

**Presented:**

25<sup>th</sup> Annual Conference on State and Federal Appeals

June 4-5, 2015  
Austin, Texas

## **Recent State Cases on Expert Witness Testimony**

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# RECENT TEXAS CASES ON EXPERT WITNESS TESTIMONY

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## RECENT STATE CASES ON EXPERT WITNESS TESTIMONY

### INTRODUCTION

In recent years, the courts have looked at expert witness testimonies with scrutiny. Many courts have found expert witness testimonies inadmissible, arguing that the testimonies are speculative and conclusory. Expert witness testimony in Texas is governed by TEXAS RULES OF EVIDENCE 702:

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.

TEX. R. EVID. 702. The Texas Supreme Court specified the requirements for expert witness testimony to be admissible. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 556–57 (1995).

The *first* requirement for expert witness testimony to be admissible is that the expert must be qualified to testify on the subject matter *Id.* at 556. The expert’s expertise must “go to the very matter on which he or she is to give an opinion.” *Broder v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). The expert must be qualified “by knowledge, skill, experience, training or education[.]” *Id.* at 153 (quoting TEX. R. EVID. 702).

The *second* requirement is that expert witness’s testimony must pertain to scientific knowledge. *Robinson*, 923 S.W.2d at 556.

*Third*, the expert witness testimony must be relevant and reliable. To be relevant, “the proposed testimony must be ‘sufficiently tied to the facts of the case that it will ‘aid the jury in resolving a factual dispute.’” *Id.* at 556 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

To determine *reliability*, the factors that the trial court may consider include but are not limited to

- (1) the extent to which the theory has been or can be tested;
- (2) the extent to which the technique relies upon the subjective interpretation of the expert;
- (3) whether the theory has been subjected to peer review and publication;
- (4) the technique’s potential rate of error;
- (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- (6) the non-judicial uses which have been made of the theory or technique.

*Merrell Dow Pharms, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997); *see also Robinson*, 923 S.W.2d at 557.

Courts must then determine whether to exclude the evidence because “its probative value is outweighed by the ‘danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. *Robinson*, 923 S.W.2d at 557 (quoting TEX. R. CIV. EVID. 403).

### RECENT TEXAS EXPERT WITNESS TESTIMONY CASES (2012–2014)

#### **Elizondo v. Krist, 415 S.W.3d 259 (Tex. 2013).**

**Facts:** Jose Elizondo and his wife filed a lawsuit against attorney, William Wells and others, for legal malpractice.

Elizondo had sustained a back and neck injury because of the BP explosion. While he returned to work a few days after the explosion, he suffered psychological problems. Jose Elizondo’s wife stated she suffered loss of consortium. Both Jose Elizondo and his wife retained Williams Wells, and the other attorneys, to represent them in a BP explosion suit. Williams Wells settled the lawsuit for \$50,000 for Jose Elizondo (although his wife did not sign the settlement).

Jose Elizondo and his wife filed a legal malpractice suit against his former attorneys. In the legal malpractice suit, the plaintiffs claimed that the personal injury suit should have been settled for more. As evidence, the plaintiffs introduced an expert witness, Arturo Gonzales, an attorney who had represented others in the BP explosion. Gonzales laid out factors for assessing the value of a lawsuit and concluded that the plaintiffs’ personal injury suit was worth \$2–3 million dollars. The trial court, however, granted some of the defendant’s summary judgment motion, including the motion regarding damages, and the plaintiffs appealed. The Court of Appeals affirmed. The plaintiffs appealed to the Texas Supreme Court.

**Holding:** The Texas Supreme Court affirmed, holding that the summary judgment affidavit of the expert was insufficient to establish legal malpractice damages. After listing ten factors for assessing a value of the suit, Gonzalez wrote in relevant part:

Based on the factual information provided and reviewed by me, my experience in the BP litigation, my knowledge of general settlement values and in the criteria . . . relied upon to establish general settlement value in the BP litigation, it is my opinion that . . . the Elizondo case would have had a general value . . . in the range of between Two Million (\$2,000,000.00) and Three Million (\$3,000,000.00) dollars. *Id.* at 262.

Gonzalez then states, “The settlement offer made by BP for the Elizondo’s claim was basically for nuisance value.”

The Court held that Gonzales’s expert witness testimony failed because of an analytical gap in his report. In the report, Gonzales listed specific criteria he contends BP focused on when determining settlement. However, he offered no analysis to explain how these facts would be applied to Elizondo’s situation. Plaintiff’s expert failed to link settlement amounts to specific injuries and circumstances. He did not undertake to compare the Elizondo settlement with other actual settlements obtained in the BP litigation. In sum, he failed to provide a demonstrable and reasoned basis on which to evaluate his

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First appeared as part of the conference materials for the  
25<sup>th</sup> Annual Conference on State and Federal Appeals session  
"Expert Testimony Update"