ETHICAL CONSIDERATIONS

JUDGE AS GATEKEEPER

PRESENTED TO:

ROBERT O. DAWSON JUVENILE LAW INSTITUTE
CORPUS CHRISTI, TEXAS
FEBRUARY 22, 2010

PRESENTED BY:

JUDGE MIKE SCHNEIDER
315th JUDICIAL DISTRICT COURT
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By Ted Jereb, Attorney at Law, and Judge Mike Schneider

1. Introduction

The Texas Rules of Evidence provide that a person qualified as an expert by knowledge, skill, experience, training, or education may provide testimony in the form of an opinion if the trier of fact will be assisted in understanding the evidence or determining a fact in issue. Tex. R. Ev. 702. Generally, expert testimony must meet two requirements. First, the expert must be qualified in the field of the subject matter in issue, and second, the testimony must be relevant and based on a reliable foundation. If these requirements are met, the expert may offer an opinion on a mixed question of law and fact, i.e. an ultimate issue to be decided by the trier of fact. Tex. R. Ev. 704.

Certain types of cases require expert witness testimony to survive a motion for an instructed verdict and to submit the case to the trier of fact. For example, a claimant alleging malpractice against a physician, attorney, engineer or other professional needs an expert qualified in that field to establish the applicable standard of care. Some cases require expert testimony to establish causation between the claimed damages and the incident or transaction made the basis of the suit, when the connection is not plainly

within the knowledge of laypersons. In other cases expert testimony is not required as a matter of law, but can assist the trier of fact, such as a reconstruction expert in an auto collision case or a valuation expert in a lost business opportunity case.

In 1975, the Federal Rules of Evidence were adopted to promote the lofty goal of the "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Since then, the role of courts as so-called "gatekeepers" has expanded, in essence making judges referees of ethics, charged with protecting jurors from irrelevant, unfounded, misleading, or otherwise inadmissible testimony. There are no standardized rules of legal ethics specifically regarding expert testimony, and few that self-regulate many of the professions whose members are frequently called upon to testify.

2. Discovery of Expert Witnesses in Texas Juvenile Proceedings

Pursuant to Section 51.17(b) of the Texas Family Code, discovery in a juvenile case is governed by the Texas Code of Criminal Procedure and appellate decisions in criminal cases. Chapter 39 of the Code of Criminal Procedure provides the statutory authority for taking depositions and obtaining other pretrial discovery. Article 39.14 of the Code of Criminal Procedure is the means by which counsel for a juvenile respondent may obtain discovery of the state's expert witnesses. Upon written motion and with proper notice to the prosecution, defense counsel may discover the name and address of each person whom the state may use at trial to present expert testimony. The court shall specify in its order the time and manner in which the prosecution must provide the disclosure to defense counsel, but the time for disclosure of experts shall not be later than twenty (20) days prior to trial. Texas Criminal Code of Procedure, Article 39.14(b). Because of the great weight often assigned by finders of fact to such expert testimony, what ethical implications are there for counsel who fail to propound such discovery?

3. Admissibility of Expert Witness Testimony

Texas Rule of Evidence 702 was adopted in 1983 and governs the admission of expert testimony as follows:

> 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.

After Rule 702 was adopted, the Texas courts of appeal decisions conflicted regarding the appropriate standard of admissibility of scientific expert testimony. Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992) addressed the issue of the admissibility of scientific evidence in a criminal case. Under Kelly, the trial court in its gatekeeper role must first decide if the testimony is sufficiently reliable relevant to help the jury understand the evidence or determine a fact in issue. The burden is on the proponent of

such scientific evidence to convince the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant. Id. at 573.

Pursuant to Kelly, to demonstrate reliability, the proponent must satisfy three criteria:

1. the underlying scientific theory is valid;
2. the technique applying the theory is valid; and
3. the techniques were properly applied on the occasion in question.

Additionally, there are seven non-exclusive factors that the trial court may consider to determine reliability:

1. the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community;
2. the qualifications of the expert testifying'
3. the existence of literature supporting or rejecting the underlying scientific theory and technique;
4. the potential rate of error of the technique;
5. the availability of other experts to test and evaluate the technique
6. the clarity with which the underlying scientific theory and technique can be explained to the court; and
7. the experience and skill of the person who applied the technique on the occasion in question.

Id. at 573.

The United States Supreme Court examined the issue in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90 (1993) and held that Federal Rule of Evidence 702 requires scientific expert testimony to be reliable and relevant in order to be admissible. (Texas Rule of Evidence 702 is based on Federal Rule of Evidence 702.) It is the responsibility of the trial court, when scientific expert testimony was proffered, to determine as a preliminary matter whether the expert was proposing to testify to 1) scientific knowledge that 2) will assist the trier of fact to understand or determine a fact in issue. Under Daubert, the trial court must first assess whether the reasoning or methodology underlying the proffered testimony is scientifically valid, i.e. reliable, and whether the reasoning or methodology can be properly applied to the facts in issue, i.e. relevant. Id. at 592-3. What ethical duties, if any do attorneys have to the gatekeeper in offering witnesses whose expert testimony is purported to be reliable? What duties do the witnesses themselves owe to the court and to their own professions?

After Kelly, the Texas Court of Criminal Appeals was confronted with a case involving expert testimony about a "soft" science versus a "hard" science. Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998). "Hard" sciences, such as mathematics, physics, chemistry and geology, are subjects where precise measurements, calculation and prediction are generally possible. The Court in Nenno decided the applicability of

the Kelly reliability factors for testimony regarding the defendant's future dangerousness. The Court stated that although the general principles outlined in Kelly apply to nonscientific expert testimony, the seven factors listed above may or may not apply depending on the context of the case. Further, when dealing with "soft" sciences, like the social sciences or fields that are based primarily on the experience and training of the witness, the Kelly requirement of reliability is relaxed. Id. at 560-1.

The Nenno court did not attempt to make a rigid distinction between "soft" and "hard" sciences, but provided an alternate set of inquiries more appropriate for the trial court to apply when determining the admissibility of nonscientific expert testimony. The inquiries are:

1. whether the field of expertise is a legitimate one;
2. whether the subject matter of the expert's testimony is within the scope of that field; and
3. whether the expert's testimony properly relies on or utilizes the principles involved in the field.

Id. at 561.

The Texas Supreme Court has addressed this issue for civil cases in E.I. du Pont de Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). Robinson involved a property damage claim resulting from an allegedly defective fungicide product. The plaintiffs offered testimony from a degreed horticulturist, but following a pretrial hearing, the trial court excluded the testimony on the basis that it was not grounded on valid scientific methods and was, therefore, not reliable.

On appeal, the Court of Appeals reversed and remanded for a new trial, holding that once the proponent establishes an expert's qualifications, the weight to be given the testimony and the credibility of the witness is to be determined by the trier of fact. Robinson v. E.I. du Pont de Nemours and Company, Inc., 888 S.W.2d 490, 492 (Tex. App.-Fort Worth 1994, writ granted). Du Pont appealed the ruling and urged the Texas Supreme Court to adopt a reliability standard similar to the standards applicable to Rule 702 of the Federal Rules of Evidence and the Texas Rules of Criminal Evidence, which were identical in wording to Texas Rule of Civil Evidence 702. Robinson, 923 S.W.2d at 556.

In Robinson the Texas Supreme Court was persuaded by the reasoning in Daubert and held that in addition to showing that an expert witness is qualified, Rule 702 requires the expert's testimony to be relevant to the issues of the case and be based on a reliable foundation. Robinson, 923 S.W.2d at 556. The Court outlined the following, non-exclusive factors that the trial court could consider in making the threshold determination of admissibility:

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/or 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 (such as research conducted outside of the legal forum).

After a finding that the proffered scientific expert testimony is both relevant and reliable, the trial court must also determine whether to exclude such testimony under Texas Rule of Evidence 403. Robinson, 923 S.W.2d at 557 (citing Daubert, 569 U.S. at 595-6).

Rule 403 provides that:

> Although 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, or by considerations of undue delay, or needless presentation of cumulative evidence.

Upon a timely challenge to the proffer of expert testimony the trial court is, therefore, the "gatekeeper" and must determine, at a pretrial hearing, whether such testimony is admissible at trial. The party proffering the expert testimony bears the burden of proof and must convince the trial judge that:

1. the expert is qualified in the field in question;

2. the expert's testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute", Robinson, 923 S.W.2d at 556, and therefore, relevant;

3. the expert's testimony must be based on scientific knowledge, and therefore, reliable; and

4. if an objection is asserted under Texas Rule of Evidence 403, the expert's testimony outweighs 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.

4. Challenges to Expert Witness Testimony

A juvenile case may involve a wide range of evidence for which an expert witness is needed to interpret data and to testify regarding the interpretation of such data for the

benefit of the fact finder. For example, the state may identify an expert witness on the analysis of DNA, ballistics, fingerprints, fingernail scrapings, tire tracks, soil, paint, blood and other bodily fluids, hair and fiber samples, or controlled substances. Counsel for the juvenile respondent should know the procedure for challenging the state's designation of an expert witness. The danger of not challenging the designation of an expert is the "extremely prejudicial impact on the jury, in part because of the way the jury perceives a witness labeled as an expert". Robinson, 923 S.W.2d at 553. A witness found qualified as an expert by the trial court arguably has more credibility than a lay witness, and his or her opinions may be given greater weight simply because of the label of an expert witness. Ethical considerations to be considered by the practitioner include not just duty to client but also duty to the court regarding one's own witnesses, too.

At the hearing on the notice of objection defense counsel must be prepared to cross-examine the expert witnesses designated by the state on the following topics:

1. the expert witness' credentials.

2. the following Kelly factors (along with the seven non-exclusive factors listed above that the trial court may consider to determine reliability) if the subject matter of the expert witness' testimony involves a "hard" science:

   A. the validity of the underlying scientific theory;
   B. the validity of the technique applying the theory; and
   C. the proper application of the technique on the occasion in question.

3. the following Nenno factors if the subject matter of the expert witness' testimony involves a "soft" science:

   A. the legitimacy of the field of expertise;
   B. the scope of the subject matter of the expert's testimony within the field of expertise; and
   C. the proper reliance or utilization by the expert witness of the principles involved in the field.

Additionally, counsel for the juvenile respondent should consider asserting a Rule 403b objection to the proffered expert testimony if its probative value is substantially 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

To ethically fulfill its duties to clients, defense counsel must be thoroughly prepared to effectively cross-examine any expert witness designated by the state. After receiving the state's designation of expert witnesses, defense counsel should gather as much information regarding each designated expert's credentials and the subject matter of their anticipated testimony through discussion with other defense counsel

knowledgeable with the expert witness and/or subject matter of testimony, internet search engines, criminal defense treatises. Information is the key to being prepared to cross-examine the state's expert witnesses at the pretrial hearing and at trial.