b. Standard of Proof: The Federal Rule

The United States Supreme Court has ruled that the so-called "*Frye* rule,"¹⁵ which required expert testimony to be based on "generally accepted" scientific techniques, has been abolished by

¹³ *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, (N.D. Miss. 1972) (expert's reports not discoverable); *Goodell v. Rehrig Intern, Inc.*, 683 F. Supp. 1051, 1053 (E.D. Va. 1988) *aff'd*, 865 F.2d 1257 (4th Cir. 1989) (request for written report of expert witness is outside the scope of Fed. R. Civ. P. 26(b)(4)). However, given the more liberal discovery allowed in the current Rule 26, such case law may no longer be authoritative. *See supra* n. 9.

¹⁴ Tex. R. Civ. P. 195.2.

¹⁵ *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

the Federal Rules of Evidence.¹⁶ The standard set forth in *Daubert* preserves much of the *Frye* test, but with two major differences. First, lack of general acceptance of the expert's scientific method or procedure is not necessarily fatal.¹⁷ Second, the Federal Rules of Evidence, particularly Rule 702, assign to the trial judge the task of ensuring that the expert's testimony both rests on a reliable foundation and is relevant to issues before the court.¹⁸ However, application of the test may vary widely since *Daubert* requires the trial judge to make an independent inquiry into scientific reliability. In rejecting *Frye*, the Court relied heavily on the plain language of Fed. R. Evid. 702, which authorizes an expert to testify based on his scientific, technical, or other specialized knowledge. The Court noted that "a rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach to relaxing the traditional barriers to opinion testimony."¹⁹ In analyzing the wording of the rule, the Court stated that:

[T]he adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truth on good grounds.²⁰

¹⁶ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 590 U.S. 579, 113 S.Ct. 2786, 2794 (1993); *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995)

¹⁷ *Id.* 2795-2799

¹⁸ *Id.* at 2795-2799.

¹⁹ *Daubert*, 113 S.Ct. at 2795; *Robinson*, 923 S.W.2d at 556. Pursuant to *Daubert* and *Robinson*, trial court's are charged with a general "gatekeeping" role to ensure that expert testimony is reliable, as well as relevant. *Id.* Since *Daubert* and *Robinson*, both the United States and Texas Supreme Courts have made it clear that the trial court's "gatekeeping" obligation applies not only to testimony based on "scientific" knowledge, but also to testimony based on other specialized knowledge, such as knowledge based on skill or experienced-based observation. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-48, 119 S.Ct. 1167, 1174 (1999); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

²⁰ *Id.*

Furthermore, in order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Thus, the trial judge must first determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."²¹ Next, the judge will utilize various factors which bear on the inquiry of whether the "reasoning or methodology underlying the testimony is scientifically valid."²² The "key question" is whether the theory or scientific technique can be and has been tested. Another consideration is "whether the theory or technique has been subject to peer review and publication."²³ In the case of a particular scientific technique, the court should consider the "known or potential rate of error."²⁴ However, "the inquiry envisioned by Rule 702 is ... flexible" and the focus is "solely on principles and methodology, not on the conclusions that they generate."²⁵ Thus, while "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, the Rules do assign substantial discretion to the trial judge to determine and ensure that an expert's testimony is reliable and relevant. But whatever latitude a trial judge allows in the presentation of experts and in utilizing unconventional theories, those experts and theories remain subject to vigorous cross-examination.

c. The Texas Standard

In Texas, expert testimony is generally admissible if the witness is qualified as an expert, the testimony will assist the jury, and the probative value of the testimony is not substantially

²¹ *Id.*

²² *Id.* at 2796.

²³ *Id.* at 2796-2798.

²⁴ *Id.*

²⁵ *Id.*

outweighed by its prejudicial effect.²⁶ The reliability of scientific evidence depends upon (1) the validity of the underlying scientific principle, (2) the validity of the technique applying that principle and (3) the proper application of the technique on a particular occasion.²⁷ The burden of proof regarding scientific evidence is on the proponent of the evidence to establish the predicate facts by a preponderance of the evidence.

d. The Actual Deposition

Have all exhibits you intend to use indexed, marked and readily available; have the adverse expert's previous publications indexed and cross-indexed if you intend to use them for impeachment purposes, and index the expert's prior depositions for efficient impeachment. Since the primary goal of a deposition is to learn everything you can about all the expert's opinions and the bases of those opinions, let the expert talk as freely as possible about those opinions. Avoid interrupting the witness. By not immediately attacking the witness, you may be able to obtain some favorable acknowledgements about recognized authors or your own experts.

i. Background Information

Begin the deposition by developing the expert's credentials, or lack thereof. Inquire about the expert's educational and work history as well as his present employment. Concentrate on what is not contained in his curriculum vitae; locate the gaps in academic training or employment history. Explore the extent to which the expert serves as an expert witness and on what topics he considers himself to be an expert. Ask the expert if there are

²⁶ *Trimboli v. State*, 817 S.W.2d 785, 790-91 (Tex. App. -- Waco 1991), *aff'd*, 826 S.W.2d 753; *Kelly v. State*, 792 S.W.2d 579, 584 (Tex. App. -- Fort Worth 1990), *aff'd*, 824 S.W.2d 568.

²⁷ *Kelly v. State*, *supra*, 792 S.W.2d at 584.

areas in which the expert's opinions disagree with acknowledged experts or recognized publications in the field. Determine whether the expert typically testifies for plaintiffs or defendants, and whether the expert has a "history" with the attorney for whom he is testifying in your case. Determine whether anyone assisted the expert in preparing his report or preparing for his deposition. Because many experts are busy, they may entrust a portion of their work to an assistant who is a weaker witness, and depending on the nature of the work, it may be wise to depose the assistant. Finally, inquire about the expert's rate of compensation and whether he has an interest in the lawsuit.

ii. Expert's Opinions

After discussing the background of the expert and his opinions in the case, it is time to begin attacking any *assumptions* made by the expert. Establish when the expert was first contacted, what the expert was asked to do, who contacted the expert, and what information the expert has been provided with in order to form his or her expert opinions. Determine exactly what documents were provided to the expert and when, so that his opinions can be limited to those documents. Sometimes lawyers only provide their experts with portions of the available documents, depositions and financial information, so it can be effective in cross examination to provide the expert with additional information or documentation during the deposition and ask the expert whether the information is important and how such information impacts his opinion. Such questions may illustrate that single factors or assumptions can dramatically impact the expert's opinion. After determining the expert's assignment, begin a specific attack on the expert's assumptions.

e. **Cross-Examination -- General**

There are simply too many different types of experts and expert testimony, and too many variables, to develop anything like a reliable or complete list of cross-examination points for expert witnesses. However, there are some general principles that should be considered when cross-examining any expert witness.

Cross-examination of an opposing expert at trial should be short and focused—usually concentrating on just a few key points. Keeping the opposing expert on the stand for too long, or opening up extensive avenues for redirect, can be dangerous. The questioner should obtain what he can, but not get too greedy.

In addition, although the subject of the expert's testimony may often be complicated, great effort should be made to simplify the examination. The cross-examiner should use plain English so that the jury can understand and follow the logic of the questions. Moreover, it is often helpful to devise and utilize analogies to present the cross-examination of the expert's testimony in a context the jury can understand.

The cross-examiner should use only leading questions so as to control the expert. No opportunity should be given for the expert to repeat his direct testimony. Rather, the questioner should carefully lead the expert with tightly focused, leading questions. Also, the questioner should not attempt to argue with the expert--particularly with respect to areas within the witness' field of expertise. Presumably, the expert should be much better versed in the subject than the attorney and it is unwise to attempt to challenge the expert on his own turf.

Accomplishing these goals requires thorough preparation. First, the questioner must thoroughly understand the subject so that he can handle an unexpected answer. Second, all exhibits to be used with the expert should be thoroughly prepared and organized so as to facilitate a smooth and efficient examination. Finally, the examination must be carefully planned so that the

questioner can maintain control over the opposing expert and avoid giving the expert an opportunity to repeat the opinions he gave in direct.

f. Personal Injury Litigation

In a personal injury case, for example, a plaintiff frequently retains an economic expert. If so, ask the plaintiff's economist to calculate the life expectancy of the injured plaintiff or the deceased, as well as for the plaintiff's spouse. Ask for the specific table used in the calculation; the tables are periodically updated and it is critical that the most recent table be used. Inquire as to whether economist reviewed the plaintiff's or spouse's medical records that might indicate a reduced life expectancy.

Ask the economist to calculate the worklife expectancy of the plaintiff. Be certain that the expectancy is calculated on the age of the plaintiff at injury and NOT at trial. Not all people have the same work life expectancy - this is not the same as expected retirement age. This variable fluctuates considerably by occupation, sex, race, and education level. There are specific government tables available that contain this information -- be certain that the plaintiff's economist has used the proper table. Also review the plaintiff's or deceased's medical records. A pre-existing medical condition can shorten a person's life expectancy and projected work life expectancy. It is critical that the economist take these conditions into consideration as part of their assumptions. If he failed to do so, establish that such a change would have a big impact on the final calculation.

Find out the plaintiff's income history and determine the source for that information.

Inquire as to whether the economist has met with the plaintiff, or if it is a wrongful death case, with the family. If not, question the economist regarding his knowledge of what the plaintiff or deceased actually did around the house.

