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EXPERT TESTIMONY: UNDERSTANDING HOW TO USE IT OR LOSE IT

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By : Michael Gerstle[1] and Mark Waddell

I.
INTRODUCTION

American jurisprudence has long supported the idea that expert testimony is needed to aid a jury into understanding complex issues that are not of the general experience of the common person. The same holds true for aiding a judge who does not have the general experience of the issue presented in the litigation. Additionally, the lawyers trying the case often do not possess the knowledge to fully understand the issues; therefore an expert is vital to the lawyer to successfully present the case to the trier of fact.

Whether lawyers like to admit it or not, in the most simplistic view, lawyering can best be described as full combat storytelling, and the best story usually wins. If a lawyer doesn't fully understand the issues at hand, it will be very difficult to relate his client's story to the judge or jury. It is therefore necessary to not only have a qualified expert, but one that can effectively communicate the issues of the case to the lawyer, judge, jury, and sometimes even the client. A good expert can win a case and the opposite holds true for a poor expert. Understanding the difference between the two is the role of the attorney who retains the expert. However, experts are not bulletproof witnesses, and can quickly be disqualified from testifying, sometimes destroying the case for the attorney that retained the disqualified expert. It is not only important to understand what makes a good expert witness, but also to understand how to avoid having your expert disqualified from testifying. In *Daubert*[2], the Supreme Court of the United States laid out the rules for gate keeping of expert testimony. What has become known as a *Daubert Challenge*, is simply an attempt to disqualify an expert from testifying. In *Daubert,* the Supreme Court set standards that trial judges use to assess whether expert testimony should be heard, and specifically if the testimony is based on scientifically sound reasoning and whether the reasoning and methodology used by the expert is relevant to the facts of the particular case.

This paper is designed to inform the reader the applicability of the test developed by the Supreme Court in *Daubert* along with the Texas cases that have applied the standards set in *Daubert,* and also the Texas Supreme Court cases that have effectively expanded the standards to advance criteria that is unique to Texas. Understanding the history of the *Daubert Challenge* will help you prevent having your expert disqualified and allow you to better choose the experts you retain.

Construction disputes are a prime example of the type of litigation that warrants expert testimony. Many of the issues in construction disputes are beyond the general knowledge of the judge or jury. Rule 702 of the Texas Rules of Evidence states that if a scientific, technical, or

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[1] Michael Gerstle is a partner with Gerstle, Minissale & Snelson and Mark Waddell, and associate attorney with the firm. Mr. Gerstle wishes to acknowledge Mr. Waddell's efforts in preparing the majority of this paper.

[2] Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993)

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.

II.
DAUBERT AND THE TEXAS ROAD THAT FOLLOWS

Though in 1983, Rule 702 was officially adopted by Texas as a guideline relating to the admission of expert testimony, it wasn't until 1996 that the Texas Supreme Court specified the standards for admission of expert testimony. Until 1996, Texas Supreme Court had only addressed the legal sufficiency of scientific evidence, but not the proper standard for admission of such evidence. Finding that the standards for proper admission of expert testimony was outside the scope of Rule 702, and recognizing the Texas courts were split on the exactly what the standard for admission of expert testimony was in Texas, the Texas Supreme Court adopted the standards set by the Supreme Court in *Daubert* in its holding in *Robinson*[3]. In order to keep unreliable expert testimony, sometimes referred to as "junk science" or "kitchen chemistry", the Texas Supreme Court not only adopted the reasoning in *Daubert*, but also expanded it in *Robinson* and several key cases that followed. Understanding the evolution of the *Daubert* standards in Texas is essential to effectively presenting expert testimony and avoid having your expert disqualified. In order to understand where Texas law is today regarding admission of expert testimony, it is necessary understand the standards set in *Daubert*, along with the key Texas Supreme Court cases that followed.

A. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

In 1993, the Supreme Court of the United States handed down a decision that fundamentally changed the rules for the admissibility of expert testimony. Prior to *Daubert*, Federal Courts used the *Frye* test to determine whether an expert opinion was admissible. Under the *Frye* test, still used by several states other than Texas, a scientific technique was considered admissible if it was "generally accepted" as reliable in the relevant scientific community.[4] In *Daubert,* the Court held that the Rule 702 of the Federal Rules of Evidence superseded the *Frye* test and specific guidelines were laid out that set the standards for the admissibility of expert testimony based on scientific evidence.

Daubert was a dispute related to a birth defect allegedly caused by the mothers' ingestion of Bendectin[5] during pregnancy. The lower court granted summary judgment to the manufacturer of the drug, Merrell Dow, based on the holding that the *Frye* test did not allow Daubert's expert testimony because no published scientific study demonstrated a link between Bendectin and birth defects. Daubert submitted his own expert evidence that suggested that Bendectin could cause birth defects. Under *Frye*, this evidence was inadmissible because the scientific technique used for Daubert's expert conclusions were not "generally accepted" as reliable in the scientific community. However, the Court disagreed and looked to language in Rule 702 of the Federal

[3] E.I. du Pont de Nemours and Co., Inc. v. Robinson 923 S.W.2d 549, 551 (Tex. 1995)
[4] Frye v. U.S. 54 App. D.C. 46, 47, 293 F. 1013, 1014 (C.A.D.C 1923)
[5] Bendectin is a prescription anti-nausea drug.

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