

# Ethics of Expert Witness Presentation

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## **PUC Proc. R. §22.221: The TRE Apply, But Not Always . . . .**

**Rules of Civil Evidence Apply. The Texas Rules of [ ] Evidence as applied in nonjury civil cases in the courts of Texas shall be followed in contested cases. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under the TRE, evidence not admissible under those rules may be admitted, except where prohibited by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.**

## TRE 701: Lay opinion testimony

- “If the witness is not testifying as an expert, the witnesses’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witnesses’ testimony or the determination of a fact issue.”

## TRE 701(a)

- Lay opinion testimony must be rationally based on the witness's perception
  - Limited to opinions based on personally-perceived factual information
  - Must flow logically from the witness's personal knowledge and experience such that a reasonable person could reach the same conclusion

## TRE 701(a)

- Examples of lay opinion testimony held to be rationally based on the witness's perception
  - Homeowner could, if a reasonable basis for the opinion is demonstrated, testify regarding opinion on value of owned real property
  - Business owner could testify about pricing and industry practices
  - Registered nurse could testify regarding personal observations of patient

## TRE 701(b)

- Lay opinion testimony must be helpful
  - The lay opinion may be a shorthand rendition of the witness's observations
  - The lay opinion may encompass the witness's specialized knowledge that does not rise to the level of "expertise" under TRE 702, but is nevertheless knowledge the trier of fact does not have

## TRE 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, expertise, training, or education may testify thereto in the form of an opinion or otherwise.”

## ***Robinson* and contested case hearings**

- *E.I. du Pont De Nemours & Co. v. Robinson* and its progeny should guide the ALJ or hearing officer when ruling on a challenge to the admissibility of expert testimony

## The *Robinson* standard

- the expert witness must be qualified
- the expert witness's proposed testimony must be relevant
- the expert witness's proposed testimony must be reliable

## The witness must be qualified

- The key to whether a witness is qualified to give an expert opinion is the fit between the witness's qualifications and the subject matter of the witness's proposed testimony
- Courts have great discretion in determining whether the witness is qualified to give an expert opinion

## **The witness's testimony must be relevant**

- To be relevant, the testimony must be sufficiently tied to the facts of the case that it will assist the trier of fact to understand the evidence admitted at trial or to determine a fact issue
- TRE 403's general balancing test does not apply to contested case hearings

## **The witness's testimony must be reliable**

- To be reliable, an expert witness's proposed testimony must be grounded in scientific, technical, or other specialized knowledge
- Appellate courts will not disturb a trial court's decision regarding whether an expert witness's testimony is reliable absent a clear abuse of discretion

## The witness's testimony must be reliable

- Scientific testimony: 6 non-exclusive factors
  - 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 subject to peer review and/or publication
  - the technique's rate of error
  - whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community
  - the non-judicial uses which have been made of the theory or technique

## The witness's testimony must be reliable

- Nonscientific testimony
  - Is there too great an analytical gap between the data and the opinion offered?
- Judicial notice
  - Once a theory or methodology has been adequately evaluated by one or more trial courts, other courts may take judicial notice of the reliability of the theory or methodology
  - A proponent in later cases need only show that the theory or methodology has been applied correctly and that the ultimate result is reliable

## TRE 703: Bases of expert opinions

- TRE 703 allows an expert witness to base an opinion on:
  - personal observation
  - facts or data admissible in evidence and presented to the expert before or during trial
  - information otherwise inadmissible in evidence, if this type of information is reasonably relied on by experts in the witness's field

## Personal observation

- May have the benefit of being particularly credible, being based upon first-hand knowledge
- Subject to challenge under Rule 104(a) to the extent that the testimony is or is not actually based upon the expert witness's first-hand observation and whether the witness had a sufficient opportunity to observe

## Facts or data offered in evidence

- Facts already in evidence may form the basis of questions posed to an expert witness to elicit an opinion
- An expert witness may obtain facts by reviewing transcripts, including trial or deposition transcripts or summaries of the trial record, and by hearing the testimony of other witnesses at trial
- “The Rule” is generally inapplicable to expert witnesses essential to the presentation of the party’s cause

## Facts or data inadmissible in evidence

- An expert witness may base an opinion on facts or data known to the expert witness before the trial, including evidence not otherwise admissible in evidence, if experts in their field of expertise would reasonably rely on that type of facts or data in forming opinions or inferences on that subject
- TRE 703 does not provide a basis for admitting otherwise inadmissible evidence because an expert witness relied on it in forming an opinion

## **TRE 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.”

## Opinion on ultimate issue

- Under TRE 704, it is generally inappropriate for a lay or expert witness to:
  - tell the trier of fact what conclusion to reach
  - testify to issues reserved to the trier of fact, such as witness credibility
  - opine on pure questions of law and legal standards

## Disclosure of facts and data

- TRE 705(a) eliminates the need to disclose all facts and data that an expert witness considered in forming an opinion before giving the opinion and shifts the burden of eliciting the bases of the expert witness's opinion to the cross-examiner
- TRE 705(c) requires the exclusion of expert opinion testimony when the facts that the expert relied on were inadequate to support the expert's conclusion
- TRE 705(b) and (d) are generally inapplicable to contested case hearings



# Applicable Texas Disciplinary Rules of Professional Conduct

## RPC 3.03: Candor toward the tribunal

- a. A lawyer shall not knowingly:
  1. make a false statement of material fact or law to a tribunal;
  2. fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
  3. in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
  4. fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or offer or use evidence that the lawyer knows to be false.
- b. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
- c. The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

## Definition of “material”

- A false statement of fact to a tribunal is material within the meaning of RPC 3.03 if a judge would attach importance to the representation and would be induced to act on it in making a ruling

## Anticipated and past false evidence

- RPC 3.03 prohibits lawyers from:
  - encouraging a witness to offer false material evidence or testimony
  - offering material evidence or testimony that the lawyer knows to be false
  - upon discovering that he or she introduced or assisted in introducing false material evidence or testimony, failing to immediately take remedial measures including urging the witness to correct the false testimony, or, if that fails, disclosing the deception to the court and the other party

## Proof believed to be false

- A lawyer may refuse to offer evidence that the lawyer reasonably believes to be untrustworthy, even if the lawyer does not know that the evidence is false
- But that discretion should be exercised cautiously in order not to impair the legitimate interests of the client

## **Persuading a witness to adopt the lawyer's theory of the case**

- A lawyer's persistently and aggressively presenting a theory of the case to a witness and requesting that the witness make changes in statements to support that theory is not a violation of RPC 3.04—even when the witness refuses to do so—unless the lawyer's conduct is in bad faith.

## **Falsifying or destroying evidence**

- In addition to being an ethical violation under RPC 3.03 and 3.04, falsifying evidence (including inducing a witness to testify falsely) or destroying evidence may be a criminal offense

## RPC 3.04: Fairness in adjudicatory proceedings

A lawyer shall not:

- a. unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.
- b. falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
  1. expenses reasonably incurred by a witness in attending or testifying;
  2. reasonable compensation to a witness for his lost time in attending or testifying;
  3. a reasonable fee for the professional services of an expert witness.
- c. except as stated in paragraph (d), in representing a client before a tribunal:
  1. habitually violate an established rule of procedure or evidence[.]
- d. knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by the tribunal except for an open refusal based on either an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

## Hiring an expert witness on contingency

- Under RPC 3.04(b), a lawyer may not aid, assist, participate in, or permit a client to enter into a contingent-fee agreement with an expert witness.

## Communication with an opposing expert

- Under RPC 4.02(b), expert witnesses employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding the matter without the consent of the lawyer who retained them
- But certain government agencies or employees, such as the police, may be contacted due to their obligations to the public at large

## Proposed RPC revisions

- The Texas Supreme Court and State Bar are considering proposed amendments to the Texas Disciplinary Rules of Professional Conduct
- The proposed amendments to RPC 3.03, 3.04, 3.08, and 4.02 are in Appendix A of the Ethics of Expert Witness Presentation materials
- Proposed amendments to to RPC 3.04, 3.08, and 4.02 clarify these rules
- The proposed amendment to RPC 3.03 is substantive but would not affect the opinion testimony issues we've discussed today

## Questions?

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