

**EXPERT AND OPINION EVIDENCE IN TEXAS UNDER  
*DAUBERT, ROBINSON,*  
AND THE AMENDED FEDERAL RULES**

—By—

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**An Examination of Issues in Preparing and Presenting  
Expert Evidence Under the New Federal Evidence Rules  
And Texas and Federal Case Law Following  
*Daubert, Kuhmo Tire, Robinson and Gammill***

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*In addition, the Court will consider the imposition of other docket control deadlines and a trial setting.*

## **VI. PREPARING TO CHALLENGE AN OPPONENT'S EXPERT WITNESS**

### **A. File Interrogatories and Requests for Production of Documents**

Always request information regarding your opponent's expert witness and his or her opinions regarding the subject matter of the lawsuit as early as possible in the case. Focus on the *Robinson* factors. Request a copy of the expert witness's curriculum vitae, all written reports regarding the lawsuit, and any supporting documents upon which the expert has relied.

### **B. Get a Detailed Expert Report**

Get a thorough report from your opponent's expert. If your opponent's expert does not voluntarily produce a written report, file a motion under Texas Rule of Civil Procedure 166b(2)(e)(4) to get one.

### **C. Depose Your Opponent's Expert**

Before having your notice of deposition and subpoena duces tecum served on the expert, contact opposing counsel to work out a mutually convenient date. Include in your subpoena duces tecum requests for all documents upon which the witness has relied in forming his opinion, including all published treatises and articles. Ask him for all treatises and articles he has written on the subject matter at issue. During deposition, you should cover completely the following areas:

1. *All education and training;*
2. *All professional affiliations;*
3. *All prior employment history;*
4. *All treatises and articles authored by the expert regarding the subject matter of the lawsuit;*
5. *All persons with whom the expert has discussed the case;*
6. *All contacts and relationships with opposing counsel;*
7. *An explanation of each opinion or theory and the factual basis for each opinion (the Daubert/Robinson factors);*
  - (a) the extent to which the opinion/theory has been or can be tested;

- (b) the extent to which the technique relies upon the subjective interpretation of the expert;
  - (c) whether the opinion/theory has been subjected to peer review and/or publication;
  - (d) the technique's potential rate of error;
  - (e) whether the underlying opinion/theory or technique has been generally accepted as valid by the relevant scientific community; and
  - (f) the non-judicial uses which have been made of the opinion/theory or technique.
8. *Prior experience as an expert witness, including prior depositions, trials, and consultations with attorneys;*
  9. *All articles and treatises upon which the expert has relied; and*
  10. *The basis of the expert's fee and the amount of time he has spent on the case.*

#### **D. Methods to Challenge the Opponent's Expert**

The method by which you choose to challenge an expert witness and the time at which you make that challenge require both knowledge of the law and strategic planning.

##### **1. Before Trial: Motion to Strike or Motion in Limine**

You may file a motion to strike an expert witness or a motion in limine on several bases: (1) opposing counsel failed to timely and properly designate the witness under the Texas Rules of Civil Procedure or a court scheduling order; (2) opposing counsel failed to timely identify the witness and/or the witness's opinions in response to interrogatories and/or to supplement same; (3) opposing counsel failed to produce expert report, curriculum vitae, and/or other relevant documents in response to document request and/or failed to supplement same; (4) the witness will not assist the trier of fact; (5) the witness cannot satisfy some or all of the six *Robinson* factors; (6) the witness is not qualified; (7) the witness is relying on an improper standard; and (8) the witness is making legal conclusions.

You must put on evidence to support your motion to exclude an expert witness. There are several forms of evidence that a trial judge will consider:

##### **a. Affidavits From Your Own Experts**