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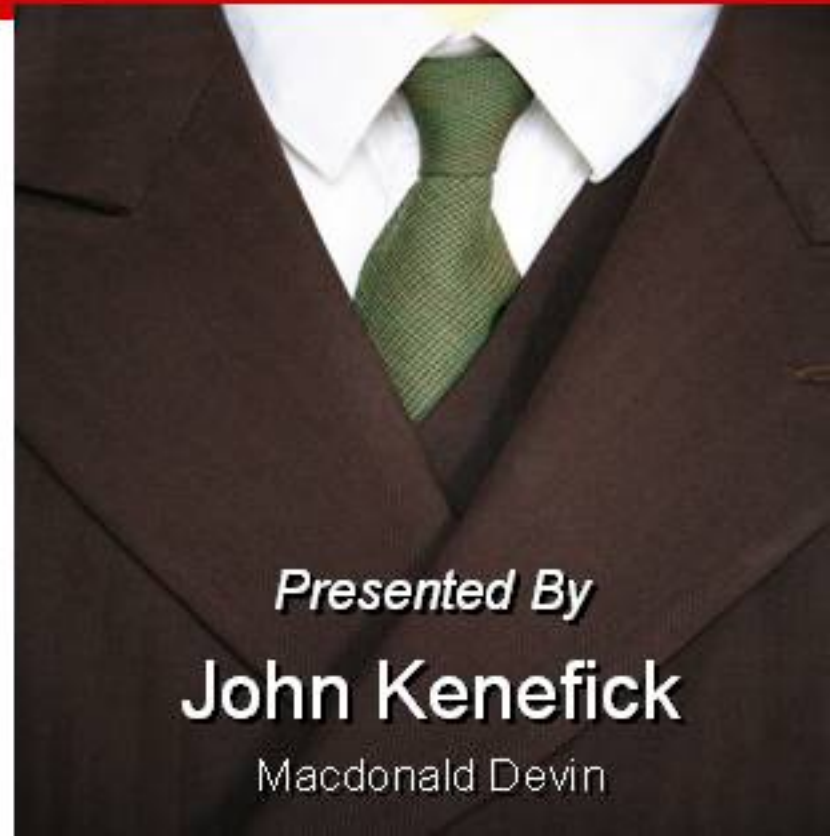
# Construction Conference

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## Dealing with Experts in Construction Defect Cases

### Top 10 Ways to Control Your Experts

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*Presented By*

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# Using and Misuse of Experts in Construction Defect Cases

*Plus: Top 10 Ways to Control Your Experts*

## I. INTRODUCTION AND OVERVIEW

## II. DISCOVERY OF EXPERTS

### A. Written Discovery

#### 1. Texas Rules of Civil Procedure

##### a. Discovery Control Plans

(I) Level 2

(ii) Level 3

##### b. Rule 195 - Expert Discovery Procedures

(I) Permissible Discovery Tools

(ii) Scope of Permissible Expert Discovery

(iii) Scheduling Order for Designating Experts

(iv) Deposition or Report?

TEX. R. CIV. P. 195.3.

(v) Supplementation

(vi) Cost of Experts

#### 2. Expert Discovery in Federal Court

a. Testifying experts

b. Consulting experts

#### 3. Local Rules For Expert Discovery

(a) Northern District of Texas

(b) Southern District of Texas

©) Western District of Texas

(d) Eastern District of Texas

## B. Depositions

1. Preparation

2. Discover *All* of the Opinions of the Adverse Expert

3. The Expert's Qualifications

4. Bias Shown By History of Testimony

5. Obtain Testimony Favorable To Your Case

## III. SCIENTIFIC RELIABILITY PROBLEMS WITH EXPERTS

### A. Introduction

### B. The Rules of Evidence

1. Rule 702

2. Rule 703

### C. The Simple Three-Step Approach

### D. The Burden of Proof

### E. The *Daubert/Robinson* Factors

1. *Merrell Dow Pharmaceuticals, Inc. v. Havner*

2. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 717 (Tex. 1998)

3. *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120 (Tex. App.–San Antonio 1999, pet. denied)

4. *Rowan Companies, Inc. v. Southwest Tenant Construction, Inc.*, 1999 WL 97545 (Tex. App.–Houston [1st Dist.] 1999) (Unpublished Opinion)

5. *Doyle Wilson Homebuilder, Inc. v. Pickens*, 996 S.W.2d 387 (Tex. App.– Austin 1999)
6. *Reliance Insurance Company v. Denton Central Appraisal District*, 999 S.W.2d, 626 (Tex. App.– Fort Worth 1999, no pet.)
7. *Sears, Roebuck & Company v. Kunze*, 996 S.W.2d 416 (Tex. App. – Beaumont 1999, pet. denied)
8. *America West Airlines, Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.– El Paso 1996)
9. *Burroughs Wellcome Company v. Crye*, 907 S.W.2d 497 (Tex. 1995)
10. *K Mart Corporation v. Honeycutt*, 43 Tex. Sup. Ct. J. 1002 —S.W.3—, 2000 WL 854305 (Tex. 2000)
11. *The Kroger Company v. Betancourt*, 996 S.W.2d 353 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1999, pet. denied)
12. *Codner v. Arellano d/b/a Road Runner Concrete*, 40 S.W.3d 666 (Tex. App. – Austin 2001)

#### G. Key Federal Cases After *Daubert*

1. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137; 119 SCT 1167; 143 L.ED. 238; (1999).
2. *Moore v. Ashland Chemical Inc.*, 151 F.3d 269 (5<sup>th</sup> Cir.1999)
3. *Tanner v. Westbrook*, 174 F.3d 542 (5<sup>th</sup> Cir.1999)

#### H. The Trial Court Must Determine Whether the Expert is Qualified

#### I. The Appellate Standard of No Evidence With Respect to Expert Testimony

#### J. Objections to Arguably Unreliable Expert Testimony

1. Texas State Law
2. Federal Courts

#### K. *Daubert* Extended Beyond Scientific Testimony

### VI. PROCEDURAL ISSUES TO CONSIDER REGARDING *DAUBERT* CHALLENGES

#### A. Timing of *Daubert/Robinson* Challenge

1. Different Procedures Used By Trial Courts
- B. Evidentiary Hearings: Required or Not?
- C. Affidavits
- D. Tenders of Evidence
- E. Court-Appointed Experts
  1. Federal Court
  2. State Court
- F. The Appellate Standard of Review For *Daubert/Robinson* Decisions
  1. Federal courts
  2. Texas

#### V. *DAUBERT/ROBINSON* CHECKLIST

- A. Pre-Trial
- B. Pre-Trial Conferences and Rulings
- C. *Daubert/Robinson* hearings:
- D. Trial
- E. Formulate Specific Questions

#### VI. CONCLUSION

## **I. INTRODUCTION AND OVERVIEW**

Many construction claims, at some point, focus on the discovery and testimony of expert witnesses. Regardless of what particular theory a plaintiff may be using to prosecute his or her lawsuit, the inquiry often turns to expert witnesses. This paper begins with a discussion of expert discovery and then focuses on procedural challenges to experts. Specifically, this paper explores the primary uses of and challenges to expert witnesses in the context of construction claims, with an emphasis on the typical Rule 702 and *Daubert/Robinson* challenges to the use of experts, and the procedural considerations regarding those challenges. The paper also covers some specific challenges to experts under Texas law.

## **II. DISCOVERY OF EXPERTS**

### **A. Written Discovery**

No matter what area of litigation or expertise of the witness, expert discovery is first controlled by the exchange of written discovery. Written discovery allows for the formal exchange of information about experts, their opinions, impressions, the materials reviewed, and their qualifications.

#### **1. Texas Rules of Civil Procedure**

##### **a. Discovery Control Plans**

At the outset of the case, some decisions will have to be made on the issue of expert discovery. Pursuant to Rule 192, discovery control plans may dictate the order, format and deadlines for expert discovery. The majority of state law construction claims will fall under Level 2 or Level 3 discovery control plans.

##### **(I) Level 2**

Level 2 is the “default” level in lawsuits where the plaintiffs fail to make an election under Rule 190. Level 2 usually restricts depositions to a total of 50 hours per side. However, if one side designates more than two experts, the opposing side may add an additional six hours of total deposition time for each additional expert. *See* Rule 190.3(b)(2). In addition, Level 2 imposes a 25 interrogatory limit. This interrogatory limit may affect the ability of a party to conduct discovery regarding consulting experts whose opinions have been reviewed by a testifying expert.

##### **(ii) Level 3**

Level 3 requires the court to enter a pretrial scheduling order, and allows the court and parties to tailor discovery to that particular suit. The extent and scope of discovery must be defined in the court order in order to

avoid application of the default Level 2 provisions. *See* Rule 190.4. Level 3 scheduling orders are designed for more complex litigation.

## **b. Rule 195 - Expert Discovery Procedures**

Rule 195 controls the scope of expert discovery. Rule 195 sets limits on the types of discoverable information on experts, and also limits the permissible types of discovery. Furthermore, designation, reporting and depositions are all regulated by Rule 195, including the cost of experts in relation to preparing for and giving depositions.

### **(I) Permissible Discovery Tools**

In Texas, a party may request another party to disclose information concerning testifying expert witnesses only through Requests for Disclosure (Rule 194) and through depositions and reports. *See* Rule 195.1. Thus a party may not seek discovery or information concerning testifying experts in interrogatories or requests for production. Further, under Level 2 a party is not obligated to disclose information regarding testifying expert witnesses unless prompted to do so through a Request for Disclosure, regardless of the expert designation deadline. However, nothing in this rule prevents discovery of consulting experts whose opinions have been reviewed by a testifying expert by serving traditional written discovery.

### **(ii) Scope of Permissible Expert Discovery**

Texas also limits the permissible scope of expert discovery in several ways. First, Rule 192.3(e) defines the permissible scope of discovery of testifying and consulting experts: The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.

A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

1. the expert's name, address, and telephone number;
2. the subject matter on which a testifying expert will testify;
3. the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the

discovery is sought, regardless of when and how the factual information was acquired;

4. the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
5. any bias of the witness;
6. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony; and
7. the expert's current resume and bibliography.

See Rule 192.3(e).

### **(iii) Scheduling Order for Designating Experts**

Experts must be designated in accordance with the pretrial scheduling order in Texas. If no pretrial scheduling order controls the designation of experts, the default guidelines contained in Rule 195.2 require the following designation dates:

- (a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period; and
- (b) with regard to all other experts, 60 days before the end of the discovery period. Designation requires the parties to furnish all of the materials and information required in Rule 194.2(f) regarding Request for Disclosure.

Specifically, the following information and materials are required to be disclosed in response to a properly served Request for Disclosure:

- (1) The expert's name, address, and telephone number;
- (2) The subject matter on which the expert will testify;
- (3) The general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise

subject to your control, documents reflecting such information; and

- (4) If the expert is retained by, employed by, or otherwise subject to your control:
  - (A) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
  - (B) The expert's current resume and bibliography.

#### **(iv) Deposition or Report?**

Texas Rule of Civil Procedure 195.3 governs the scheduling of expert depositions. Rule 195.3 states:

- (a) *Experts for Party Seeking Affirmative Relief.* A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:
  - (1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot - due to the actions of the tendering party - reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.
  - (2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.
- (b) *Other Experts.* A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in control of

the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

TEX. R. CIV. P. 195.3.

There is absolutely no requirement under Rule 195.3 for the party not seeking affirmative relief to produce an expert report. In fact, Rule 195.3 provides that if the plaintiff does not provide an expert report, he must make the expert available for deposition “reasonably promptly” after the expert is designated. Rule 195.3.

If the plaintiff does provide an expert report, he is not required to make the expert available for deposition until after all other experts have been designated. *See*, Rule 195.3. In other words, only if the party seeking affirmative relief fails to provide a report do the deposition requirements become effective. Whether or not experts are designated with or without reports, all parties must make experts available for deposition reasonably promptly following the designation of all experts.

Regardless of whether plaintiff provides an expert report, Rule 195.3 provides no circumstances under which a defendant is required to provide one. Nevertheless, in many cases defense counsel readily agree to provide expert reports without seizing the strategic advantage provided by the Texas Rules of Civil Procedure and a plaintiff’s counsel’s over-reliance on the need for expert reports.

The best way to take advantage of a plaintiff’s attorney’s focus on expert reports is to negotiate a Scheduling Order that does not require either party to provide an expert report for any retained expert witnesses. Often, both sides will agree to a Level 3 Scheduling Order that governs the major deadlines in a case such as expert designation deadlines, when discovery ends, when pre-trial documents are due and the trial date, among others. When the parties are unable to come to an agreement regarding a scheduling order, this is typically due to a disagreement over on various deadlines. Items simply omitted from a proposed Level 3 Scheduling Order rarely catch an attorney’s attention. Therefore, it is vital that defense counsel initiate the negotiation over the Level 3 Scheduling Order by submitting a proposed draft to plaintiff’s counsel to review. By omitting requirements for either party to provide an expert report, expert report requirements are taken off

of the negotiating table. An opposing attorney may agree to a Level 3 Scheduling Order without even realizing that providing expert reports is not required.

By removing the expert report requirement from the case, defendant is placed in an advantageous position in many ways. First, plaintiff's counsel will often simply not realize that expert reports are not needed and will readily supply them with plaintiff's designation of expert witnesses. Thus defense counsel is provided a road-map for use during plaintiff's expert's deposition. Second, by not having defendant's expert reports, plaintiffs' counsel will be without a road-map of his own when deposing the defendant's experts. Many plaintiff's counsels have become accustomed to having expert reports to rely upon when deposing defendant's experts. By taking away plaintiff's counsel's roadmap, defense counsel place themselves on the path to a successful defense.

Following designation of an expert by a party seeking affirmative relief, the designating party must either provide a report or make the expert available for deposition reasonably promptly to allow completion of the deposition at least 15 days prior to the deadline for designation of the opposing party's experts. *See* Rule 195.3. Only if the party seeking affirmative relief fails to provide a report do the deposition requirements become effective. Whether or not experts are designated with or without reports, all parties must make experts available for deposition reasonably promptly following the designation of all experts.

#### **(v) Supplementation**

The Texas Rules of Civil Procedure require supplementation of expert discovery, including written and deposition discovery. Rule 195.6 requires supplementation only for experts who are retained by, controlled by, employed by, or otherwise under the control of a party. For these experts, supplementation is only required for changes or additions to the expert's mental impressions or opinions and the basis for them.

#### **(vi) Cost of Experts**

Texas requires the party retaining the expert witness to pay all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition. *See* Rule 195.7.

## 2. Expert Discovery in Federal Court

The Federal Rules of Civil Procedure provide specific guidelines for expert discovery:

### a. Testifying experts

A party is entitled to discover information about the other party's experts who will testify at trial. FRCP 26(b)(4)(A). A party is entitled to the following information about the other party's testifying expert:

#### (1) Identity of experts.

The identity of all expert witnesses who may present testimony at trial. FRCP 26(a)(2)(A).

#### (2) Written report.

A written, signed report from each expert retained or specially employed to provide expert testimony or whose duties as an employee regularly involve giving expert testimony. FRCP 26(a)(2)(B). Not all testifying experts must produce a report, only those experts retained or specially employed by a party. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under FRE 702. The expert's report must include the following:

(a) A complete statement of opinions to be expressed and the basis for them.

(b) The data or other information considered by the witness in forming the opinion.

(c) Any exhibits used as summary of or support for the exhibits.

(d) The expert's qualifications, including a list of all publications for the past 10 years.

(e) The compensation to be paid to the expert.

(f) A list of other cases in which the expert has testified at trial or in deposition in the preceding four years. FRCP 26(a)(2)(B). The party need not

produce copies of reports and transcripts of previous testimony of the expert as part of the disclosure. *All W. Pet Sup. Co. v. Hill's Pet Prds. Div.*, 152 F.R.D. 634, 640 (D. Kan.1993).

(3) Other discovery.

A party is entitled to other discovery about the testifying experts, including depositions. FRCP 26(b)(4). A testifying expert who is required under FRCP 4(a)(B) to produce a report may not be deposed until after the report is provided. FRCP 26(b)(4)(A).

(4) Cost of expert.

Ordinarily, the party seeking discovery will pay the expert's fee for the time spent on discovery. Under FRCP 26(b)(4)(C), the court may require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery and to pay the party whose expert is made subject to discovery a fair portion of the fees and expenses that party incurred in obtaining information from the expert. *See Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 213 (E.D. Wis. 1994). The rule does not specify when a party must demand payment of fees to its expert, but courts have used it to award expert fees even after trial. *Compare Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1011-12 (10th Cir.1996) (motion for fees was untimely because it was filed 4-1/2 months after the court had entered a final judgment & ordered each party to bear its own costs) *with Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 336 (5th Cir.1995) (application for costs filed 9 months after original application for taxation of costs was timely). The party seeking discovery is not required to pay the expert's time spent preparing for a deposition. *Healy*, 154 F.R.D. at 214 (certain exceptions exist, including complexity of case and time elapsed between expert's work and deposition date).

**b. Consulting experts**

Generally, a party cannot discover the facts known by a consulting expert. *See* FRCP 26(b)(4)(B). A consulting expert is an expert retained in anticipation of litigation who is not expected to testify. A party may discover the facts known and opinions held by a consulting expert only if

it is impracticable to obtain facts or opinions on the same subject or by other means, or for medical examinations as provided under FRCP 35(b), FRCP 26(b)(4)(B); *Braun v. Lorillard Inc.*, 84 F.3d 230, 236 (7th Cir. 1996) (negative test results for presence of asbestos fibers in decedent's lungs were discoverable when tests destroyed tissue and results could not be obtained from any other source). It is unclear whether a party may discover the identity and location of a consulting expert by interrogatory under FRCP 26(b)(1). FRCP 26 generally does not permit discovery of the identity of non-testifying, retained experts without the required showing of exceptional circumstances. *USM Corp. v. American Aerosols, Inc.*, 631 F.2d 420, 424 (6th Cir. 1980); *Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses*, 622 F.2d 496, 501 (10th Cir. 1980) (expressing no view on exceptional circumstances exception).

### **3. Local Rules For Expert Discovery**

#### **(a) Northern District of Texas**

No local rule affects FRCP 26 and a party's obligation to file initial disclosures.

#### **(b) Southern District of Texas**

No local rule affects FRCP 26 and a party's obligation to file initial disclosures.

#### **©) Western District of Texas**

No local rule affects the scope of discovery permitted under FRCP 26 and a party's obligation to file initial disclosures.

#### **(d) Eastern District of Texas**

Local Rule 26 further elaborates on the parties' initial disclosure obligations. In addition to very specific expert disclosure and discovery requirements, that rule provides the following:

“LOCAL RULE CV-26 Provisions Governing Discovery; Duty of Disclosure

#### **(b) Disclosure of Expert Testimony.**

(1) When listing the cases in which the witness has testified as an expert, the disclosure shall include the styles of the cases, the courts in which the cases

were pending, the cause numbers, and whether the testimony was in trial or deposition.

(2) By order in the case, the judge may alter the type or form of disclosures to be made with regard to particular experts or categories of experts, such as treating physicians.

## **B. Depositions**

One of the most important events in the course of litigation is the expert deposition. The outcome of the plaintiff's construction claims may hinge on how the testifying expert does in deposition. Naturally, careful preparation and evaluation of the issues involved in the case improves the likelihood of a successful deposition of the plaintiff's expert.

### **1. Preparation**

The value of preparation cannot be overestimated. Knowledge of all relevant literature is critical to raising and sustaining any *Daubert* challenges against that particular expert. It is also helpful to consult with your client and your own consulting experts in preparation for taking the opposing expert's deposition.

### **2. Discover *All* of the Opinions of the Adverse Expert**

Trial is the most important cross examination, and it is better to know all the answers at trial than to be surprised at trial when you get the answer to the question that you were afraid to ask in deposition.

### **3. The Expert's Qualifications**

Weaknesses of the plaintiff's expert's qualifications should be exploited. If your experts have better credentials, be sure to point out to the differences to the jury through the *opposing* expert witness, so as to refrain from making your experts appear pompous.

### **4. Bias Shown By History of Testimony**

Of course, it generally pays to know the testimonial history of the expert you are opposing. Does the witness testify only for plaintiffs? Does the witness testify for plaintiffs the vast majority of the time? Has the expert made sworn statements in other cases that are inconsistent with the expert's positions in the case at hand?

## 5. Obtain Testimony Favorable To Your Case

During cross-examinations, it is possible to obtain testimony from an opposing expert that supports -- at least in a small way -- your theory of the case. There are some commonly acknowledged principles that can serve as small admissions of the validity of your case. An adverse expert may be willing to agree with several of your premises while disagreeing with your conclusion. In the same fashion, it may be possible to have the adverse witness accredit your expert witness by having the adverse witness acknowledge the reliability of your witness' data and assumptions, and the legitimacy of his credentials. In some cases, you may even be able to get the adverse expert to admit that your expert is better qualified in a specific area.

### III. SCIENTIFIC RELIABILITY PROBLEMS WITH EXPERTS

#### A. Introduction

An understanding of the applicability of *Daubert* to construction claims is crucial to an effective challenge to the theories of an expert. The United States Supreme Court changed the landscape of pretrial and trial challenges to expert witnesses when it handed down its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The *Daubert* decision reined in trial courts' unwarranted tolerance of what the high Court called "junk science." Masquerading as "scientific theories," many novel, unproven and unreliable techniques and theories had invaded federal courts. Trial courts had taken too passive an approach to gate keeping and too often had permitted unreliable testimony to reach the jury, cloaked in the aura of the special expertise brought by the expert witness. The *Daubert* Court reminded trial courts that "The Rules--especially Rule 702--place appropriate limits on the admissibility of purportedly scientific evidence by assigning the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* The Court enunciated a list of six factors for trial courts to consider when ruling on the admissibility of expert testimony. *Id.* The end result was that Rule 702 now has specific parameters for use in evaluating whether a proffered expert's testimony should be permitted to be heard by the jury. *Id.* Before turning to the six *Daubert* factors however, we will examine Rules 702 and 703 to understand the existing framework at the time that *Daubert* was handed down.

#### B. The Rules of Evidence

##### 1. Rule 702

Many states have enacted rules of evidence that mirror the federal rules. Texas Rule of Evidence 702, like its federal counterpart, permits opinion testimony by a witness qualified as an expert by knowledge, skill, experience, training, or education. Rule 702 provides: If scientific, technical, or other specialized





































