HANDBOOK OF TEXAS EVIDENCE
CIVIL PRACTICE

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General Provisions 1
Judicial Notice 45
Presumptions 83
Relevancy and Its Limits 107
Privileges 167
Witnesses 243
Opinions and Expert Testimony 323
Hearsay 373
Authentication and Identification 433
Contents of Writings, Recordings, and Photographs 461

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CHAPTER 7

Opinions and Expert Testimony

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700. Introduction

701. Opinion Testimony by Lay Witnesses
   §701.01 Summary of the Rule
   §701.02 Not Testifying as an Expert
   §701.03 Basis and Effect of Opinions or Inferences
   §701.04 Helpfulness Requirement

702. Testimony by Experts
   §702.01 Summary of the Rule
   §702.02 Comparing the Texas Rule to the Federal Rule
   §702.03 Qualifications
   §702.04 Specialized Knowledge
   §702.05 Assist the Trier of Fact
   §702.06 Relevance
   §702.07 Reliability
   §702.08 Sufficient Bases for Opinions
   §702.09 Procedure

703. Bases of Opinion Testimony by Experts
   §703.01 Summary of the Rule
   §703.02 Admissibility of the Facts or Data Considered by Experts
   §703.03 Comparison of Texas and Federal Rules

704. Opinion on Ultimate Issue
   §704.01 Summary of the Rule
   §704.02 Ultimate Issue of Fact

705. Disclosure of Facts or Data Underlying Expert Opinion
   §705.01 Summary of the Rule
   §705.02 Comparing the Texas Rule to the Federal Rule
§705.03 Disclosure of the Bases of Expert Opinions
§705.04 Exclusion of Opinions Where Underlying Facts/Data Insufficient
§705.05 Limitation or Exclusion of Facts or Data Underlying Expert Opinions

706. Audit in Civil Cases
§706.01 Summary of the Rule
§706.02 Comparing the Texas Rule to the Federal Rule
§706.03 Court-Appointed Auditors

700. Introduction

A layperson’s image of a witness is likely to be the image of a person recounting facts—what the witness saw, heard, smelled, tasted, or touched. The law’s preference is consistent with this image. A general rule of evidence is that witnesses must speak to facts and cannot give their beliefs or opinions to the jury. This general rule is a corollary to another general rule of evidence—that only juries may draw inferences from the facts. Therefore, if a witness renders an opinion, rather than allowing the jury to reach its own conclusion from the facts, the witness is invading the jury’s traditional role. Opinion testimony is so prevalent in the courtroom today that the modern practitioner is likely to conclude that the general rule prohibiting opinion testimony is of no use or application. The general rule, however, sheds a great deal of light on the function and form of modern opinion testimony.

Generally, opinion testimony is permissible only when some deficiency in the jury makes it incapable of drawing the conclusion for itself. In such cases, the law allows the witness to draw the conclusion for them. Similarly, when resolution of the dispute requires application of specialized knowledge, an expert is permitted to provide a conclusion to the jury because the jury does not possess the specialized knowledge or skill needed to draw the conclusion for itself.

Texas Rules of Evidence 701 through 706 determine when the witness will be able to render an opinion. The Rules, for the most part, embody the principle that jurors will draw all conclusions. Opinion testimony is permissible only when it will “assist the jury.” If the jury could

1 Cooper v. State, 23 Tex. 331, 1881 WL 9659, at *4 (1859).
draw the conclusion as well as the witness, the opinion does not assist the jury and is inadmissible.

Opinion testimony is divided into two categories under the Texas Rules: (1) lay opinion testimony and (2) expert opinion testimony. Lay and expert opinion jurisprudence has changed significantly over the last decade under federal and Texas case law. The impetus for such changes primarily resulted from a United States Supreme Court expert opinion trilogy and, in Texas, a parallel Texas Supreme Court expert opinion trilogy. In sum, these decisions articulate an affirmative gatekeeping duty for judges to ensure the relevance and reliability of expert witness opinion testimony.

The Texas opinion evidence rules are set forth in Texas Rules 701 through 706. Texas Rule 701 governs lay opinion testimony, permitting lay witnesses to testify on matters based on their personal knowledge in the form of an opinion where such testimony assists the trier of fact. Texas Rule 702 governs expert opinion testimony, permitting qualified expert witnesses to testify on matters that will assist the trier of fact based on their scientific, technical, or other specialized knowledge. Texas Rules 703 through 705 govern the bases of the expert's opinion (type, sufficiency, and disclosure of underlying facts and data), and the permissibility of opinion testimony on ultimate issues of fact. Lastly, Texas Rule 706 governs the admissibility of the opinions of court appointed auditors.

While the opinion evidence provisions of the Federal Rules and Texas Rules address many of the gatekeeping considerations articulated by the dual-trilogies, additional considerations emerge in the decisional jurisprudence. As a result, the discussion of each Texas Rule commences with an analysis of the express provisions of the Rule, and then addresses interpretive and supplemental case decisions.

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

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4 Daubert, 509 U.S. at 597; Gammill, 972 S.W.2d at 725.
inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony of the determination of a fact in issue.

§701.01 Summary of the Rule

Ordinarily, lay witnesses may testify only as to facts; the fact-finder alone may draw conclusions from such facts. This general rule precludes lay witnesses from rendering opinions except in limited circumstances. Lay opinions were admissible under pre-Rules decisions where "the data upon which the inference is based are so numerous, complicated or evanescent that they cannot be communicated to the minds of the jurors in such a manner as to give them the knowledge possessed by the witness." The Texas Supreme Court has said that the reason for Rule 701 is to address those situations where it would be impossible for a witness to describe her overall perceptions of an event on a fact-by-fact, perception-by-perception basis. Instead, the witness is allowed to give her mental impressions of the event produced by her perception of the facts. In essence, the witness is allowed to give an opinion as a "shorthand rendition of facts" and to "boil down" the facts to lay opinions. Like lay testimony as to facts, they are based on the witness's own perceptions of sensory data, but have been "summarized and interpreted" so that they can be communicated.

Pre-Rule decisions limit lay opinions to situations where they were necessary for the fact-finder to understand the underlying facts. Modern Texas Evidence law, however, permits lay opinions when they are merely helpful to the fact-finder. Rule 701 governs lay opinion testimony and

\[5\] See Nichols v. Seale, 493 S.W.2d 589, 594 (Tex. Civ. App.—Dallas 1973), rev'd on other grounds, 505 S.W.2d 251 (Tex. 1974). The classic exception to this rule is demonstrated by the case of McKee v. Nelson. McKee was an action for breach of promise to marry in which a central issue regarding damages was whether the jilted bride-to-be was "sincerely attached" to her fiancé. Witnesses to the courtship rendered the opinion that she was in fact "sincerely attached." The Supreme Court held that the opinions were admissible, stating "there are a thousand nameless things indicating the existence or degree of the tender passion, which language cannot specify." Thus, the lay opinion that the jilted bride-to-be was "sincerely attached" was permitted because the facts on which the opinions were based were of a type not capable of communication. McKee v. Nelson, 4 Cow. 355, 15 Am. Dec. 384 (N.Y. Sup. Ct. 1825) (cited in Cooper v. State, 23 Tex. 391, 1881 WL 9659, at *6 (1859)).

\[6\] See City of Fort Worth v. Lee, 186 S.W.2d 954, 960 (Tex. 1945), overruled on other grounds by Burck Royalty Co. v. Walls, 616 S.W.2d 911, 925 (Tex. 1981).

\[7\] Id.


permits such testimony where the opinions are based on the witness's personal perceptions, and the opinions either help the fact-finder understand the testimony or assist the fact-finder in determining a fact in issue. The remainder of this section on lay opinion testimony (1) states and fleshes out the requirements of Rule 701; (2) discusses common applications of Rule 701; and (3) discusses the scope of Rule 701's application, including the line between lay and expert opinion testimony.

§701.02 Not Testifying as an Expert

Rule 701 governs opinion testimony of a lay witness. By its terms, application of Rule 701 is limited to a witness "not testifying as an expert." Most lawyers are satisfied with the definition that a lay witness is a nonexpert. Modern discovery rules requiring pretrial designation of experts make it easier for the lawyer to distinguish the expert from the lay witness. However, distinguishing expert and lay opinion testimony is not always so simple. Making this distinction is important because a creative trial attorney may disguise expert opinion testimony as a lay opinion in order to avoid reliability challenges or to circumvent expert disclosure deadlines.

So, what does it mean to not testify as an expert? Using a colloquialism, it is a little bit of a "chicken and egg" question depending on a practitioner's point of reference. On the one hand, lay opinion testimony can be defined as everything except what is expert subject matter. Alternatively, what is not expert witness subject matter can be defined by reference to subjects that jurors (i.e., laypersons) can decide without the assistance of an expert. Generally, where a matter lies within the common knowledge of jurors, it is lay as opposed to expert witness subject matter. For example, lay witnesses have been allowed to give opinions on "sanity, insanity, value, handwriting, intoxication, physical condition, health, disease, estimates of age, size, weight, quantity, time, distance, speed, identity of persons and things." In addition, lay witnesses in Texas cases have also been allowed to give opinions on causation, value of their own

property,\textsuperscript{13} damage to their own property,\textsuperscript{14} a testator's state of mind, testamentary capacity,\textsuperscript{15} and their own medical condition.\textsuperscript{16}

Still, neither the Rule nor the case law draws a bright line between the two forms of opinion testimony. For example, whether a person is intoxicated may be a matter both within the common knowledge of jurors and an appropriate subject of expert testimony. A juror could testify that a person was intoxicated based on seeing the person stagger and stammer. A doctor could testify that the person was intoxicated based on the results of various tests. The difference here between the lay and expert opinion is the bases of the opinions. The lay opinion is, and must be, based on the lay witness's own perceptions—what he can hear, smell, taste, touch, or see. The expert may base his opinion on the application of scientific, technical, or specialized knowledge and any items reasonably relied upon by experts in the field. Since the basis of a lay opinion must be the lay witness's perception, an effective method for distinguishing lay from expert opinions is to identify the bases of the opinion. If a lay witness renders an opinion not based on his own perception, it is impermissible, and if based on some specialized knowledge or outside source, it resembles expert opinion testimony.

Distinguishing between lay and expert testimony is particularly difficult where the witness bases his opinion on training and experience as well as his own perceptions of the event. The line between training and experience (both of which are specifically mentioned as bases for expert opinions in Rule 702) and the perceptions of a witness (the basis for lay opinions under Rule 701) may be difficult to draw. “Perceptions” under Rule 701 refer to “a witness's interpretation of information acquired through his or her own senses or experiences at the time of the event.”\textsuperscript{17} Experience and training under Rule 702, on the other hand, refer to knowledge and skills acquired prior to the event.\textsuperscript{18}

\begin{footnotesize}\begin{enumerate}
\item[16] City of San Antonio v. Vela, 762 S.W.2d 314, 321 (Tex. App.—San Antonio 1988, writ denied). But see Rodriguez v. State, 697 S.W.2d 463, 468-69 (Tex. App.—San Antonio 1985, no writ) (excluding lay opinion testimony concerning the deceased's belief that he was going to die).
\item[18] Id.
\end{enumerate}\end{footnotesize}
The case law does not draw this distinction quite so clearly, and opinions based on both perceptions and experience or training have been admitted as both lay and expert opinions.\textsuperscript{19} As the Texas Court of Criminal Appeals has said, a bright line between lay and expert opinions cannot always be drawn because “all perceptions are evaluated based on experiences.”\textsuperscript{20} However, the court also stated that, as a general rule, even where a witness bases his opinions on training and experience, observations that “do not require significant expertise to interpret and which are not based on a scientific theory” are admissible under Rule 701 so long as the other requirements of Rule 701 are met.\textsuperscript{21}

However, while Texas Rule 701 applies to witnesses not testifying as experts, it does not expressly preclude lay witnesses from giving opinions based on scientific, technical, or other specialized knowledge. In contrast, Federal Rule 701 states that a lay witness may render an opinion so long as it is “not based on scientific, technical, or specialized knowledge.” The Advisory Committee gave its reasoning for this change to Federal Rule 701 (which was identical to Texas Rule 701 until December 2000): “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedience of proffering an expert in lay witness clothing.”\textsuperscript{22} Instead, such testimony must now be offered under Federal Rule 702 and subjected to all of the qualification, relevance, and reliability considerations we discuss hereafter, not to mention the related discovery rules for expert witnesses described under the Federal Rules of Civil Procedure.\textsuperscript{23}

Texas courts have not adopted a bright-line approach to differentiate strictly between lay and expert opinions on scientific, technical, or specialized matter. In some instances, a witness not testifying as

\textsuperscript{19} Id. at 536 (citing Harnett v. State, 38 S.W.3d 650, 659 (Tex. App. — Austin 2000, pet. ref’d) (Social worker testified under Rule 701 based on personal observations and under Rule 702 based on training and experience.); Thomas v. State, 916 S.W.2d 578, 581 (Tex. App. — San Antonio 1996, no pet.) (Police officer testified as both lay and expert witness regarding the operation of a crack house.); Ventry v. State, 917 S.W.2d 419, 422 (Tex. App. — San Antonio 1996, pet. ref’d) (Police officer rendered both lay and expert opinions about the scene of an accident.); Yohey v. State, 801 S.W.2d 232, 243 (Tex. App. — San Antonio 1990, pet. ref’d) (Police officer’s testimony as to time of death was admissible under Rules 701 and 702.); Austin v. State, 794 S.W.2d 408, 409-11 (Tex. App. — Austin 1990, pet. ref’d) (Police officer’s testimony regarding code word for prostitution was admissible under both Rules 701 and 702.).

\textsuperscript{20} Id. at 537.

\textsuperscript{21} Id.


\textsuperscript{23} Id.
an expert may have "specialized knowledge" akin to that of expert witnesses. Assuming the opinions are relevant to a fact in issue, Texas courts are generally inclined to allow the quasi-expert opinions even if offered under Texas Rule 701.24 However, it is more accurately said that the same witness may be a lay witness with respect to some subjects and an expert with respect to others.

Simply because a lay witness has personal knowledge of a relevant matter does not mean the witness is free to render opinions. A lay witness without any specialized knowledge may not exercise subjective judgment to reach an opinion even where he has personal knowledge of the relevant facts.25 For example, a witness was not qualified to testify that a particular safety precaution would have prevented an injury even though the witness saw the accident.26 Such a witness is no better suited to reach the conclusion than the jury, and the subject is "peculiarly within the province of the jury."27

Texas courts sometimes evaluate the "close calls" under both Texas Rules 701 and 702, avoiding the need to admit the opinions solely under one Rule or the other. For example, in Vela v. Yamaha Motor Corp., lay witness opinions on business custom and practice, industry, and competitor information were admitted. In Leitch v. Hornsby, a coworker was not qualified to testify that a particular safety precaution would have prevented injury, despite observing the accident; and in Clark v. McFerrin, opinions by a witness, as to pain and suffering compensation the plaintiff should receive, were excluded.28

§701.03 Basis and Effect of Opinions or Inferences

Texas Rule 701 requires the witness's opinions to "be rationally based on the perception of the witness."29 In contrast, expert opinions may be based on anything reasonably relied upon by experts in the field.30 This requirement of Rule 701 is similar to Rule 602's personal

26Id.
27Clark v. McFerrin, 760 S.W.2d 822, 828 (Tex. App. — Corpus Christi 1988, writ denied) (Opinions by witness as to pain and suffering compensation plaintiff should receive excluded.).
28Id.
30Tex. R. Evid. 703.
knowledge requirement. Rule 602 prohibits a witness from testifying to a matter unless "the witness has personal knowledge of the matter."31 The opinion must be based on what the lay witness saw, heard, felt, smelled, or tasted.32 Opinions based on what the witness was told will not be admitted.33 For example, the owner of a diamond was not permitted to opine that the diamond weighed one carat where the opinion was based solely upon what she heard someone say it weighed.34

§701.04 Helpfulness Requirement

Under Rule 701, the lay opinion must be "helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue."35 The first phrase of this requirement—helpful to a clear understanding of the witness’ testimony—is, to a large extent, a restatement of the "short rendition" or "composite fact" rule that preceded Rule 701. However, where the former law permitted "short renditions" where the underlying facts could not be communicated, Rule 701 allows a "short rendition" wherever it would be helpful.36 In other words, it may be possible for the witness to communicate the facts on a fact-by-fact basis, but Rule 701 permits a "short-hand rendition" so long as the opinion is helpful.

While Rule 701 is not as restrictive as pre-Rule 701 law, it does not change the classic rule that "no opinion is needed for what any fool can plainly see."37 If the facts underlying the opinion are easily communicated and understood, no "short rendition" opinion under Rule 701 will be permitted because it would not be helpful. For example, a lay opinion that police were harassing the defendant was unnecessary where the jury had all the facts supporting the opinion and were able to reach their own conclusion about what the police had done.38

Lay opinions are not limited to opinions that are obviously "short renditions" or "composite facts." If the proponent can demonstrate

31 Tex. R. Evid. 602.
34 Id. Id. TEX. R. EVID. 701.
35 See Fed. R. Evid. 701 (b) advisory committee’s note.
37 Roberts v. State, 743 S.W.2d 708, 711 (Tex. App.—Houston [14th Dist.] 1982, pet. ref’d).
that the lay opinion is based on the perception of the witness and will assist the trier of fact, a lay opinion is permissible on a wide variety of subject matters. In Hanks v. LaQuey, the court permitted a lay opinion regarding the distance from which a warning light could be seen. In the same case, the court concluded that a lay witness’s opinion regarding the speed of a car was admissible. Courts have also permitted witnesses to render opinions regarding a person’s age.

Some interesting cases arise regarding opinion testimony as to state of mind, intent, and the like. Texas courts have held that opinion testimony regarding another’s state of mind, rationally based on the witness’s perception, is admissible under Rule 701. Lay opinion testimony has been admitted on a testator’s intent and capacity based on the witness’s perception of the testator at the time of making the will. Similar opinions were admitted to address a defendant’s mental state, to address intent in setting a fire, and to refute assertions of knowledge about a customer’s bankruptcy. Generally, these opinions relate to fact issues that cannot be proven by direct evidence.

702. Testimony by Experts

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

39 Hanks v. LaQuey, 425 S.W.2d 396, 407 (Tex. Civ. App. — Austin 1968, writ ref’d n.r.e.).
40 See id.
42 Ethicon, Inc. v. Martinez, 835 S.W.2d 830, 832 (Tex. App. — Austin 1992, writ denied) (citing Campbell v. Groves, 774 S.W.2d 717, 719 (Tex. App. — El Paso 1989, writ denied) (“In will probate case, witness permitted to testify that testator was of unsound mind based upon personal observations of hallucinations and persecution complex”).
46 Chase Commercial Corp. v. Datapoint Corp., 774 S.W.2d 359, 368 (Tex. App. — Dallas 1989, no writ) (Employee was allowed to testify, based on close working relationship and observation, to opinion that another employee would not have assigned lease to plaintiff if he had known the company was bankrupt).
§702.01 Summary of the Rule

Oftentimes the resolution of a factual dispute requires application of specialized knowledge not possessed by the average juror. Expert opinions are admissible to assist the trier of fact in resolving such disputes. The Rules attempt to ensure that the experts rendering the opinions are qualified to render such opinions, that the subject matter of the opinion is expert in nature, rather than a matter of general knowledge, and that the opinion will actually assist the jury. The Texas Rules of Evidence primarily address these three issues. In keeping with developments in federal courts and in the Court of Criminal Appeals, the Texas Supreme Court has also imposed a reliability requirement. The purpose of this requirement is to ferret out so-called “junk science.” In sum, Rule 702 and the Texas Supreme Court case law require an expert opinion to be helpful and reliable, have a sufficient basis, and be rendered by a qualified expert.

The express language of Texas Rule 702 identifies only three issues a court should consider in determining whether opinion testimony is admissible as an expert opinion.

1. **Qualifications:** The expert must be qualified in the subject matter of his testimony based on “knowledge, skill, experience, training or education.”

2. **Subject matter:** The subject of the opinions must be expert subject matter, i.e., “scientific, technical or other specialized knowledge.”

3. **Helpfulness:** The expert’s testimony must assist the trier of fact in understanding the evidence or determining a disputed fact issue.\(^{47}\)

However, Texas Rule 702 does not reflect the sole considerations relevant to whether a witness’s testimony is admissible as an expert opinion. Other Texas Rules and Texas decisional jurisprudence identify additional considerations, including whether the witness’s opinions are relevant and reliable.

§702.02 Comparing the Texas Rule to the Federal Rule

Through amendments made in 2000, the Federal Rules now reflect Daubert-related reliability considerations. The text of the Texas Rules contain no such requirements. In *Daubert v. Merrell Dow Pharmaceuticals*,

\(^{47}\) Tex. R. Evid. 702.
Inc.\textsuperscript{48} the United States Supreme Court identified four considerations to be used in the exercise of a court’s gatekeeping function.

1. \textit{Testing}: “whether the theory or technique . . . can be (and has been) tested”;

2. \textit{Peer review and publication}: “whether the theory or technique has been subjected to peer review and publication”;

3. \textit{Error rate}: the “known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation”; and

4. \textit{Acceptance}: “widespread acceptance.”\textsuperscript{49}

In the Advisory Committee Notes that accompanied the 2000 amendments to the Federal Rules,\textsuperscript{50} additional considerations addressed by courts across the country were identified as follows:

1. \textit{Opinions independent of litigation}: whether the expert’s testimony is based on “research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying”;

2. \textit{Improper extrapolation}: whether “the expert has extrapolated from an accepted premise to an unfounded conclusion”;

3. \textit{Alternative explanations}: whether “the expert has accounted for obvious alternative explanations”;

4. \textit{Professional standard of care}: whether “the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting”;

5. \textit{Reliable field of expertise}: whether “the expert’s field of expertise is known to reach reliable results for the type of opinion the expert would give.”\textsuperscript{51}

The current version of Federal Rule 702 generally reflects these reliability considerations.


\textsuperscript{49} \textit{Id}. The third consideration, error rate, is reasonably divisible into two separate considerations: (1) the known or potential error rate; and (2) whether standards and controls existed and were maintained during the technique’s use. In simple terms, the former addresses “quantity” (what is the error rate, and what degree of error can be tolerated before the technique becomes unreliable), and the latter addresses “quality” (how reliable is the indicated error rate, or possibility for error, based on proper control during the use of the technique—whether a scientific test or experiment, a statistical population control group, and so forth).


\textsuperscript{51} \textit{Id}. at 418 (citations omitted).
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 principle and methods reliably to the facts of the case.

In comparison to the Texas Rule, Federal Rule 702 contains three additional numbered requirements for admitting expert testimony: (1) reliable basis for opinions; (2) reliable methodology; and (3) reliable application of the methodology to the facts. Despite the difference between the express provisions of Texas and Federal Rules 702, the Texas Supreme Court case of E.I. du Pont de Nemours & Co. v. Robinson and its progeny, along with provisions of other Texas opinion evidence rules discussed hereafter, incorporate reliability considerations similar to those articulated in Daubert, the Advisory Committee Notes, and the enumerated components of Federal Rule 702.

§702.03 Qualifications

To give expert opinion testimony, Rule 702 requires the witness to be qualified as an expert. In deciding if an expert is qualified, trial courts "must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion." An expert may be qualified based on characteristics including knowledge, skill, experience, training, or education. What particular characteristic or combination of these characteristics will qualify an expert in a particular situation is not defined, but the use of "or" in the language of the Rule indicates that no one particular

52 Fed. R. Evid. 702.
53 923 S.W.2d 549 (Tex. 1995).
54 For example, Tex. R. Evid. 705(c) to (d) create the same practical requirement as Fed. R. Evid. 702(1), requiring the trial court to exclude expert opinions that are not supported by a sufficient evidentiary basis.
56 Tex. R. Evid. 702 (third clause).
characteristic is necessarily required, and that any one or more of these characteristics may be sufficient.\textsuperscript{57} An expert is qualified if she has specialized knowledge, regardless of whether such knowledge is derived from education, practical experience, or some combination. In \textit{Gammill} the Texas Supreme Court held that experience alone can establish qualification in some instances.

An expert’s office or position does not ensure that such expert is qualified. For example, it is not presumed that a police officer is qualified to opine on the cause of an accident. However, where the officer has sufficient training in the relevant field of science and a high degree of knowledge concerning the course of accidents, he may be qualified as an expert.\textsuperscript{58} Following this reasoning, a state highway patrolman with 16 years’ experience in accident investigation may be qualified to testify about highway design.\textsuperscript{59} Importantly, the patrolman is qualified because of specialized knowledge derived from training, education, and experience—not because he carries the title of a highway patrolman.

Similarly, possession of a license or degree does not ensure qualification. Conversely, where an expert has acquired specialized knowledge through any one of a number of methods, he is qualified to testify based on that knowledge even where he lacks a license in the pertinent area.\textsuperscript{60} Concerning degrees, one area where the courts have sliced the expert opinion evidence jurisprudence very thinly concerns what qualifications a doctor needs to testify on particular medical subjects.\textsuperscript{61} On the one hand, every medical doctor is not automatically qualified as an expert on every medical question,\textsuperscript{62} but that does not mean that only a neurosurgeon can testify concerning injuries to the brain.\textsuperscript{63} Rather, the

\textsuperscript{57} \textit{Gammill}, 972 S.W.2d at 726 (Experience alone can establish qualifications in some cases.); Thomas v. State, 915 S.W.2d 597, 600 (Tex. App.—Houston [14th Dist.] 1996, pet. ref’d) ("Expert is qualified to testify if the expert has special knowledge derived from the study of technical works, specialized education, practical experience, or a combination of the above.").

\textsuperscript{58} Gainsco County Mut. Ins. Co. v. Martinez, 27 S.W.3d 97, 104 (Tex. App.—San Antonio 2000, pet. dism’d by agr.).


\textsuperscript{60} \textit{Helena Chem. Co.}, 47 S.W.3d at 499-500 (plant pathology); Southland Lloyd’s Ins. Co. v. Tomberlain, 919 S.W.2d 822, 827-28 (Tex. App.—Texarkana 1996, writ denied) (insurance issues).

\textsuperscript{61} America W. Airlines v. Tope, 935 S.W.2d 908, 918 (Tex. App.—El Paso 1996, no writ) (Exclusion of psychologist’s testimony reversed; though she was not M.D. or Ph.D, she possessed two graduate degrees, was licensed to practice in two states, belonged to numerous professional societies, and had 20 years’ experience.)

\textsuperscript{62} Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996).

\textsuperscript{63} Id. at 153.
expert must prove that her qualifications fit the "specific issue before the court."  

Based on this standard, an emergency room doctor's opinions were excluded concerning the cause of brain injuries. However, similar testimony was admitted where (1) a physician reviewed patient test results, relevant peer-reviewed publications, and the testimony of another neurologist; (2) a physician was not experienced in neurology but had knowledge of what was customarily done by other practitioners under similar circumstances to those at issue; and (3) a non-physician with a doctorate in neuroscience had conducted research and taught in the field of neurological injuries. The Texas Civil Practice and Remedies Code imposes additional qualification requirements on certain expert witnesses testifying in medical malpractice cases. The statutory requirements apply in suits involving a health care liability claim against a physician for the injury or death of a patient, and require the expert who testifies on the standard of care to be a physician who (1) was practicing medicine at the time the testimony was given or at the time the claim arose; (2) has knowledge of the standards of diagnosis, care, treatment, injury, or condition involved in the claim; and (3) is qualified based on training or experience to render an opinion on the relevant standard of care. The Code also imposes additional qualification requirements in suits against a health care provider and permits testimony on the standard of health care only from a person "practicing health care." The Code also requires testimony on causation in a medical malpractice case to be rendered by a physician.

Where the expert is qualified in the subject, testimony may still be limited to those issues most closely fitting the expert's qualifications.

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64 Id.
65 Id.
66 Roberts v. Williamson, 52 S.W.3d 843, 848 (Tex. App.—Texarkana 2001, no pet.).
68 Ponder v. Texarkana Mem'l Hosp., 840 S.W.2d 476, 477-78 (Tex. App.—Houston [14th Dist.] 1991, writ denied). See also State ex rel. L.C.F., 96 S.W.3d 651, 654 (Tex. App.—El Paso 2003, no pet.) (Resident in his second month of a four-year program in clinical psychiatry permitted to testify as expert where other qualifications were established.).
69 TEX. CIV. PRAC. & REM. CODE ANN. §74.401(a)(1)-(3).
70 TEX. CIV. PRAC. & REM. CODE ANN. §74.402(b).
71 TEX. CIV. PRAC. & REM. CODE ANN. §74.403(a).
72 See Keo v. Vu, 76 S.W.3d 725, 732 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (On issues relating to pre- and post-operative care in connection with rhinoplasmy, subject overlaps many fields, expert need not be specialized in particular branch of medicine, and experienced surgeon performing operations on same parts of body is qualified.).
For instance, a nursing home nurse's testimony on the standard of care for nurses in nursing homes is admissible. However, her testimony on standards of care for nursing homes in general is not admissible.\(^\text{73}\)

The principle that an expert's qualifications must fit the issue at hand is not limited to the field of medicine. For example, where one engineer had experience in the relevant field, but not with the specific issue, and another engineer had researched and published regarding the specific issue, only the second engineer was qualified.\(^\text{74}\) Similarly, an engineer was not qualified to opine as to causes of residential plumbing leaks where his only experience was with foundations of large commercial buildings.\(^\text{75}\) In contrast, a chemical expert experienced with a particular fabric treatment solution was qualified to testify about another fabric treatment solution with which he had no experience where the differences between the two treatments were slight.\(^\text{76}\)

In some instances, broad-based knowledge and experience is enough. In an escalator accident case, an expert who was not an engineer and had no college degree and was not trained in accident reconstruction was deemed qualified.\(^\text{77}\) His specialized knowledge was derived from a long career in escalator safety, installation, and maintenance; related training; speaking and writing; and recognition of him by peers within the industry as well as the national media as a qualified expert in the field.\(^\text{78}\) A similar result was reached where an expert had inspected defective equipment and thoroughly familiarized himself with technical operating manuals and depositions, despite no prior experience with the subject equipment.\(^\text{79}\) Moreover, a witness with education and experience in civil engineering, albeit no license to practice engineering, was qualified to give road and driveway planning testimony.\(^\text{80}\)


\(^{75}\) State Farm Lloyd's v. Mireles, 63 S.W.3d 491, 499 (Tex. App.—San Antonio 2001, no pet.).


\(^{77}\) Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 401-02 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.t.). \textit{See also} Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499-500 (Tex. 2001) (Even though expert had a degree in wildlife management and was not a plant pathologist, general knowledge as plant-science consultant, etc., sufficed.).

\(^{78}\) Schindler Elevator Corp., 78 S.W.3d at 401-02.


These examples are not exclusive to scientific and medical opinions. For instance, on business and quasi-legal issues relating to corporate structures of large, multi-tiered natural gas companies, an estate planning attorney with no specific experience in the natural gas industry was sufficiently qualified based on more than a decade of corporate experience in a 20-plus-year career that included representing more than 100 corporations, litigating alter-ego issues, and advising clients on preserving liability protections in the corporate form. Similarly, an appraiser with 20 years of experience was qualified to testify that a ranch could not be partitioned.

In certain cases, the foundation does not relate to the expert’s formal training but to her firsthand observations. An experienced house mover, for instance, was qualified to give opinions on repair costs for move-damaged homes. A beekeeper would be allowed to give expert opinion that bees take off into the wind based on years of observation. As the court learned, the beekeeper has no training or education that gives him specialized knowledge regarding flight principles, “but he has seen a lot more bumblebees than [the jurors] have.”

§702.04 Specialized Knowledge

Whatever an expert’s qualifications may be, opinion testimony is not admitted as expert testimony unless the subject of the opinions is a subject requiring expertise. Rule 702 describes expert opinion subject matter as “scientific, technical, or other specialized knowledge.” Thus, Texas Rule 702 requires the expert to testify regarding specialized subject matters, including scientific and technical subject matter.

81 Id.
86 The Gammill court explained the inherent difficulty in assessing the reliability of experience-based testimony by its reference to the “beekeeper analogy” found in a Sixth Circuit decision: “If one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. . . . On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions.” Gammill, 972 S.W.2d at 724-25 (quotations and citations omitted) (emphasis omitted).
86 Id.
Implicitly, Rule 702 prohibits expert opinion testimony regarding matters within the common knowledge of jurors. Stated another way, when the "issue involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide," not the subject of expert testimony. The line between general knowledge and expert knowledge is a muddled one and not always so easy to draw.

Many appropriate subjects of expert testimony are obvious, such as the traditional hard sciences (biology, chemistry, physics, etc.), medicine, and engineering, as well as technical fields such as law, history, music, and various business and industry disciplines (e.g., auctioneers, bankers, valuation professionals, and other businesspersons and industry experts). In addition to scientific and technical knowledge, expert subject matter includes "other specialized knowledge." Other specialized knowledge may include the "softer sciences" such as the behavioral sciences, and disciplines that incorporate a mixture of science, skill, and experience, such as accident reconstruction and house moving, as well as railroad engineering, carpentry, farming, security, and weapons.

87 K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 359-60 (Tex. 2000) (excluding doctor's opinions on human factors and safety where "none of the opinions would assist the trier of fact").
88 GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 620 (Tex. 1999).
94 Id.
97 Waring v. Wommack, 945 S.W.2d 889, 899-93 (Tex. App. — Austin 1997, no writ) (Texas has a "long history of allowing qualified accident reconstruction experts to testify regarding the way in which an accident occurred.").
§702.05  Assist the Trier of Fact

The third express consideration under the Texas Rules is that the expert’s opinions must assist the trier of fact in determining a fact in issue or understanding the evidence.100 This consideration may at times overlap with others such as expert subject matter101 or, as we discuss hereafter, relevance. However, it is not inconceivable that opinions will be related to expert subject matter and relevant, but still not assist the trier of fact. Courts and practitioners need not undertake Herculean efforts to determine precisely which one or more of these considerations is raised by an expert’s opinion. In a close case, however, selected jurisprudence addressing expert opinions in the context of assisting the trier of fact are worthy of consideration to illustrate situations where the helpfulness factor may be more clearly useful.

Many times expert opinions amount to applications of the subject matter to the facts of the case, such as when opinions are offered on the proper standard of care and whether a party met that standard of care.102 The resulting opinion is often on an ultimate issue to be decided by the trier of fact (e.g., negligence). While such testimony may be admissible under the Texas Rules,103 expert opinions involving issues within the common knowledge of the average juror do not assist the jury since the jury is equally competent to form an opinion on the ultimate issue.104 In cases such as these, the opinion is relevant but not helpful.

Nonetheless, the fact that expert opinions are more general than specific does not necessarily make them less helpful to the trier of fact. Opinions establishing subject matter background and broad principles may assist the trier of fact.105 On the other hand, opinions that are merely conclusory—for example, simply stating what the standard of care is and asserting that the defendant failed to meet it, or that one

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100 Tex. R. Evid. 702 (second clause).
101 See, e.g., K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 359-60 (Tex. 2000) ("[N]one of [the] opinions would assist the trier of fact" because they were common knowledge, not expert subject matter.). But see Burns v. Baylor Health Care Sys., No. 08-02-00159-CV, 2003 Tex. App. LEXIS 8132, at *8-*13 (Tex. App.—El Paso Sept. 19, 2003, pet. filed) (Though testifying regarding parking garage safety "[the witness] possesses specialized knowledge of the human visual process, which is not obviously within the common knowledge of jurors.").
103 Tex. R. Evid. 704. See infra section 704.
104 Park, 28 S.W.3d at 112.
condition "could" or "can" cause a second condition—are not helpful to the trier of fact and amount to insufficient evidence of causation.\textsuperscript{106} Moreover, while expert opinions directed at the accuracy, credibility, or validity of other fact and expert witness’s opinions are not generally helpful to the trier of fact, expert opinions on subjects that make another witness’s testimony more or less believable may assist the trier of fact.\textsuperscript{107}

\textbf{\S 702.06 Relevance}

Rule 402 makes all irrelevant evidence inadmissible. Therefore, expert opinion testimony, like all other evidence, must be relevant. As articulated in the preceding discussion, an expert’s opinions must be relevant to assist the trier of fact. While an opinion that “assists the trier of fact” is relevant, the opposite is not necessarily true. An opinion can be relevant without being helpful.

The Texas Supreme Court recently reemphasized the importance of considering relevance separately when it summarized the “basics” of admitting opinions under Rule 702, to wit: expert testimony is admissible so long as the expert is qualified, the opinion is relevant, and the opinion is based on a reliable foundation.\textsuperscript{108} Turning specifically to the relevance inquiry, the court stated that Texas Rule 702 incorporates the traditional relevancy inquiry of Texas Rules 401 and 402.\textsuperscript{109} The requirement is met if "the expert testimony is ‘sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.’"\textsuperscript{110} An expert opinion is not relevant where it has no relationship to the issues in dispute.\textsuperscript{111} Moreover, an irrelevant opinion

\textsuperscript{106} Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 622 (Tex. App.—Eastland 2000, pet. denied).
\textsuperscript{107} Gonzales v. State, 4 S.W.3d 406, 417-18 (Tex. App.—Waco 1999, no pet.); Vasquez v. State, 975 S.W.2d 415, 418-19 (Tex. App.—Austin 1998, pet. ref’d); Scogza, 949 S.W.2d at 363 (Opinions on normal behavior patterns under certain circumstances are helpful in understanding another witness’s or victim’s conduct.). See also Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.) (Experienced business executive’s opinions on whether parties had reached a contractual agreement admitted based on evidence he had seen, including testimony concerning what notes taken by another person meant to him.).
\textsuperscript{109} Id. at 629 (quoting Robinson, 923 S.W.2d at 556), TEX. R. EVID. 401 defines relevancy, and TEX. R. EVID. 402 discusses the admissibility of relevant evidence.
\textsuperscript{110} Id. at 629 (quoting Robinson, 923 S.W.2d at 556).
\textsuperscript{111} Robinson, 923 S.W.2d at 554.
does not assist the jury (or trier of fact), \( ^{112} \) illustrating the overlap and codependence of some of the expert opinion inquiry.

In *Jordan v. State*, the court discussed the gatekeeping duties of judges and the role of the relevance inquiry, defining relevance in practical terms as being the closeness of "fit" between the expert opinion evidence and the proposition it is offered to support.\(^ {113} \) The court was consistent with civil jurisprudence in this area, also noting the overlap and connection between the assistance (or helpfulness) inquiry and the relevance inquiry.\(^ {114} \)

Concluding this review of the considerations that govern the admission of expert opinion testimony is a discussion of the balancing test under Texas Rule of Evidence 403 applied in the context of Texas Rule 702.\(^ {115} \) In essence, even if the court concludes an expert's opinions are "relevant and reliable" (under the broad use of those terms illustrated in the preceding discussions), the court must still weigh the opinions against the danger of unfair prejudice, confusion, or the possibility of misleading the jury.\(^ {116} \)

The "danger" to be avoided with experts entails the perennial dilemma of their mere function—providing opinions on subjects

\(^ {112} \)Id.


[i]n sorting the untested or invalid theories from those that are grounded in "good" science, trial judges are called upon to serve as "gatekeepers." With respect to the relevance consideration, . . . Rule 702[] require[s] that the expert's testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony that does not relate to a fact in issue is not helpful. This consideration is what the Supreme Court referred to as the "fit" requirement. That is, the proffered testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."

*Jordan*, 928 S.W.2d at 555 (internal citations omitted).

\(^ {114} \)Id. (interchangeably discussing relevance and whether evidence "will assist the trier of fact" and stating that this reasoning was in line with that of the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995)).

\(^ {115} \)Tex. R. Evid. 702. See also Chapter 4 for a more complete discussion of *Tex. R. Evid.* 403.

\(^ {116} \)See, e.g., *Perales v. State*, 117 S.W.3d 434, 441 (Tex. App. — Corpus Christi 2003, pet. filed) (stating that "the threshold question is . . . whether the evidence is reliable and relevant" . . . and that "[t]he second inquiry is whether the probative value of the evidence is outweighed by one of the factors outlined in Texas Rule of Evidence 403 . . . includ[ing] unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence"); *Campbell v. State*, 118 S.W.3d 788, 797 (Tex. App. — Houston [14th Dist.] 2003, pet. denied) ("Having determined the evidence was relevant, we must now consider whether it should be excluded because it was unfairly prejudicial. Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.").
that the average juror does not normally understand under a court-sponsored label of "expert." It is this potential aura of infallibility that may prejudice the jury. As the Texas Supreme Court stated, "A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. A jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert." Hence, the risk of prejudice or misleading the jury is significant. Illustrating this concern is an appellate court's decision on the reliability of an expert's valuation opinion. In this instance, the Tyler court excluded the valuation opinions as more prejudicial (confusing or misleading) than probative where the expert commingled the value of the business with the value of the real property.

§702.07 Reliability

In serving its gatekeeping function, the court is concerned not only with the relevance of the testimony but also with a second key requirement: the court must determine whether or not the expert's testimony is reliable. Initially, the function of the reliability inquiry was to ferret

117 60 Am. Jur. Trials §9 (2003), which states:

It is important to note that expert testimony may create a special kind of prejudice. For example, simply qualifying opining witnesses as experts carries the danger that their testimony may be accepted because of their stature as "experts" and not because of the validity of their testimony. Thus, where there is doubt regarding the expert's qualifications or the admissibility of his testimony, the testimony should be excluded to prevent the jury from deciding to believe the testimony for an improper reason—because he is an "expert."

118 E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995).

119 See Resendiz v. State, 112 S.W.3d 541, 549 (Tex. Crim. App. 2003) (en banc) ("Evidence may confuse or mislead the jury if it distracts the jury from the main issues in the case or tends to focus the jury's attention on facts tangential to the case before them.").


121 Id. at 19.

122 See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (holding that the gatekeeping test of "relevant and reliable" applies not only to scientific experts but also to any other expert purporting to testify about technical or specialized topics, and that the test for reliability should be "flexible" rather than exclusively limited to the Daubert factors); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486 (Tex. 2001) (Texas Supreme Court adopts the Kumho reasoning). See generally Sofia Adrogue & Alan Ratliff, Kicking the Tires After Kumho, 37 Hous. L. Rev. 431 (2000); Harvey Brown, Eight Gates for Expert Witnesses, 96 Hous. L. Rev. 743 (1999).
out junk science.\textsuperscript{123} The concern was that jurors could not discern reliable theories or techniques from bogus ones.\textsuperscript{124} Now, the reliability inquiry is applied to all matters, not just scientific ones, and the proponent need not establish that the method is "generally accepted" among others in the field; a novel theory can be deemed "reliable."\textsuperscript{125} As previously discussed, there is a Texas reliability trilogy that parallels the trilogy under federal law. The first case, \textit{E.I. du Pont de Nemours \\& Co. v. Robinson} addresses the reliability of scientific opinions and the importance of ensuring reliability in the case of novel scientific evidence.\textsuperscript{126} The second decision, \textit{Merrell Dow Pharmaceuticals, Inc. v. Havner}, discusses the effect of \textit{Robinson} on evidence sufficiency issues.\textsuperscript{127} Finally, \textit{Gammill v. Jack Williams Chevrolet, Inc.} confirms that reliability should be addressed in connection with all expert opinions, not just those based on scientific knowledge.\textsuperscript{128}

In \textit{Robinson}, the Texas Supreme Court set forth the following nonexclusive\textsuperscript{129} factors for use in determining the reliability of expert opinions:

\begin{itemize}
\item "extent to which the theory has been or can be tested";
\item "extent to which the technique relies upon subjective interpretation by the expert";
\end{itemize}

\textsuperscript{123} \textit{Frye v. United States}, 293 Fed. 1013, 1014 (D.C. Cir. 1923) (holding that scientific expert testimony was only reliable where the theory or technique was commonly accepted or used by other scientists in the field); \textit{Zani v. State}, 758 S.W.2d 233, 241 (Tex. Civ. App. 1988) (en banc) (Texas Court of Criminal Appeals stating that it has relied on the \textit{Frye} test in several cases).
\textsuperscript{126} \textit{Robinson}, 923 S.W.2d 549, 556 (Tex. 1995). \textit{See also} \textit{Hernandez v. State}, 53 S.W.3d 742, 751-52 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (explaining that \textit{Robinson} is the "Texas progeny" of \textit{Daubert}, and therefore referring to the test for reliability as the "\textit{Daubert/Robinson} standard")
\textsuperscript{127} \textit{Havner}, 953 S.W.2d 706, 713 (Tex. 1997) (Where expert testimony is unreliable, it is legally insufficient and, thus, no evidence under the summary judgment standard.).
\textsuperscript{128} \textit{Gammill}, 972 S.W.2d 713, 726 (Tex. 1998).
\textsuperscript{129} \textit{Robinson}, 923 S.W.2d at 557 ("[T]rial courts may consider other factors."); \textit{Hernandez}, 53 S.W.3d at 752 ("The United States Supreme Court, the Texas Supreme Court, and the Texas Court of Criminal Appeals have repeatedly emphasized that the pertinent suggested inquiries are to be used flexibly and are not exclusive. A trial court may consider other factors . . . germane to an expert's qualifications and field of expertise. . .").
• "whether the theory or technique has been subjected to peer review and/or publication";
• "the technique's potential error rate";
• "general acceptance of the theory or technique in the relevant scientific community"; and
• "the non-judicial uses of the theory or technique."\(^{130}\)

In *Robinson*, the Texas Supreme Court concluded that a scientific opinion cannot assist the trier of fact if it is unreliable.\(^{131}\) The proponent of the evidence has the burden to prove that the expert is qualified and that his testimony is reliable under *Robinson*.\(^{132}\) Then, it is the trial judge's responsibility to determine whether the test has been satisfied.\(^{133}\) If the opinion is unreliable, then it is inadmissible.\(^{134}\) The appellate courts give the trial judge great discretion in making this determination, and will only reverse for an abuse of that discretion.\(^{135}\) In this context, that requires a showing that the trial judge acted in an arbitrary and unreasonable manner.\(^{136}\)

In *Wolfson v. BIC Corp.*, the Houston Court of Appeals stressed the importance that *Robinson* placed on the scientific method: in order for an opinion to be reliable, it must have been reached following the proper analysis.\(^{137}\) Thus, where the expert first reaches a conclusion, and then does research and testing to generate support for that conclusion, then he has taken the steps out of order and his opinion cannot pass the *Robinson* test of being scientifically reliable.\(^{138}\) For

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\(^{130}\) *Robinson*, 923 S.W.2d at 557. See also *Wal-Mart Stores, Inc. v. Garcia*, 974 S.W.2d 83 (Tex. App. — San Antonio 1998, no pet.) (applying the *Robinson* factors to the expert's testimony, regarding the laws of physics and the degree of force with which a falling sign hit the plaintiff, to conclude that the evidence was reliable and therefore admissible, per the following analysis: "His conclusions . . . are based upon well-recognized laws of physics that have been tested; use of those laws of physics involves little, if any, subjective interpretation by the expert; the theories involved are not novel; the technique has little, if any, potential rate of error; the laws of physics related by Larks are generally accepted as valid within the scientific community; and the laws of physics are routinely used in non-judicial uses such as engineering. We hold that the [evidence was admissible.]"); *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927, 934 (Tex. App. — Texarkana 1997, writ denied) (fact that expert opinion was prepared for litigation does not automatically render it unreliable, but it is more likely to be biased.).

\(^{131}\) *Robinson*, 923 S.W.2d at 557.


\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.


\(^{138}\) Id.
example, in *Wolfson*, a products-liability case, the expert testified that he reached his conclusion without ever having examined the essential component parts of the product at issue. Thus, the court held that the expert's opinion was unreliable because he had “formed a conclusion and then based his opinion on that conclusion,” rather than beginning with the research and subsequently reaching a conclusion based on the findings.

In *Havner*, the court went beyond *Robinson*'s requirement that the conclusion be reached via the proper methodology to hold that, *even if* a proper methodology is used, the resulting opinion will still be unreliable if the underlying data was unreliable. In so holding, the *Havner* court reasoned that

[i]t could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach. . . .

[E]ven an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. In concluding that this testimony is scientifically unreliable and therefore no evidence, however, a court necessarily looks beyond what the expert said. Reliability is determined by looking at numerous factors including those set forth in *Robinson* and *Daubert*.

Based on the above, the *Havner* court engaged in a detailed analysis of various scientific tools used in toxic tort cases to determine causation. The court primarily focused on epidemiological studies, which “examine existing populations to determine if there is an association between a disease or condition and a factor suspected of causing that disease or

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139 *Id.*
140 *Id.*
141 *Merrill Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997) (“The underlying data should be independently evaluated in determining if the opinion itself is reliable.”).
142 *Id.* at 712.
143 *Id.* at 713-30 (Specifically at issue here was whether Bendectin actually caused birth defects.).
condition."¹⁴⁴ "[F]or an epidemiological study to [provide] a reliable foundation, it must be unbiased in its design, otherwise properly designed, properly executed, and show that exposure to the substance more than doubles the risk of injury."¹⁴⁵ Additionally, the epidemiological study will not be deemed "reliable" unless it has a "confidence interval of ninety-five percent," meaning that it can be repeated with the same results 95 percent of the time. Ultimately, the court in Havner concluded that the underlying data was not reliable, and therefore the expert's conclusions regarding causation were not reliable and should be excluded.¹⁴⁶

Finally, in Gammill, the Texas Supreme Court made two important holdings in regard to the admissibility of expert testimony.¹⁴⁷ First, the court clarified that the Daubert/Robinson standards for reliability apply to all expert scientific testimony, whether it be based on a conventional or a novel theory.¹⁴⁸ Second, the court held that "Rule 702's fundamental requirements of reliability and relevance [apply] to all expert testimony offered under that rule," including not only scientific theories but also non-scientific "opinions based on technical or other specialized knowledge."¹⁴⁹

However, the court acknowledged that the Daubert/Robinson factors are not always the appropriate test for reliability of non-scientific testimony.¹⁵⁰ In some cases, the testimony can be deemed "reliable" based on the experience of the expert, while in other cases, the testimony may be deemed "unreliable" because there is "simply too great of an analytical gap between the data and the opinion offered."¹⁵¹ In Gammill, the court excluded the expert's opinion because there was a "gap" in his analysis: he "fail[ed] to show how his observations, assuming they were valid, supported his conclusions that [the plaintiff] was wearing her seat belt or that [the seat belt] was defective."¹⁵²

¹⁴⁴ Id. at 715.
¹⁴⁵ Allison v. Fire Ins. Exch., 98 S.W.3d 227, 239 (Tex. App.—Austin 2002, pet. withdrawn) (holding that the expert's opinion, that the plaintiff's toxic encephalopathy (brain damage) was caused by exposure to mold, was inadmissible since the epidemiological study that his conclusion was based on was unreliable, in part because a confidence interval could not be calculated).
¹⁴⁶ Havner, 953 S.W.2d at 730. See also Allison, 98 S.W.3d at 240 ("If an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable."). See generally Helena Chem. Co. v. Wilkens, 47 S.W.3d 486, 499 (Tex. 2001); Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995).
¹⁴⁸ Id. at 721-22.
¹⁴⁹ Id. at 726.
¹⁵⁰ Id.
¹⁵¹ Id.
¹⁵² Id. at 727.
When the *Daubert/Robinson* factors are an appropriate way to test the reliability of an expert’s opinion, there is no particular factor or combination of factors that are necessarily relevant or dispositive.\(^{153}\) For example, the publication and peer review factor is only relevant in areas where publications are not uncommon.\(^{154}\) Beyond the factors enumerated in *Daubert/Robinson*, *Havner*, and *Gammill*, Texas criminal jurisprudence has suggested the following additional factors as considerations in the determination of reliability:

- “the clarity with which the underlying theory or technique can be explained to the court”;
- the opinions of the other experts concerning the theory or technique; and
- the proper application of the theory or technique.\(^{155}\)

Moreover, in the case of non-scientific subjects, Texas criminal jurisprudence suggests the following factors:

- the relevant standards within the field;
- whether the field of expertise is a legitimate one; and
- whether the opinions are within the scope of the relevant field.\(^{156}\)

Finally, there are still other courts that have included additional factors, such as the following:

- whether the expert has adequately accounted for obvious alternative explanations,\(^ {157}\) and
- whether the expert has employed in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.\(^ {158}\)

The test for determining the reliability of expert testimony that grew out of *Robinson*, *Havner*, and *Gammill* has been criticized on the ground that it invades the province of the jury.\(^ {159}\) The argument is that

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\(^{154}\) Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 726-27 (Tex. 1997); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).


reliability is really just credibility and credibility is for the jury, not the judge, to determine.\textsuperscript{160} Putting this criticism aside (Robinson is not going anywhere), the question of what role the jury plays in the post-Robinson world remains. After Robinson, courts serve as gatekeepers, allowing only reliable opinions to reach the jury, and the jury is free to reject the conclusion of the expert.\textsuperscript{161} Therefore, the trial court’s duty is to determine whether the analysis used by the expert is reliable, not whether the expert’s conclusions are correct.\textsuperscript{162} The issue of correctness is for the jury.\textsuperscript{163}

Texas case law has addressed the reliability of DNA opinions (Kelly),\textsuperscript{164} eyewitness identification (Jordan),\textsuperscript{165} the poisonous effects of fertilizer (Robinson), the “soft” sciences (Nenna),\textsuperscript{166} the effects of a drug on birth defects (Havner),\textsuperscript{167} and engineering testimony concerning automotive design defects (Gammill).\textsuperscript{168} While the complete Texas expert opinion jurisprudence addressing reliability is too voluminous to discuss in its entirety, the decisions highlighted below provide a broad cross-section of the opinions challenged and the reliability-related reasons for opinion exclusion or admission.

Engineering opinions concerning flooding by a nearby reservoir in a reverse condemnation proceeding were admitted even where they were based on a different methodology than that most generally accepted where the expert demonstrated the reliability of his methodology based on real-world experience, and the methods were not novel or unproven.\textsuperscript{169} Pulmonary disease causation opinions were admitted where the expert established publication and testing, and a less than 5 percent error rate.\textsuperscript{170} Valuation opinions were admitted where

\textsuperscript{160} Id. at 421. (“What began as a concern regarding the jury’s ability to sort through ‘junk science,’ has grown into an overall lack of confidence in jurors’ qualifications to examine any expert testimony.”). See also Minnesota Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 189 (Tex. App.—Texarkana 1998, pet. denied).


\textsuperscript{162} Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 628, 629 (Tex. 2002) (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 728 (Tex. 1998)).


\textsuperscript{166} Nenna v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998).

\textsuperscript{167} Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

\textsuperscript{168} Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998).

\textsuperscript{169} See Tarrant Reg’l Water Dist. v. Gragg, 43 S.W.3d 609, 611 (Tex. App.—Waco 2001, no pet.).

“classic” (or accepted) real property valuation methodology and quantitative process applied.\textsuperscript{171}

Accident causation opinions were admitted despite the expert’s lack of experience with the accused equipment where the expert examined the equipment, reviewed numerous depositions and the operator’s manual, and applied accepted methodology.\textsuperscript{172} Opinions concerning interpretation of technical terms in real property deeds, title policy, and survey were admitted based on the specialized nature of the subject matter and the practicing attorney and attorney/title company executive witness’s specialized knowledge and experience.\textsuperscript{173}

Accident causation opinions were admitted based on testing using accepted methodology with nonjudicial uses.\textsuperscript{174} Standard of care opinions concerning commercial building security measures in a personal injury case were admitted despite the fact that much of the subject was within the general knowledge of the jury; the specialized knowledge of the experienced security expert provided additional assistance to the trier of fact.\textsuperscript{175} Opinions regarding an insurance company’s duty to defend were admitted on mixed questions of fact and law where the witness had experience as outside counsel for insurance companies defending insureds and experience in personal injury matters similar to the subject litigation.\textsuperscript{176}

Medical expert opinions were excluded where the expert did not rule out other potential causes for the appellant’s illnesses, nor did he rely on peer-reviewed articles, clinical trials, health department investigations, or the appellant’s laboratory tests.\textsuperscript{177} Medical testimony

\textsuperscript{171} Harlingen v. Estate of Sharboneau, 1 S.W.3d 282, 288 (Tex. App.—Corpus Christi 1999, pet. denied). \textit{But see} Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 806, 808 (Tex. 2002) (Expert opinion excluded where mere bald assurance that comparable sales were used to set value when, in fact, underlying data were not independently evaluated and accepted methodology was not properly applied.); Gregg County Appraisal Dist. v. Laidlaw Waste Sys., Inc., 907 S.W.2d 12, 19 (Tex. App.—Tyler 1995, writ denied) (Although selected methodology was accepted valuation approach, it was not the accepted method for valuations in connection with ad valorem taxes.).

\textsuperscript{172} Kroger v. Betancourt, 996 S.W.2d 353, 360-63 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

\textsuperscript{173} Templeton v. Dreiss, 961 S.W.2d 645, 672 (Tex. App.—San Antonio 1998, no pet.). \textit{But see} Holden v. Weidenfeller, 929 S.W.2d 124, 134 (Tex. App.—San Antonio 1996, writ denied) (excluding similar opinions on implied easement).

\textsuperscript{174} Waring v. Wommack, 945 S.W.2d 889, 892 (Tex. App.—Austin 1997, no writ).

\textsuperscript{175} Glasscock v. Income Prop. Servs., Inc., 888 S.W.2d 176, 180 (Tex. App.—Houston [1st Dist.] 1994, writ dism’d by agr.).

\textsuperscript{176} State Farm Fire & Cas. Co. v. Gandy, 880 S.W.2d 129, 136 (Tex. App.—Texarkana 1994), rev’d on other grounds, 925 S.W.2d 696 (Tex. 1996).

\textsuperscript{177} Praytor v. Ford Motor Co., 97 S.W.3d 237, 244-46 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
on the cause of a brain tumor as excluded where none of the articles in the field exploring the purported link between head injuries and brain tumors took the step the expert took, and the medical literature reflects that no such link has been established through epidemiological or other studies.\(^{179}\)

Valuation opinions were excluded where the expert did not apply accepted methodology reliably, creating too great an analytical gap between the data relied upon and the opinions offered.\(^{180}\) Diesel exhaust exposure poisoning opinions were excluded where causation was speculative based on studies only showing an increase in risk, studies had methodological flaws, other plausible causes of the condition were not considered or ruled out, and significant gaps existed between analyses and opinions.\(^{181}\)

Water contamination causation opinions were excluded as speculation and surmise where the expert concluded there was a correlation between the timing of the defendant’s discharge from retention ponds and the occurrence of contamination, but did not rule out alternative explanations for the contamination based on other possible contaminating occurrences during the same period.\(^{182}\) Lead contamination opinions were excluded where the expert used proper methodology but, in applying an “enrichment factor” to convert soil contamination to airborne contamination, the expert did not apply an accepted methodology properly.\(^{183}\)

An oil and gas auditing expert’s opinions on the meaning of specialized percentage cap accounting provisions in a contract were excluded where the court viewed the legal construction of those provisions as a matter of law for the court and the expert would not be allowed to give a legal opinion.\(^{184}\) Expert opinions intended to

\(^{178}\) As a relevant notation, the general rule in Texas is that an expert is required on the issue of causation in negligence cases where the subject is one that jurors would not ordinarily be competent to evaluate. See Foust v. Estate of Walters, 21 S.W.3d 495, 505 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Arce v. Burrow, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997), modified and remanded on other grounds, 997 S.W.2d 229 (Tex. 1999).

\(^{179}\) Manasco v. Insurance Co. of Pa., 89 S.W.3d 239, 241-45 (Tex. App.—Texarkana 2002, no pet.).

\(^{180}\) Exxon Pipeline Co v. Zwahr, 88 S.W.3d 623, 629-30 (Tex. 2002). See also Weingarten Realty Advisors v. HCAD, 93 S.W.3d 280, 286-87 (Tex. App.—Houston [14th Dist.] 2002, no pet.).


establish that an injury did not occur the way the plaintiff asserted, based on an accident simulation/re-creation test, were excluded where the theory and technique used had not been tested and contained subjective determinations relating to re-creation of conditions that were not exactly the same as in the real accident.185

Causation opinions concerning disease in dairy cows were excluded due to the failure to consider or eliminate other potential causes, the indeterminate error rate, the absence of testing and acceptance, and study conducted solely for litigation.186 Mental anguish opinions by a mental health coworker were excluded despite accepted psychological methodology where the opinions could not be tested, the potential error rate was unexamined, and peer review and publication were limited or nonexistent; the opinions were entirely subjective.187 Causation opinions on skin temperature reduction were excluded due to unreliable technique, sloppy investigative work, absence of peer review or publication, and study conducted solely for litigation.188

While this is by no means an exhaustive list of examples, it is sufficient to illustrate the often-subtle distinctions between opinions deemed reliable and those excluded as unreliable. The one rallying point for trial courts and practitioners surrounds the exercise of the gatekeeping function. Where a trial court takes the time to consider the various factors, makes findings supported by the record, and expressly applies the factors (or concludes certain factors are not applicable), a trial court's determinations will be disturbed only for an abuse of discretion.189

§702.08 Sufficient Bases for Opinions

Under Federal Rule 702, there is an express provision requiring that expert opinions be based on sufficient facts or evidence.190 While

189 United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997).
190 Fed. R. Evid. 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.
Texas Rule 702 does not contain a similar provision,\textsuperscript{191} Texas Rule 705, (and the jurisprudence discussed hereafter) both dictate that if the underlying facts or data do not provide a sufficient basis for experts’ opinions, the opinions are inadmissible.\textsuperscript{192}

It appears that much of the jurisprudence under \textit{Robinson} and its progeny relating to insufficient or unreliable supporting facts or data developed independent of Texas Rule 705 since many of the \textit{Robinson}-related decisions do not also reference Texas Rule 705. For example, the leading decision in this area is the middle of the trilogy, \textit{Havner}.\textsuperscript{193} There, the Texas Supreme Court addressed \textit{Robinson} in the context of reviewing a no evidence summary judgment.\textsuperscript{194} The court held that if “the foundational data underlying opinion testimony are unreliable, . . . any opinion drawn from that data is likewise unreliable.”\textsuperscript{195} On that basis, the summary judgment was granted because the expert’s opinions

\textsuperscript{191} Tex. R. Evid. 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.

\textsuperscript{192} Tex. R. Evid. 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) \textit{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) \textit{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) \textit{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.

See also Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 622 (Tex. App.—Eastland 2000, pet. denied).

\textsuperscript{193} Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).

\textsuperscript{194} Id. at 713.

\textsuperscript{195} Id. The court also stated that an expert's opinion must exceed the adoption of “magic language” used by others; instead, the underlying basis for the opinion “should be independently evaluated in determining if the opinion itself is reliable.” Thus, the court noted that a credentialed expert’s opinion that “‘the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system’” would be unreliable scientific evidence, and as such, no evidence. Id. at 712 (citations omitted).
were unreliable, and since unreliable evidence is no evidence, a no evidence summary judgment was appropriate.\textsuperscript{196}

Subsequently, the Texas Supreme Court revisited the issue of unreliable foundation in a Deceptive Trade Practices Act case where the plaintiff asserted that the defendant had misrepresented the suitability of seed for the plaintiff's soil and climate.\textsuperscript{197} In affirming the admission of causation evidence by the plaintiff's plant physiologist who had conducted relevant tests and studies, the court reiterated that if "an expert relies upon unreliable foundational data, any opinion drawn from that data is likewise unreliable."\textsuperscript{198}

One possible explanation for the two lines of cases is the sometimes-gray line between whether the bases of expert opinions are insufficiently reliable as opposed to whether simply insufficient evidence exists to support a finding. Or, in other words, is the issue one of admissibility or legal sufficiency? This distinction was most recently discussed by the Austin Court of Appeals.\textsuperscript{199} In \textit{Capital Metro}, the court held that the opponent of the evidence was not required to make a \textit{Robinson} challenge at the trial court in order to raise a "no evidence" challenge at the appellate court.\textsuperscript{200} The court reached this conclusion because the opponent was challenging the expert opinion on the basis that it was "premised on unsupported assumptions, speculation, and surmise."\textsuperscript{201} According to the Austin court, such an attack was not considered a challenge to the reliability of the evidence but rather to its sufficiency; therefore, no \textit{Robinson} objection was required.\textsuperscript{202}

The court's opinion in \textit{Capital Metropolitan} was based on another appellate court decision, \textit{General Motors Corp. v. Harper}.\textsuperscript{203} There, the Eastland Court of Appeals differentiated between (1) the waiver of error based on insufficiency of the evidence that occurs where a party asserts that scientific evidence at trial is unreliable and, therefore, no evidence, but does not object before or at the time expert evidence was offered as to its reliability (also known as the "\textit{Maritime Overseas} rule"),\textsuperscript{204} and (2) the general assertion of insufficiency of the evidence

\textsuperscript{196} Id. at 712.
\textsuperscript{197} Helena Chem. Co. v. Wilkins, 47 S.W.2d 486 (Tex. 2001).
\textsuperscript{198} Id. at 500.
\textsuperscript{200} Id. at 578.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} 61 S.W.3d 118 (Tex. App. — Eastland 2001, no pet.).
\textsuperscript{204} Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).
on appeal where, effectively, the only support for the verdict was unsupported (and, therefore, unreliable) expert opinion.\textsuperscript{205}

The \textit{Harper} court held that the appellant had not waived error based on sufficiency of the evidence despite having not objected to the expert opinion as unreliable. The court concluded as follows: thus, “the distinction between admissibility and legal sufficiency will still be observed, except that a legal sufficiency claim can be waived to the extent that the claim questions the reliability of the science and its methodology.”\textsuperscript{206}

\section*{§702.09 Procedure}

No discussion of Texas Rule 702 is complete without some exchange as to how and when a party may go about challenging the admissibility of expert opinions. Although the Texas Rules of Civil Procedure, local rules of court, and other statutes generally govern the relevant procedure regarding designating, discovering, and disclosing experts, no uniform statewide procedure exists for challenging expert opinion evidence.

Generally, to preserve an objection to the admissibility of expert opinion evidence, a party must object to the evidence before trial, or when the evidence is offered, pursuant to the aforementioned \textit{Maritime Overseas} rule.\textsuperscript{207} Objections may be included as part of a motion for summary judgment,\textsuperscript{208} or made separately in a motion to exclude\textsuperscript{209} once opinions have been offered by report or deposition, as part of a pretrial motion or objection under Texas Rule 104,\textsuperscript{210} or

\textsuperscript{205} \textit{Harper}, 61 S.W.3d at 129.

\textsuperscript{206} \textit{Id. See also} Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 285-86 (Tex. App.—Texarkana 2000, no pet.) (“Despite the overlap between these standards, if certain evidence is admitted because wholesale exclusion of the evidence is inappropriate, the totality of causation evidence may nonetheless be legally insufficient.”) (applying \textit{Robinson} analysis under both standards).


\textsuperscript{208} \textit{See} Weiss v. Mechanical Servs., Inc., 989 S.W.2d 120, 124 (Tex. App.—San Antonio 1999, pet. denied).

\textsuperscript{209} \textit{See} North Dallas Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 96 (Tex. App.—Dallas 1995, writ denied).

\textsuperscript{210} E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).
through objection at trial when the expert testimony is offered. Pretrial hearings regarding the admissibility of expert testimony may be conducted pursuant to Rule 104. Texas Rule 104 provides that a trial court may conduct a hearing on witness qualifications and evidence admissibility.

As with other evidence, the burden is on the proponent of the evidence to establish that it is admissible. Under Rule 104(a), the proponent has the burden to establish the qualifications of the expert and the admissibility of the opinions by a preponderance of the evidence.

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 evidence.

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211 See id.
212 TEX. R. EVID. 104 (Preliminary Questions):
   (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.
   (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
   (c) Hearing of Jury. In a criminal case, a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or in a criminal case when an accused is a witness and so requests.
   (d) Testimony by Accused Out of the Hearing of the Jury. The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.
   (e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.
214 TEX. R. EVID. 104(a). See also Chapter 1, section 104.
Texas Rule 703 provides requirements for the types of facts or data upon which an expert may rely. Implicitly, the Rule assumes that there must be a supporting basis for the expert's opinions. Texas Rule 703 requires that the facts or data (1) be perceived by, reviewed by, or made known to the expert before the proceeding; and (2) again, by implication, be based upon admissible evidence unless such facts or data are of the type reasonably relied upon by experts in the field, in which case the evidence need not be otherwise admissible into evidence.

As set forth in the Rule, an expert may rely upon facts or data personally observed or reviewed (e.g., depositions, transcripts, documents, and other expert reports) as well as facts or data that the expert is made aware of, including, perhaps, other witness testimony. The jurisprudential mantra is that the expert is required to bring more to court than just knowledge of the facts; the expert is relied upon for expertise in the particular field that is the subject of his opinions.

Generally, the expert can disclose the bases for opinions to the fact-finder.

Although there is some disagreement among the authorities concerning the extent of Evidence Rules 703 and 705, we believe the correct view is that those rules, as amended, now allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion, subject to an objection. . . .

215 Tex. R. Evid. 703.
216 See Tex. R. Evid. 705(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.").
217 Tex. R. Evid. 703, 705(C).
218 Tex. R. Evid. 703. See Henderson v. State, 14 S.W.3d 409 (Tex. App.—Austin 2000, no pet.) ("An expert witness need not have personal knowledge of all the facts on which he bases an opinion. Instead, an expert may base an opinion on facts or data perceived by, reviewed by, or made known to him before testifying."); See also Duckett v. State, 797 S.W.2d 906, 920 (Tex. Crim. App. 1990) (Expert may base his opinion on facts he learns from listening to others testify at trial.); Moore v. Grantham, 599 S.W.2d 287 (Tex. 1980) (Expert may base his opinion on facts his counsel informs him of at trial, in the form of a hypothetical.); State v. Resolution Trust Corp., 827 S.W.2d 106, 108 (Tex. App.—Austin 1992, writ denied) (Expert may base his opinion on otherwise inadmissible hearsay.); Connecticut Gen. Life Ins. v. Tommie, 619 S.W.2d 199, 204 (Tex. Civ. App.—Texarkana 1981) (Expert may base his opinion on personal knowledge.).
As discussed hereafter in section 705, certainly the expert can be compelled to reveal the bases of expert opinions upon cross-examination, and in some instances the expert may be limited in discussing such bases before the jury.

§703.02 Admissibility of the Facts or Data Considered by Experts

A significant exception to the general inadmissibility of hearsay evidence is the last clause of Texas Rule 703. Where evidence is not, for instance, (1) based on personal knowledge, (2) a business record, or (3) properly authenticated, the evidence may still be relied upon by the expert so long as it is of the type reasonably relied upon by experts in the field. This includes evidence otherwise inadmissible as hearsay.

The determination of whether the inadmissible evidence is of the type normally relied upon by experts in the field is for the gatekeeper—the trial court. In making its determination, the court is not limited to a superficial determination of whether the type of evidence relied upon is normally relied upon by experts in the field, but may look further into the reliability of the underlying evidence itself. Where it is not sufficiently reliable, the court may exclude it and opinions based thereon.

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221 Tex. R. Evid. 705(a)-(b).
222 Tex. R. Evid. 705(d).
223 Tex. R. Evid. 703 ("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.").
225 Seaside Indus., Inc. v. Cooper, 766 S.W.2d 566, 571 (Tex. App.—Dallas 1989, no writ).
227 General Elec. Co., 747 S.W.2d at 831.
230 Texas Workers' Compensation Comm'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).
231 Id.
Comparison of Texas and Federal Rules

The first two sentences of Texas Rule 703 and Federal Rule 703 are substantially the same. They describe the types of bases upon which an expert may rely and allow for reliance upon otherwise inadmissible evidence so long as such bases are reasonably relied upon by experts in the field. Where the two Rules differ is that Federal Rule 703 limits disclosure of inadmissible bases of the expert’s opinion unless the court conducts a balancing test and concludes such disclosure is substantially more probative than prejudicial. The comments to the Federal Rule summarize the reason for the addition:

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert’s opinion, a trial court applying this Rule must consider the information’s probative value in assisting the jury to weigh the expert’s opinion on the one hand, and the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert’s opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under the balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.

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\textsuperscript{232} \textbf{TEX. R. EVID. 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.

\textsuperscript{233} \textbf{FED. R. EVID. 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.

\textsuperscript{234} \textit{Id.}

\textsuperscript{235} Amendments to Federal Rules of Evidence, 192 F.R.D. 410, 424-25 (advisory committee’s note).
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.

§704.01 Summary of the Rule

Whereas Texas Rule 702 addresses the substance of an expert's opinions and Texas Rule 703 addresses the bases for an expert's opinions, Texas Rule 704 addresses the form of an expert's opinions.236 Experts often testify about information they have reviewed, tests they have conducted, and calculations they have made, reaching opinions about the results of those efforts. However, as the jurisprudence referenced in earlier sections demonstrates, experts may also testify, for instance, about the proper standard of care and whether that standard was breached,237 the cause of an injury,238 and the value of property or amount of damages.239 In essence, experts may testify about questions that are ultimately decided by the trier of fact in reaching a verdict. Texas Rule 704 is the authority for this particular form of expert opinion.

Federal Rule 704 has two parts.240 The first part mirrors Texas Rule 704, whereas the second part prohibits expert opinion testimony

236 TEX. R. EVID. 704.
237 Beal v. Hamilton, 712 S.W.2d 873, 876 (Tex. App. — Houston [1st Dist.] 1986, no writ) (“In a medical malpractice suit, the standard of care is the threshold question, and that must be established so that the fact finder can determine whether [there was a breach of that standard]. . . . The physician-defendant may be the expert to establish the standard of care.”).
238 Louder v. De Leon, 754 S.W.2d 148 (Tex. 1988) (holding that expert could state opinion regarding proximate cause). See also Williamson v. O'Neill, 696 S.W.2d 431, 432 (Tex. App. — Houston [14th Dist.] 1985, no writ) (“Certainly Relator is entitled to know, prior to trial, the opinion of the adverse party-defendant as to the cause of the [harm]. Further, such opinion testimony is not objectionable merely because it embraces an ultimate issue to be determined by the trier of fact.”).
239 Cathey v. Meyer, 115 S.W.3d 644, 663 (Tex. App. — Waco 2003, pet. filed) (Damages expert was permitted to testify about the amount of compensation that should be awarded.).
240 FED. R. EVID. 704 (Opinion on Ultimate Issue):

(a) Except as provided in subdivision (b), 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.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
on the mental state or condition of the defendant that otherwise constitutes an element of the crime charged or a defense. 241 Although the Federal Rule differs from the Texas Rule, federal and Texas courts ultimately apply the same standard in criminal matters, but under separate criminal jurisprudence. 242

§ 704.02 Ultimate Issue of Fact

Some of the more common ultimate issue opinions that appear in the expert jurisprudence include duty, 243 standard of care (e.g., negligence, gross negligence) and breach of that standard, 244 causation (proximate cause); 245 injury or harm; 246 and other mixed questions of law and fact. 247

Two predicates to the admission of an expert’s testimony on these subjects is that the expert demonstrate that she is familiar with the proper legal definition in question 248 and that the opinions will aid, not supplant,
the jury’s determination of the ultimate issue.\textsuperscript{249} Regardless of whether such predicates are met, however, an expert may not simply state an opinion on a pure question of law because such questions are solely for the court (and not within the province of the jury) to decide.\textsuperscript{250}

**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 \textit{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.

\textbf{\S 705.01 Summary of the Rule}

Texas Rule 705 provides that an expert can testify as to opinions without prior disclosure of the bases therefor, may disclose such bases

\textsuperscript{249}Gonzales v. State, 4 S.W.3d 406, 417 (Tex. App. — Waco 1999, no pet.) (applying a standard similar to Tex. R. Evid. 403).

\textsuperscript{250}National Convenience Stores, Inc. v. Matherne, 987 S.W.2d 145, 149 (Tex. App. — Houston [14th Dist.] 1999, no pet.) (opinion that legal duty existed); Dickerson, 964 S.W.2d at 690 (Opinion construing legal effect of document held inadmissible).
during direct examination, and may be compelled to disclose such bases during cross-examination. Further, with the court’s consent in civil cases, the opposing party may voir dire the witness concerning the bases of expert opinions out of the presence of the jury. In criminal cases, due to the lack of formal discovery, an opponent is entitled to voir dire the expert about the facts underlying the expert’s opinions. If the court finds the bases insufficient to support the expert’s opinions, the court is required to exclude the opinions.

Given that expert opinions may rely upon otherwise inadmissible evidence, an attorney may attempt to “back door” otherwise inadmissible evidence by presenting it as part of the basis of his expert’s opinion. For example, an out-of-court statement may be inadmissible hearsay but still be the type of information reasonably relied upon by experts in the field. Such evidence, though inadmissible when offered into evidence directly, may reach the hearing of the jury when the expert discloses that he relied upon the statement in forming his opinions. Where the prejudice of disclosing the basis of the opinion outweighs the probative value of disclosure, the court has two basic options. The court may preclude disclosure of the underlying, otherwise inadmissible basis for the expert’s opinion. The court may also issue instructions to the jury on the permissible use of such evidence.

§705.02 Comparing the Texas Rule to the Federal Rule

In contrast to the Texas Rule, Federal Rule 705 only contains the first and third part of the second sentence of Texas Rule 705(a).

251 Tex. R. Evid. 705(a). See also Western Atlas Int’l v. Wilson, 930 S.W.2d 782, 787 (Tex. App.—Tyler 1996, writ denied) (stating that if the expert has not disclosed his underlying facts on direct, then it is the cross-examiner’s responsibility and right to question him about those underlying facts).

252 Tex. R. Evid. 705(b). See also Coastal Indus. Water Auth. v. Trinity Portland Cement Div., 523 S.W.2d 462, 471 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.) (holding that a civil judge has discretion to permit a voir dire of the expert in certain situations).

253 Tex. R. Evid. 705(c). See also Alba v. State, 905 S.W.2d 581, 587-88 (Tex. Crim. App. 1995) (“[A] criminal defendant is undeniably entitled, upon timely request, ‘to conduct a voir dire examination directed to the underlying facts or data upon which the opinion [of the State’s expert] is based.’ [This must occur] ‘prior to the expert giving his opinion’ and ‘out of the hearing of the jury.’”).

254 Tex. R. Evid. 705(d). See also Torres v. City of Waco, 51 S.W.3d 814, 823 (Tex. App.—Waco 2001, no pet.) (“Expert’s conclusory opinion does not suffice to raise a fact issue in response to a summary judgment motion.”).


256 Fed. R. Evid. 705.
Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

However, despite these differences in language, the relevant Federal Rules and general practice cumulatively cover all the issues addressed under Texas Rule 705.

First, no Federal Rule or jurisprudence available expressly prevents an expert from disclosing on direct examination the bases for expert opinions, as described in the first half of sentence two of Texas Rule 705(a). Similarly, it is customary in federal practice to take a witness on voir dire to explore threshold questions outside the hearing of the jury as described in Texas Rule 705(b).

Concerning the sufficiency and reliability of facts or data underlying an expert's opinion, as previously discussed in section 702, Federal Rule 702(1) requires that expert opinions be based on sufficient facts or data. Lastly, the Federal Rules contain a presumption against disclosing the bases of expert opinions that are otherwise inadmissible, as contrasted with exclusion under Texas Rule 705(d) only if there is a danger of misuse by the jury.

§705.03 Disclosure of the Bases of Expert Opinions

Generally, Texas Rule 705 addresses the disclosure and limits on disclosure of the bases for expert opinions discussed in Texas Rule 703. These Rules "now allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion. . . . The details of those facts and data may [also] be brought out on cross-examination." An expert need not, however, disclose the bases of his opinions for them to be

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257 See, e.g., United States v. Mares, 940 F.2d 455, 463 (9th Cir. 1991); United States v. Robinson, 922 F.2d 1531, 1533 (11th Cir. 1991); United States Football League v. National Football League, 842 F.2d 1335, 1375 (2d Cir. 1988).

258 Fed. R. Evid. 705 (third sentence).

259 Stam v. Mack, 984 S.W.2d 747, 750 (Tex. App.—Texarkana 1999, no pet.). See also Alice Leasing Corp. v. Castillo, 53 S.W.3d 433, 446 (Tex. App.—San Antonio 2001, pet. denied) (Court permitted vigorous cross-examination of the witness, his demonstration (including use of videotape), and his opinions and found such testimony admissible under Rule 705.).
admissible, nor is there an absolute right to disclose the bases of expert opinions to the jury where disclosure is deemed prejudicial by the court. Lastly, cross-examination is not limited only to those subjects upon which the expert relied but rather extends to all matters considered.

While much of the jurisprudence under Texas Rule 705 focuses on exclusion of expert opinions or limitations on the disclosure of underlying bases due to the expert’s reliance on hearsay or otherwise inadmissible evidence, not all such evidence is so unreliable or prejudicial that it demands exclusion or limitations on disclosure. For example, photographs, impressions from inspections, and uncorroborated measurements may be perfectly reasonable bases for an expert’s opinions and free of legitimate reliability concerns. Similarly, statements by witnesses at the scene of an accident are properly the bases of an accident reconstruction expert’s opinions and may be disclosed to the jury.

§705.04 Exclusion of Opinions Where Underlying Facts/Data Insufficient

Under Texas Rule 705(c), the “substance of the [expert’s] testimony must be considered.” Based on the previous discussions of Texas Rule 702, a similar analysis is dictated by Robinson and its progeny as part of the overall reliability analysis. In sum, “underlying data should be independently evaluated in determining if the opinion itself is reliable.” Whether through direct examination, cross-examination, or voir dire, where inquiry reveals the basis for the expert’s opinion is unreliable, the opinions should be excluded.


261 TEX. R. EVID. 705(d); Kramer v. Lewisville Mem'l Hosp., 831 S.W.2d 46, 49 (Tex. App.—Fort Worth 1992), off’d, 858 S.W.2d 397 (Tex. 1993); Beavers v. Northrup WW Aircraft Servs., Inc., 821 S.W.2d 669, 674 (Tex. App.—Amarillo 1991, writ denied).


266 Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

267 Id. at 713.

268 See, e.g., Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 630 (Tex. 2002) (unreliable basis or application of method disclosed on voir dire). See also discussion supra section 702.
§705.05 Limitation or Exclusion of Facts or Data
Underlying Expert Opinions

Depending on the circumstances, the court may either exclude discussion of the underlying bases of an expert’s opinion altogether, or issue a limiting instruction as to its use.269 In order to exclude the testimony outright, the court should consider several factors.270 An appellate court applied a Robinson-like reliability analysis under Texas Rule 705 that merits articulation and scrutiny:

The non-exclusive list of factors the court may consider in deciding admissibility includes the extent to which the theory has been or can be tested, the extent to which the technique relies upon the subjective interpretation of the expert, whether the theory has been subjected to peer review and/or publication, the technique’s potential rate of error, whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and the non-judicial uses that have been made of the theory or technique.271

Where the underlying facts or data could prejudice the jury and disclosure of the opinion bases is not otherwise significant to the credibility of the expert’s opinion, courts can reasonably and properly prohibit disclosure.272

This Rule, however, by no means creates a presumption of exclusion, and courts routinely admit otherwise inadmissible evidence that supports an expert’s opinion when it possesses at least some indicia of reasonableness and reliability.273 At the same time, where hearsay is built upon hearsay, courts will routinely exclude the bases of the opinions from disclosure to the jury.274

269 Tex. R. Evid. 705(d). See also Walck v. State, 943 S.W.2d 544, 545 (Tex. App.—Eastland 1997, pet. ref’d).
271 Id.
274 First Southwest Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954, 956, 958 (Tex. App.—Texarkana 1989, writ denied) (where opinions were based on fire marshall’s report that incorporated results of interviews with unnamed eyewitnesses).
In the case of a limiting instruction, "the opponent of such evidence may ask for a limiting instruction if he fears the evidence may be used for a purpose other than support for the testifying expert's opinion." If the request is made with respect to otherwise inadmissible subjects, the court should issue the instruction as a matter of course.

706. Audit in Civil Cases

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

§706.01 Summary of the Rule

This Rule concerns the admissibility of the reports prepared by court-appointed auditors under Texas Rule of Civil Procedure 172. In sum, such reports are admitted regardless of whether the support for the report is otherwise inadmissible. The fact that the auditor’s report may opine on ultimate issues of fact does not prevent its admission, just as with other expert opinions pursuant to Texas Rule 704. Any party opposing the auditor’s findings should file exceptions to the report and put on evidence in support of the exceptions.

275 Tex. R. Evid. 705(d); Stam v. Mack, 984 S.W.2d 747, 750 (Tex. App. — Texarkana 1999, no pet.).
276 Tex. R. Evid. 705(d).
277 Tex. R. Evid. 706.
278 Id.
279 Id.
280 Id. See also Blair v. Blair, No. 01-89-01035-CV, 1991 WL 9226, at *4 (Tex. App. — Houston [1st Dist.] 1991, writ denied) (not designated for publication) ("[A]bsent statutory prohibition, the report of a court-appointed expert may be contradicted or refuted by other admissible evidence. . . . [T]hus the auditor's conclusory determination . . . was not binding and conclusive on the trial court, which was authorized to make its own evaluation about the accuracy of the auditor's report.").
§706.02  Comparing the Texas Rule to the Federal Rule

The scope of Texas Rule 706 is much narrower than Federal Rule 706. Federal Rule 706 is a broad court-appointed expert provision.\(^{281}\) At least at this juncture, a comparable rule is not found in the Texas Rules of Evidence or other rules or statutes.\(^{282}\) Thus, more so than any of the other opinion rules, the Texas state and federal courts are farthest apart in this area.

**Federal Rule of Evidence 706**

Court Appointed Experts

**Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witness agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness’ finding, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

**Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

**Disclosure of appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact the court appointed the expert witness.

**Parties’ experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

\(^{281}\) Fed. R. Evid. 706.

\(^{282}\) The Advisory Committee Notes to the 1972 Proposed Rules state that “[t]he practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation have been matters of deep concern” and bases for the appointment of court experts. The Advisory Committee Notes, however, acknowledge a point of controversy with the use of court-appointed experts—“the contention . . . that court appointed experts acquire an aura of infallibility to testimony to which they are not entitled.”
In sum, Federal Rule 706 addresses the court's authority to appoint experts; discovery, examination, and compensation of the court-appointed expert; disclosure of the expert's court appointment to the jury; and the parties' unaffected rights to use their own experts.\textsuperscript{283} No special provision exists in Federal Rule 706 causing the expert's report to be automatically admissible.

In connection with court-appointed experts, the Texas Supreme Court Advisory Committee, and subsequently the Texas Supreme Court, have rejected a proposed Rule 706 that was considered by the State Bar Administration of the Rules of Evidence Committee for \textit{Daubert/Robinson} hearings.\textsuperscript{284} In sum, the proposed rule provided as follows: (1) the court would be able to appoint an expert once any motion to determine scientific expert reliability under Rule 702 was filed by any party; (2) the court would have to find the expert qualified; (3) the expert's role would be limited to that of an advisory expert to provide written advice to the court on whether the parties' experts used reliable scientific methods and principles, and not whether their opinions were valid, accurate, or credible; (4) the parties would be entitled to cross-examine the expert out of the hearing of the jury; (5) the parties would be entitled to respond to the court's expert; (6) the advisory expert's opinions would be inadmissible at trial; (7) the expert would be compensated from public funds, except that the expert's fees during the parties' cross-examination would be paid by the parties; and (8) the court should make a record of the appointment and use of the expert.

This proposed rule did not become law. Even if it had, significant differences would still exist in scope between Texas Rule 706 and

\textsuperscript{283} See \textit{In Re: Evid. R. 706}. In \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579, 592-93 (1993), the United States Supreme Court urged federal judges faced with a challenge to scientific testimony to undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Not all the Justices thought this gatekeeping task would be an easy one. Chief Justice Rehnquist had concerns and stated as follows: "I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too." \textit{Id.} at 600 (Rehnquist, C.J., dissenting). Responding to Chief Justice Rehnquist's concerns, Justice Blackmun, writing for the majority, expressed confidence in the ability of federal judges to undertake such a review, noting that, among other things, judges "should also be mindful" of the authority to appoint experts under Rule 706 of the Federal Rules of Evidence — in essence, allowing "the court at its discretion to procure the assistance of an expert of its own choosing." \textit{Id.} at 595.

Federal Rule 706. Among others, the proposed Texas Rule would have provided only for an advisory expert on scientific issues as opposed to allowing for a testifying expert on any expert subject matter as under the Federal Rule. Interestingly, some members of the judiciary and commentators appear to take the view that appointment of the equivalent of a Federal Rule 706 expert is within the inherent power of courts in Texas. Absent legislative guidance or adoption of an evidentiary or procedural rule, however, it appears that exercise of this power may create more questions about the use and compensation of the expert than it answers.

§706.03 Court-Appointed Auditors

Because the scope of the Texas Rule is so narrow, there is little case law specifically on Texas Rule 706. Most of the issues associated with court-appointed auditor reports address problems with the required affidavit under Texas Rule of Civil Procedure 172 or the timeliness of exceptions.

285 Former Justice Raul Gonzales has noted, without providing authority under the Texas state rules, that trial courts may appoint experts to assist the court "on complicated scientific and statistical matters," with the experts' fees assessed as court costs. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 414 (Tex. 1998) (Gonzalez, J., concurring). See also Brown, supra note 284, at 1168 & n. 221 (listing other authorities).