

DEFEATING *DAUBERT/ROBINSON* CHALLENGES.

TEXAS TRIAL LAWYERS ASSOCIATION

Beat the Heat

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I. INTRODUCTION

In 1993, the United States Supreme Court changed the evidentiary landscape for the admissibility of expert testimony in the landmark decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) (“*Daubert*”). The Texas Supreme Court followed suit in 1995 by adopting and expanding the *Daubert* holding in *E.I. du Pont De Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (“*Robinson*”). These decisions erected “gates” through which expert testimony must pass. Since these decisions were initially handed down, the law regarding the admissibility of expert testimony has continued to evolve.

This paper is intended to provide a practical framework of the law regarding the admissibility of expert testimony, with a specific focus on *Daubert/Robinson* and their progeny. Additionally, this paper outlines the procedure--and provides practice pointers--for challenging and defending experts on *Daubert/Robinson* grounds. Finally, recent helpful cases involving *Daubert/Robinson* are summarized.

II. BACKGROUND: FROM FRYE TO ROBINSON

By now, most lawyers are familiar with the facts and holdings of *Frye*, *Daubert* and *Robinson*. Accordingly, this section only briefly abstracts the *Frye*, *Daubert* and *Robinson* decisions.

A. *Frye*

In *Frye v. U.S.*, 293 Fed. 1013 (D.C. 1923), the Court affirmed the exclusion of opinion testimony derived from an early version of the polygraph. In doing so, the Court held that opinion testimony based on scientific evidence is admissible only if the science is “generally accepted” in the field to

which it belongs. *Id.* at 1014. The *Frye* “generally accepted” test governed the admissibility of expert testimony for the next seventy years.

B. *Daubert*

Daubert was a products liability case involving the morning-sickness drug Bendectin. Bendectin allegedly caused birth defects in children whose mothers ingested the drug during pregnancy. The *Daubert* plaintiffs relied on expert testimony to link Bendectin to the birth defects. Those expert opinions were based on animal studies, pharmacological studies purporting to show similarities between the chemical make-up of Bendectin and other drugs which were known to cause birth defects and re-analysis of previously published human statistical studies. The district court rejected the plaintiffs’ expert testimony holding that such evidence did not meet the *Frye* “general acceptance” test. The Ninth Circuit affirmed based on *Frye*. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991) (*Daubert I*).

On appeal, the U.S. Supreme Court held that *Frye* was superseded by the adoption of Rule 702 of the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993). The Supreme Court noted that, pursuant to Rule 702, a proponent of expert testimony must show that the offered opinions and conclusions are based on (1) “...scientific...knowledge” that (2) will “...assist...” the trier of fact. *Daubert*, 113 S. Ct. at 2796. Keying on this language, the Court erected two “gates” or requirements that must be satisfied before a trial court can properly admit scientific expert testimony. The requirement that an expert’s testimony pertain to “...scientific...knowledge” establishes the standard of evidentiary reliability--the reliability gate. *Id.* at 2795. Likewise, the requirement that an expert’s

opinion "...assist..." the trier of fact is the root of the relevancy gate. *Id.* The *Daubert* Court charged trial courts with a gatekeeping function by requiring that trial court's determine that evidence is "reliable" and "relevant" before admitting it as evidence for consideration by the trier of fact. The factors suggested by the Court for assessing the "reliability" and "relevancy" of proffered evidence are discussed, in detail, in later sections.

C. *Robinson*

In *E.I. du Pont De Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) the Texas Supreme Court adopted standards for the evaluation of scientific expert testimony that paralleled and expanded *Daubert*. In *Robinson*, a landowner sued the manufacturer of a pesticide for damage to his pecan orchard. Plaintiff's expert testified that the pesticide, Benlate 50DF, was contaminated, and when applied, it damaged plaintiff's trees. Defendant moved to exclude the expert on the grounds that his methodologies and research were flawed. The trial court excluded plaintiff's expert. *Robinson*, 923 S.W.2d at 552. The Court of Appeals reversed, holding that the trial court abused its discretion since only the expert's methodology and research, not his qualifications, were contested. *Robinson v. E.I. du Pont Nemours and Co., Inc.*, 888 S.W.2d 490 (Tex. App. - Ft. Worth 1994), *rev'd* 923 S.W.2d 549 (Tex. 1995).

The Texas Supreme Court reversed the Court of Appeals and affirmed the trial court's decision. The Texas Supreme Court concluded that trial judges should undertake a "gatekeeper" role in evaluating expert testimony. *Robinson*, 923 S.W.2d at 553 ("trial judges have a heightened responsibility to ensure that the expert testimony has some indicia of reliability.") The *Robinson* decision endorsed the reasoning of *Daubert* and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)(adopting a standard for determining the relevancy and reliability of evidence under

Rule 702 of the Texas Rules of Criminal Evidence). The *Robinson* Court held that in addition to showing that an expert is qualified, Rule 702 also requires that the proponent show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation. *Robinson*, 923 S.W.2d at 556.

With *Daubert* in Federal Court and *Robinson* in State Court, we have now moved from the "generally accepted" test of *Frye* (wherein the scientific community served as the "gatekeeper") to the reliability and relevancy tests (wherein the trial court serves as the "gatekeeper"). Both *Daubert* and *Robinson* enumerated factors to guide trial judges in their determination of what is reliable and relevant. These factors are discussed in Section V. But, prior to that discussion, is an explanation of a threshold requirement of Rule 702—having an expert that is qualified in the area of the proffered testimony. See Section IV

III. DAUBERT/ROBINSON'S ANALYSIS NOW APPLIES TO ALL EXPERTS: KUMHO/GAMMILL

Both *Daubert* and *Robinson* dealt with "hard" science. Applying the *Daubert/Robinson* holding to the "hard" sciences is logical. Application of these decisions, however, to the "soft" sciences or to expert testimony based upon experience and training is difficult at best. This problem was the topic of much debate, but has been decided by the U.S. Supreme Court in *Kumho Tire v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999) and by the Texas Supreme Court in *Gammill v. Jack Williams Chevrolet, Inc.* 972 S.W.2d. 713 (Tex. 1998).

A. Federal Court

The Fifth Circuit (applying what would ultimately be the law of the land) handed down two significant decisions on this issue before *Kumho* time: *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) and *Moore v.*

Ashland Chemical Inc., 125 F.3d 679 (5th Cir. 1997)(*en banc*). *Watkins* is a products liability case where a gravel wash plant employee was killed when the conveyor he was operating fell on him. *Watkins*, 121 F.3d 984. The Plaintiff brought suit alleging that the conveyor was defectively designed because it was supported by only one wire rope. In support of this claim, the Plaintiff offered the testimony of a civil engineer, who claimed that the conveyor was unreasonably dangerous and that alternative designs were feasible. However, the expert did not make cost calculations or design drawings to support his opinions that the existing design was defective or that an alternative design was safer. The district court excluded the plaintiffs' engineering expert's testimony regarding an alternative design of the conveyor system pursuant to Rule 702 and *Daubert*. *Id.* The Fifth Circuit affirmed. In affirming the district court, the Fifth Circuit rejected the view proffered by the Tenth Circuit in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.1996), that an expert's opinions can avoid scrutiny under *Daubert* merely because they are based on his experience and training. The court reasoned:

We cannot agree with the *Compton* court's conclusion that *Daubert* only applies when "unique, untested or controversial methodologies or techniques" are relied on by the expert....The nonexclusive list of factors relevant under *Daubert* to assessing scientific methodology--testing, peer review, and "general acceptance"--are also relevant to assessing other types of expert evidence. Whether the expert would opine on economic valuation, advertising psychology, or engineering, application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers.

The Fifth Circuit further stated that the *Compton* decision "suffers from the vagueness of the line it draws between 'methodology' and other scientific or technical knowledge." The court reasoned the when an engineering expert testifies to alternative designs, that opinion, by definition, includes elements of science, technology, and methodology.

The *Watkins* court held that *Daubert's* "...focus on a standard of evidentiary reliability and the requirement that proposed expert testimony must be appropriately validated are criteria equally applicable to 'technical or other specialized knowledge'...The nonexclusive list of factors relevant under *Daubert* ... are also relevant to assessing other types of expert evidence." *Id.* at 990. In the Fifth Circuit's view, allowing an expert to avoid *Daubert* simply by stating that his conclusions were not reached by any particular method or technique, but rather general engineering principles and practical experience, would lead to an approach of "the less factual support for an expert's opinion, the better."

After holding that *Daubert* and its factors apply to an engineer testifying about an alternative product design, the Fifth Circuit affirmed the trial court's exclusion of plaintiffs' expert. In applying *Daubert*, the Fifth Circuit was critical of the expert's: (1) failure to test alternative designs; (2) failure to investigate other designs available at the relevant time; (3) failure to make any design drawings; (4) failure to retain calculations supporting the design; (5) failure to examine the failed component part; (6) failure to analyze the impact an alternative design would have the product's utility; and, (7) failure to analyze the costs associated with implementation of the alternative design. *Id.* Significantly, the Court held that the *Daubert* factors applied in concept, but in the Court's application, they gloss over three of the four factors. *See Id.* The only factor that the Court did apply was that of testability. *Id.* So, did the *Daubert* factors apply or not? The answer to this

question was better clarified in the Fifth Circuit's *en banc* decision in *Moore v. Ashland Chemical Inc.*, 125 F.3d 679 (5th Cir. 1997), and ultimately the U. S. Supreme Court in *Kumho Tire*.

In *Moore v. Ashland Chemical Inc.*, 125 F.3d 679 (5th Cir. 1997), Moore contracted reactive airway dysfunction syndrome hours after being exposed to a mixture of chemical gases on defendants' premises. Moore and his wife sued claiming that the chemical exposure caused his condition. *Id.* at 683. In support of their claims, the Moores offered the testimony of "two well credentialed clinical physicians." *Id.* The trial court excluded one of the two physician's testimony on causation pursuant to Rule 702 and *Daubert*. *Id.* at 697-700. After the exclusion of this testimony, the jury found that Moore's injury was not proximately caused by defendants' negligence, and the trial court granted the defendants a take-nothing judgment. *Id.* at 683.

Sitting *en banc*, the Fifth Circuit reversed and remanded. *Id.* at 710. It also made two significant clarifications in Fifth Circuit law. First, the *Moore* Court held that the trial court's "gatekeeping" function, as espoused in *Daubert*, applies to the admission or exclusion of every type of expert testimony. *Id.* at 682, 685-86. However, the *Moore* Court also took a giant leap towards restricting the application of the *Daubert* factors. *Id.* at 683, 688. ("The *Daubert* factors, which are techniques derived from hard science methodology, are, as a general rule, inappropriate for use in making the reliability assessment of the expert clinical medical testimony.") Rather than blindly applying the *Daubert* factors, the trial court, in executing its "gatekeeping" function, should look to the principles, methods and procedures of the particular field of knowledge involved. *Id.* at 686-87.

***Kumho Tire Company, Ltd., et al v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999)**

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) the Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. It held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.* at 593-594.

Kumho Tire required the Court to decide how *Daubert* applies to the testimony of engineers and other experts. The Court concluded that *Daubert's* general holding -- setting forth the trial judge's general "gatekeeping" obligation -- applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. The Court also concluded that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability.

But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997) (courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination). Applying these standards, the court determined that the District Court's decision in *Kumho Tire* -- not to admit certain

expert testimony -- was within its discretion and therefore lawful.

B. Texas

The recent Texas Supreme Court opinions are consistent with Fifth Circuit law that *Daubert/Robinson* applies not only to all scientific testimony, but to all expert testimony. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex.1998). In so holding, the Texas Supreme Court stated that the *Daubert* court expressly rejected the argument the Federal Rule 702's requirement that expert testimony be reliable applied "specifically or exclusively to unconventional evidence." *Gammill, citing Daubert*, 509 U.S. at 592, n.11, 113 S.Ct. 2786 ("Although *Frye* focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specifically or exclusively to unconventional evidence....). The Court also cited the Texas Court of Criminal Appeals in rejecting the dual application of *Daubert/Robinson*. The Court stated:

[N]owhere in *Kelly* did we limit the two-pronged [relevance and reliability] standard to novel scientific evidence. The Supreme Court in *Daubert* directly addressed this issue in a footnote...The Supreme Court noted the "under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795. We likewise see no value in having a different standard of admissibility for novel scientific evidence. The problems presented in determining whether or not a particular type of evidence would be considered "novel" are daunting enough to reject application of a dual standard. Moreover, we observe that the factors and criteria set forth in *Kelly* as bearing upon the reliability of

proffered scientific evidence are an adequate measure for assuring that "novel" scientific evidence which is "junk science" is excluded. These factors "addressed the soundness of the underlying scientific theory and techniques." *Jordan v. State*, 928 S.W.2d 550, 554 (Tex.Crim.App.1996).

Gammill, 927 S.W.2d at 721.

The Texas Supreme Court also noted that the consensus of Federal Circuit courts that had addressed *Daubert's* scope that its application is not limited to novel scientific methodologies but, at a minimum, extends to all scientific expert testimony proffered under Federal Rule of Evidence 702. *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir.1997)("We cannot agree...the *Daubert* only applies when 'unique, untested or controversial methodologies or techniques' are relied on by the expert."); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143, n.8 (9th Cir.1997)("Daubert's holding applies to all expert testimony, not just testimony based on novel scientific methods."); *Peitzmeier v. Hennessey Indus., Inc.*, 97 F.3d 293, 297 (8th Cir.1996, cert. denied, 117 S.Ct. 1552, 137 L.Ed. 701 (1997)(refusing to limit *Daubert's* application to novel scientific theories or methodologies."). Like the above cited Federal Circuit Courts, the Texas Supreme Court did not believe that the rules governing admission of scientific evidence should differ depending on whether the evidence is considered novel or unconventional. Thus, the *Gammill* court held that the *Daubert/Robinson* analysis applied to all scientific testimony.

In addition to holding that the *Daubert/Robinson* analysis applied to all scientific testimony, the Texas Supreme Court held that the *Daubert/Robinson* analysis applied to all expert testimony. The Court stated that "[w]e agree with the Fifth, Sixth, Ninth, and Eleventh Circuits that Rule

702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert testimony should be shown to be reliable but not others. All expert testimony should be shown to be reliable before it is admitted." *Gammill*, 972 S.W.2d at 726.

While the Texas Supreme Court took a hard line approach in determining that all expert testimony is subject to the two-prong [relevancy and reliability] gate-keeping analysis proscribed under *Daubert/Robinson*, it recognized that the methods of performing that gate-keeping duty will not be the same for every case. The Court stated, "it is equally clear that the considerations listed in *Daubert* and in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony." *Gammill*, 972 S.W.2d at 726. The Court used an analogy proffered in *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir.1994), to explain the necessity of fluidity in the factors used by the trial courts. The Court stated:

To borrow the *Berry* court's analogy, a beekeeper need not have published his findings that bees take off into the wind in a journal for peer review, or made an elaborate test of his hypotheses. Observations of enough bees in various circumstances to show a pattern would be enough to support his opinion. But there must be some basis for the opinion offered to show its reliability. Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may

have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed.

Gammill, 972 S.W.2d at 726. Clearly, the Texas Supreme Court has held that while the relevancy and reliability gate-keeping analysis established by *Daubert/Robinson* apply to all expert testimony, the trial courts must determine for themselves the proper method for this analysis, which may differ from case to case.

Following the mandate of the Texas Supreme Court, the Austin Court of Appeals recently held that the trial court, in discharging its duty as "gatekeeper," determines how the reliability of particular testimony is to be assessed. *Olin Corp. v. Smith*, 990 S.W.2d 789 (Tex. App.-Austin 1999, writ denied). In *Olin*, plaintiff sued defendant for marketing defective ammunition and for failing to warn users that the ammunition was subject to delayed firing. After attempting to shoot a pig, plaintiff heard a click. Assuming the revolver was empty, he brought it into the vehicle to reload. He placed the revolver on his right thigh with its muzzle pointed toward the floorboard. He reached for more ammunition and the gun discharged, striking him in the leg. Plaintiff sustained serious injuries which resulted in the eventual amputation of his leg below the knee. The trial court allowed plaintiff's experts to testify to cause of the delayed discharge and the jury returned a verdict in favor of the plaintiff. On appeal, defendant argued that the expert testimony offered by plaintiff to show that the delayed discharge was caused by defective ammunition was merely anecdotal and not based on scientific tests. The Court of Appeals held that the trial court must determine how the reliability of particular testimony is to be assessed when discharging its "gate-keeper" responsibilities under *Daubert/Robinson*. Thus, while the *Daubert/Robinson* two-pronged "gate-keeper" analysis is applicable to all expert testimony,

the trial court must determine how the two prongs are to be assessed to particular testimony.

IV. THE OUTER GATE: IS YOUR EXPERT QUALIFIED TO TESTIFY ON THE SUBJECT-AT-ISSUE

In the shadows of *Daubert/Robinson* many practitioners failed to give adequate consideration to important threshold issues--are the proffered experts qualified and are those qualifications in the area of the proffered testimony. Although the *Daubert/Robinson* decisions deal with Rule 702 and the admissibility of expert testimony, the gravamen of those opinions do not discuss the actual qualifications of expert witnesses. Nevertheless, this important outer gate should not be ignored. See *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996).

Rule 702 of the Texas Rules of Evidence reads:

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. (emphasis added)

New Federal Rule of Evidence 702 reads:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the

product of reliable principles and methods, and (3) the witness has applied the principles and method reliably to the facts of the case.

Thus, the first key to the outer gate is a qualified expert. A witness testifying pursuant to Rule 702 must be qualified as an expert "...by knowledge, skill, experience, training, or education..." The witness's qualification as an expert may be by way of education, even in the absence of practical, hands-on experience. *Lavestere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 176-77 (5th Cir. 1990), *cert. denied* 510 U.S. 859, 126 L. Ed. 2d 132, 114 S. Ct. 171 (1993). However, a formal education is not required for qualification of an expert under Rule 702; practical experience may suffice. See *Glasscock v. Income Property Services, Inc.*, 888 S.W.2d 176, 180 (Tex. App.--Houston [1st Dist.] 1994, writ *dism'd* by agrmt); *Petrolia Insurance Co. v. Everitt*, 719 S.W.2d 639, 641 (Tex. App.--El Paso 1986, no writ); *U.S. v. Hernandez - Talacios*, 838 F.2d 1346, 1350 (5th Cir. 1988).

A qualified expert will not, by itself, get one past the outer gate. As the Texas Supreme Court recently reminded us--the qualified expert must be qualified to testify on THE SUBJECT MATTER AT ISSUE. In *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996), the Texas Supreme Court affirmed the exclusion of testimony by an emergency room medical doctor who attempted to opine on the causal relationship between a head injury and a death. In doing so the Court noted:

Dr. Condos's medical expertise is undoubtedly greater than that of the general population, but the Heises do not establish that his expertise on the issue of cause-in-fact met the requirements of Rule 702.... On this record, the Heises simply did not establish that Dr. Condos's opinions on cause-in-fact would have risen above mere speculation to offer

genuine assistance to the jury... Just as a lawyer is not, by general education and experience, qualified to give an expert opinion on every subject of the law, so to a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease. *Id.* at 153.

The *Broders* Court's rationale was that even a highly trained emergency medical doctor is not an "expert" in neurology. Therefore, the medical doctor (although qualified) was not qualified *on the subject matter at issue*, that being neurology.

Insure that your expert witness is qualified by one of the methods recognized in Rule 702 (knowledge, skill, experience, training, or education). Then, determine whether your qualified expert is, indeed, qualified to give opinions in the area of his or her expected testimony. In short, to pass the outer gate, one must affirmatively show (1) a qualified expert (2) who is qualified to testify on the subject-at-issue.

V. THE DAUBERT/ROBINSON STANDARDS

A. The Trial Court's Gatekeeping Function

The *Daubert/Robinson* decisions and their progeny have dramatically changed the landscape of the admissibility of expert testimony in that the trial court (rather than the community in which the expert practices) now has the "gatekeeping" role in determining what types of evidence are and/or will be admissible.

In interpreting the language of Rule 702, the seven justice majority in *Daubert* erected two "gates" through which scientific evidence must pass before it may be presented to a jury. *Daubert*, 113 S. Ct. at 2796. The

Watkins and *Gammill* courts expanded the scope of these gates to include all expert testimony, whether scientific or other. See *Watkins*, 121 F.3d 984 (5th Cir.1997); *Gammill v. Jack Williams Chevrolet*, 927 S.W.2d 713 (Tex.1998). Thus, faced with a proffer of expert testimony, the trial judge must determine, pursuant to Rule 104(a), whether the qualified expert is proposing to offer opinions and conclusions based upon (1) a scientific or technical knowledge that (2) will assist the trier of fact to understand or to determine a fact in issue. *Id.* at 2796. In determining whether the proffered evidence is relevant and reliable, the focus "must be on principles and methodology, not on the conclusions they generate." *Id.* at 2796. Stated differently, the court should not decide whether the expert is right, but rather decide if he used proper scientific methodology to arrive at his conclusion. In addition, as stated in *Gammill* and *Olin*, the trial court is called upon to determine the proper reliability tests for testimony that is not scientific. *Gammill*, 927 S.W.2d at 726.

The requirement that an expert's testimony pertain to "scientific or technical knowledge" establishes a standard of evidentiary reliability. *Id.* at 2795. Likewise, the requirement that an expert's testimony "assist" the trier of fact is the root of Rule 702's relevancy requirement. In short, the trial court must analyze both standards of admissibility, reliability and relevancy, to determine whether the evidence should pass through the gates of admissibility.

B. The Reliability Requirement.

The *Daubert/Robinson* Courts had given trial judges parameters to guide them in determining what evidence should pass the reliability "gate" by providing a list of factors to consider. *Id.* at 2797; *Robinson*, 923 S.W.2d at 557. The factors a trial court may consider include: (1) The extent to which the theory has been or can be tested; (2) whether the theory was subject to peer review or publication; (3) the theory's potential rate of

error; (4) the general acceptance of the theory within the relevant and scientific community; (5) non-judicial uses which have been made of the theory; and, (6) the extent to which the theory relies upon the subjective interpretation of the expert. *Id.* The latter two factors are mentioned only in the *Robinson* opinion. *Id.*

1. Testability

The *Robinson* and *Daubert* Courts held that an important factor in assessing reliability is whether the scientific theory can be and has been tested. *Id.*; *See also American Foreign Ins. Co. v. General Electric*, 45 F.3d 135, 138 (6th Cir. 1995); *Bradley v. Brown*, 42 F.3d 434, 438 (7th Cir. 1994) (Holding that the first and most important factor in the *Daubert* analysis is whether the theory was subjected to the scientific method); *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995); *Wheat v. Pfizer, Inc.*, 31 F.3d 340, 343 (5th Cir. 1994); *Porter v. White Hall Laboratories, Inc.* 9 F.3d 607, 613 (7th Cir. 1993). Stated differently, scientific methodology is based upon generating hypotheses and testing them to see if they can be falsified. *Daubert*, 113 S. Ct. at 2797.

2. Peer Review and Publication

The *Robinson* Court, in its second factor for demonstrating reliability, emphasizes the importance of peer review and publication. *Robinson*, 923 S.W.2d at 557. The *Daubert* Court agrees by holding that peer review and publication of an expert theory is crucial because it markedly increases the likelihood that substantial flaws in methodology will be detected. *Daubert*, 113 S. Ct. at 2797.

3. Potential Rate-of-Error

A third of the *Daubert/Robinson* Court's considerations for determining reliability is the potential rate-of-error of the theory in question. *Daubert*, 113 S. Ct. at 2796-97; *Robinson*, 923 S.W.2d at 557. If the rate of

error exceeds an acceptable level or is unknown, then this factor weighs against admissibility. *Id.*; *See also Bradley*, 42 F.3d at 434; and *Resado*, 5 F.3d at 119.

4. Generally Accepted

The *Daubert* and *Robinson* Courts both consider whether the type of evidence and/or theory as issue has been generally accepted in the relevant scientific community as a factor in determining reliability. *Daubert*, 113 S. Ct. at 2796-97; *Robinson*, 923 S.W.2d at 557. This factor is reminiscent of the old "generally accepted" test described in *Frye v. United States*, 293 F. 1013, 1014 (1923).

5. Non-Judicial Uses Which Have Been Made of the Theory

The fifth guideline suggested by the Texas Supreme Court in determining the reliability of expert testimony is whether or not the experts' opinions or theories have non-judicial uses. *Robinson*, 923 S.W.2d at 557. In that regard, the *Robinson* Court concludes that "opinions formed solely for the purposes of testifying are more likely to be biased towards a particular result." *Id.* Similarly, the Ninth Circuit, in *Daubert II*, gave "significant" consideration to whether or not the experts were proposing to testify about matters growing naturally and directly out of research they had conducted independent of litigation, or whether they had developed their own opinions expressly for purposes of testifying. *Daubert II*, 43 F.3d 113, 117 (9th Cir. 1994). Clearly the courts consider a scientific theory that has its genesis outside the courtroom more reliable than science generated in the context of litigation.

6. Whether a Theory Relies Upon an Expert's Subjective Interpretation

The last non-exclusive factor suggested by the Texas Supreme Court in evaluating the admissibility of expert testimony is

whether the technique relies upon the subjective interpretation of the expert. *Robinson*, 923 S.W.2d at 557. Obviously, if the expert's conclusions are verifiable by objective tangible evidence, then that substantially decreases the likelihood of a biased conclusion.

While the trial court must use these factors to assess the reliability of most expert's testimony, they do not always mesh with the particular type of testimony being proffered. In light of the applicability of *Daubert/Robinson* to all expert testimony, the Texas Supreme Court and the Fifth Circuit have recognized that the reliability "gate" needs to remain fluid. As recently stated by the Austin Court of Appeals, "[t]he trial court in discharging its duty as 'gatekeeper' determines how the reliability of particular testimony is to be assessed." *Olin*, 990 S.W.2d at 789. While the factors offered in *Daubert/Robinson* may be helpful in determining the reliability of an expert's testimony, there may not be a perfect fit between the stated factors and the opinions offered. Thus, as the Texas Supreme Court and the Fifth Circuit have acknowledged, the trial court must use its discretion to determine how the reliability of particular testimony is to be assessed.

C. The Alternative Reliability Test

A pattern is arising in both Federal and State court cases dealing with "non-scientific" testimony. Many decisions dealing with non-scientific testimony either summarily disregard the *Daubert/Robinson* factors or simply failed to mention them all together. Instead, these court decisions often focus upon an "analytical gap" analysis set forth in *General Electric Co. v. Joiner*, 118 S. Ct. 512, 139 L. Ed.2d 508 (1997) and later in *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998). In short, these decisions do not strictly adhere to the *Daubert/Robinson* factors, but consider alternative factors in assessing an expert's testimony's reliability. Overriding this

analysis, is a determination of whether there is an "analytical gap" between the data and materials relied upon by the expert and the ultimate conclusions or opinions reached by the expert. The specific application of this "analytical gap" analysis is explored on a case by case basis in Section VII.

D. The Relevancy Requirement

In addition to determining whether the proffered is reliable, the United States Supreme Court and the Texas Supreme Court require that the trial court determine whether the evidence or testimony will "assist" the trier of fact. The illustrative example provided by the *Daubert* court is as follows:

The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night is dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night." *Daubert*, 113 S. Ct. at 2796.

Another court explained the relevancy requirement by noting that the term "causation" has two elements: (1) whether an event in question can cause the injury (general causation); and (2) whether the event in question caused plaintiff's injury (specific causation). *Casey*, 877 F. Supp. at 1381-82. With the *Daubert/Robinson* decisions, the trial courts had assumed a gatekeeping role. *Kumho Tire* removed any doubt clearly underscoring this gatekeeping role. In this role, the trial court must determine: whether the proffered expert is qualified to testify on the subject-at-issue; whether such testimony is based on reliable methodology; and whether the testimony is relevant.

VI. THE SIGNIFICANT CASES SINCE *DAUBERT/ROBINSON*

***Watkins v. Telsmith*, 121 F.3d 984 (5th Cir. 1997)**

Products liability case where a conveyer belt collapsed and killed the defendant's employee. Employee's widow sued conveyer belt's manufacturer alleging that the belt was defectively designed. The trial court excluded the plaintiff's expert's testimony regarding alternative design pursuant to *Daubert*. The plaintiff's appealed on the grounds that *Daubert* should only apply to scientific testimony and not where the expert is giving opinions based upon experience. The Fifth Circuit disagreed and affirmed the trial court holding that *Daubert* is not limited to "scientific knowledge" or testimony based upon "novel" scientific evidence.

***Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex.1998)**

Product liability action against the manufacturer and dealer of a motor vehicle arising out of a one-vehicle accident that resulted in the passenger's death. Plaintiff alleged that a wiring harness was positioned too close to the accelerator pedal and could block release of the pedal. Plaintiff alleged that this harness caused plaintiff's accelerator pedal to stick, causing plaintiff to lose control of the vehicle. The Texas Supreme Court held that *Daubert/Robinson* applies to not only to all scientific evidence, but to all proffered expert testimony. In so holding, the Texas Supreme Court recognized that the factors enumerated in *Daubert/Robinson* for assessing the reliability of expert testimony may not be applicable to certain types of expert testimony. In such cases, the trial court is to determine how to assess the reliability such testimony.

***Moore v. Ashland Chemical*, 125 F.3d 679 (5th Cir. 1997) (*en banc*)**

Negligence case where plaintiff alleged that defendants exposed him to a mixture of chemical gases causing him to contract reactive airways disease. Plaintiff's expert, a doctor, was proffered to testify that the exposure caused the plaintiff's disease. The trial court excluded the testimony, and the defendant received a take-nothing judgment after the jury declined to find causation. The Fifth Circuit reversed after being asked to determine the reliability of the expert's opinion as to the cause of the plaintiff's disease. The court held that the *Daubert* factors were meant to apply to hard science disciplines only. Because clinical medicine is not a hard science, the *Daubert* factors do not apply. The court reasoned that clinical medicine's goals, subject matter, conditions of study, and well developed methodology are sui generis and quite different that of hard science and its methodology. Because of this, the trial judge should determine whether the opinions are solidly based in the knowledge, principles, and methodology of clinical medicine. *Daubert* factors are inappropriate in determining reliability in such a context. However, this decision does not mean the Court is not to apply a *Daubert* analysis; rather, it just loosens the requirement to use the factors enumerated in *Daubert*.

***Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402**

Plaintiff had *Jones Act* claim for injuries he sustained on defendant's ship. Defendant appealed on the basis that the trial court should have applied a *Daubert/Robinson* review to determine whether any well founded scientific methodology supported the actual damages award. Defendant contended that if such a standard were applied to the plaintiff's experts' testimony, the testimony would have been legally insufficient to show the long term conditions, of which the plaintiff complained. The Texas Supreme Court held that the defendant's appeal was without merit because they did not make a timely objection to the scientific evidence. To preserve a

complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered.

***Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)**

Products liability case where parents of a child who suffered limb reduction birth defect sued manufacturer of Bendectin drug taken by the mother during her pregnancy. The defendant challenged the scientific reliability of the plaintiff's expert's testimony and asserted that his opinion did not rise to the level of evidence. The Texas Supreme Court held that an expert's bare opinion is no evidence. In order to be legally sufficient evidence, the opinion must be reliable within the meaning of Rule 702 and *Robinson*. This determination is made by independently evaluating the data for reliability. If the data that the expert relied upon in reaching an opinion is flawed, then the expert's testimony is no evidence because it is itself unreliable. Moreover, an expert's testimony may be found unreliable even if the underlying data is reliable when the methodology that the expert used to draw conclusions from the data is flawed.

***General Electric Co. v. Joiner*, 118 S. Ct. 512, 139 L. Ed.2d 508 (1997)**

Electrician was diagnosed with lung cancer and brought action against manufacturer of PCB's alleging strict liability, negligence, fraud, and battery. The case was removed to federal court, and the district court excluded plaintiff's experts. The Ninth Circuit reversed applying what the U.S. Supreme Court stated was a "particularly stringent standard of review" to the district court's ruling. The U.S. Supreme Court held the exclusion of expert testimony should be reviewed on an "abuse of discretion" basis.

***United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997)**

Parents of child who died after contracting HIV through a blood transfusion sued the blood bank. The trial court granted the defense's motion for summary judgment, and the Court of Appeals reversed. The Supreme Court ruled that the trial court did not abuse its discretion in rejecting the plaintiffs' expert on the grounds that he lacked qualifications to testify. The court held that the facts of the case conclusively established that the expert did not have the requisite knowledge, skill, experience, training, or education to testify as to the relevant standard of care in the case. The burden of establishing the expert's qualifications is on the offering party, and they must establish that the expert has qualifications regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.

***Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996)**

Medical malpractice action alleging emergency room doctors were negligent in failing to treat patient's head injury which ultimately caused her death. The Texas Supreme Court held that plaintiffs' expert, an emergency room medical doctor, was not qualified to testify on the connection between a head injury and plaintiff's death.

***Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999)**

Black was a slip and fall case. The treating doctor was unable to identify any physical basis for the plaintiff's continued complaints of pain. All objective tests for pain including MRI, EMG, and diskogram produced normal results. The plaintiff was referred to a board certified physical medicine and rehabilitation doctor who specialized in treating patients with persistent pain. Following several weeks of treatment, the

specialist diagnosed plaintiff with fibromyalgia.¹

The defendant challenged the doctor's testimony and the causal connection between the fall and the medical condition.

The Fifth Circuit reviewing the trial court's factual findings for clear error and its conclusions of law *de novo* cited the traditional rule that under Texas law, plaintiffs were required to prove to a reasonable degree of medical certainty, based on reasonable medical probability and scientifically reliable evidence, that the fall caused the fibromyalgia.

The trial judge had admitted the doctor's expert testimony notwithstanding Food Lion's Rule 702/*Daubert* challenges.

Significantly, the Fifth Circuit noted that the trial court *did not* tie the expert's testimony to the standards for scientific reliability set forth in *Daubert*. However, the trial court *did* base his decision on several factors including:

1. The doctor's testimony;
2. Testimony of other medical experts presented by deposition;
3. Observations that notwithstanding the elusiveness which forecloses an absolute determination of causality, the doctor followed an accepted protocol in rendering opinions in

¹Fibromyalgia is characterized by complaints of generalized pain, poor sleep, inability to concentrate and chronic fatigue. The condition is most common in women between the ages of 30 and 50 and is often associated with hormonal problems. The doctor hypothesized that the fall caused physical trauma which in turn caused hormonal changes causing the fibromyalgia.

terms of reasonable medical probability.

4. The doctor followed the well-established protocol in reaching her opinion by ruling out other possible causes for the fibromyalgia including:

Fully apprising herself of the plaintiff's prior medical history before the accident;

Determining that no postaccident incident was an intervening cause for the onset of fibromyalgia;

No other factors, based upon review of tests performed prior to accepting plaintiff as a patient, as well as her own testing, contributed to the fibromyalgia.

The Fifth Circuit affirmed the abuse of discretion test in reviewing the trial court's ultimate determination of scientific reliability. The court specifically noted that *Kumho Tire* had explained that abuse of discretion review *also* governs a trial court's decision about how to determine scientific reliability.

Noting that *Kumho Tire* had affirmed *Daubert's* principles concerning the reliability-assurance function of Rule 702 applying to technical or specialized testimony *as well as* to scientific expert testimony, the court concluded that the *Kumho Tire* opinion fully supports the Fifth Circuit's *en banc* decision in *Moore* that *Daubert analysis governs expert medical testimony*.

The Fifth Circuit then noted that *Kumho Tire refines in a common sense way, but does not undermine*, the use of the specific *Daubert* factors as a reference point for gauging the reliability of potential expert testimony.

While *Kumho Tire* clearly holds that the trial court “may” consider factors in addition to the *Daubert* requirements, the Fifth Circuit held that:

Kumho Tire’s emphasis on the word “may” should not be misunderstood to grant open season on the admission of expert testimony by permitting courts discretionarily to disavow the *Daubert* factors. On the contrary, the Supreme Court simply recognized obvious facts that there are many kinds of experts and expertise, that the *Daubert* inquiry is always fact specific, and that *Daubert* factors may not all apply even to admissibility of pure scientific testimony. *Kumho Tire* also stressed that the *Daubert* factors may be relevant to the reliability of experience-based testimony. The overarching goal of *Daubert*’s gatekeeping requirement, however, is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Kumho Tire, 119 S. Ct. at 1167.

Bearing in mind that the doctor expert in this case had employed in the courtroom the “same level of intellectual rigor that characterizes the practice of the doctor in the relevant field, in that she had treated the fibromyalgia condition outside the courtroom based upon the earlier diagnosis ultimately repeated in the courtroom,” the Fifth Circuit then proceeded to exclude the expert’s testimony!

The Fifth Circuit made it very clear that *Kumho Tire* does not require district courts to

reinvent the wheel every time expert testimony is offered in court. The court further stated that the *Daubert* factors “may be used as a starting point” for analysis in the usual case citing *Moore*, 151 F.3d at 275 (noting *Daubert*’s “five factor, nonexclusive, flexible test” for determining the reliability of expert testimony. The court then noted not every guidepost outlined in *Daubert* will necessarily apply to expert testimony ... but the district court’s preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid ... is no less important. *Black*, 171 F.3d 308 citing, *Daubert* 509 US at 592-593.

The Fifth Circuit continued that:

In the vast majority of cases, the district court first should decide whether the factors mentioned in *Daubert* are appropriate. Once it considers the *Daubert* factors, the court can then consider whether other factors not mentioned in *Daubert*, are relevant to the case at hand.

Noting that the trial court did not have the benefit of *Kumho Tire* or the Fifth Circuit *en banc* decision in *Moore* when he admitted the expert’s testimony, and the fact that the trial court’s opinion did not even cite *Daubert*, the court proceeded to exclude the expert’s testimony, holding that the trial court misapplied the *Daubert* test and failed to articulate any satisfying alternative standards abusing its discretion and admitting the testimony.

Citing medical literature indicating an insufficient causal relationship between trauma and fibromyalgia, and the doctor’s testimony that fibromyalgia had no known etiology, the court concluded that if medical science does not know the cause, then the expert’s theory of causation is isolated and unsubstantiated.

In language reminiscent of the old *Frye* “generally accepted” test, the court then held that the expert’s opinion, having failed to gain acceptance within the medical profession, and since experts in the field conclude that the ultimate cause of fibromyalgia cannot be known, only an educated guess can be made based upon the patient’s history.

The court concluded that while no one doubts the utility of medical histories in general and the process by which doctors rule out some known causes of disease in order to finalize the diagnosis, such general rules must under *Daubert*, *Kumho Tire*, and *Moore*, be applied, specifically to the facts in each case.

The court concluded that the trial judge should have first applied the *Daubert* criteria to this case. Alternatively, if the trial court decided to depart from *Daubert*, he should have articulated reasons for adopting the test that he used and in particular, should have shown why an alternate test was necessary to introduce “in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *citing Kumho Tire*.

VII. HELPFUL CASES IN DEFENDING EXPERTS FROM DAUBERT/ROBINSON CHALLENGES FROM 1999 TO 2001

This section of the paper provides brief abstracts of recent *Daubert/Robinson* cases that should be helpful in defending a challenged expert. Cases were reviewed from January 1999 to the present. Not all significant *Daubert/Robinson* cases are included in this section. Rather, the author selected a sample of cases with good language and facts that may be useful in response briefs defending experts.

A. FEDERAL CASES

***St. Martin v. Mobil Exploration and Production USA, Inc.*, 224 F.3d 402 (5th Cir. 2000)(*en banc*)**

In this case the St. Martin’s owned property which contained an ecologically sensitive fresh water marsh. This marsh abutted canals on which barges operated by Mobil and other Defendants run. The Plaintiff’s alleged that the oil companies use of and failure to maintain the canals caused erosion and other damage to the St. Martin’s fresh water marsh.

In support of their allegations, the Plaintiffs offered Dr. Robert Chabreck who is a specialist in the ecology of the region, but not an expert in hydrology. Admittedly, Dr. Chabreck failed most of the *Daubert* standards in that has not published or peer reviewed his theory in the case, his theory is not supported by specific scientific studies and he has not conducted any test to verify his hypothesis. Nevertheless, the Court found that Dr. Chabreck’s expertise in the marsh land ecology and his personal observation of the property, sufficiently qualified him to testify as an expert. *Id.* at 405. As to whether the substance of his testimony was sufficiently reliable and relevant, the *en banc* Fifth Circuit held: “the *Daubert* factors are non-exclusive and need not be rigidly applied in every case”. *Id.* at 406. The Court acknowledges that his theory arose “...from his general understanding of the dynamics within marshes...combined with his personal observation of the marsh in question.” *Id.* at 407. The Court goes on to note that a marsh land expert would not have published a peer review paper on each possible permeation of factors or each damaged area of a marsh. They again note that Dr. Chabreck’s testimony is based on his personal observation of the marsh in question and his general and undisputed expertise on marsh ecology and deterioration. *Id.* at 408. In not applying the *Daubert* factors, the *en banc* Fifth Circuit significantly held the District Court properly considered alternative indices

of Chabreck's testimony's reliability and relevancy.

This *en banc* decision by the Fifth Circuit is significant in that they are blessing an "eyeball" conclusion by qualified expert. It is the author's opinion that tests could have been conducted to simulate waves made by the barges and the effects of those waves on a marsh. Apparently, these tests were not required. Likewise, the Fifth Circuit does not require any strict adherence to the *Daubert* factors but specifically notes that the Court properly considered alternative ways of assessing expert testimony's reliability and relevancy.

***Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606 (5th Cir. 1999).**

Skidmore was suing her former employer for sexual harassment and attempted to introduce a psychiatrist's testimony that headaches, vomiting and nightmares resulted from the post-traumatic stress disorder. The defense contended that the psychiatrist's testimony did not satisfy the factors listed in *Daubert*. In response the Fifth Circuit noted that whether the *Daubert* factors apply depends on the nature of the issue at hand, the witnesses' particular expertise and the subject matter of the testimony. The Fifth Circuit states "it is a fact specific inquiry."

The psychiatrist testified to his expertise, the criteria by which he diagnosed Plaintiff, and the standard methods of diagnosis in his field. With this foundation, the Fifth Circuit held "absent any indication that (expert's) testimony amounted to the sort of "junk silence" *Daubert* blocks, we see no abuse of discretion in the District Court's admitting the testimony.

This is again another case in which the expert provides the court with the appropriate factors to be used in determining whether the testimony is reliable and is another example

where the application of the *Daubert* factors was not strictly adhered to.

***Rushing v. Kansas City Southern R.R. Co.*, 185 F.3d 496 (5th Cir. 1999).**

This is a nuisance case in which Plaintiffs are suing a railroad for excessive noise emissions from an adjoining switching yard. In this case, a Federal standard set forth methodology for conducting sound-level tests as well as maximum decibel levels. The Fifth Circuit held that the reliability of test prescribed by the legislature or a regulatory agency may not be challenged under *Daubert*.

Reading between the lines, if there is a Federal Statute or Regulation that sets forth a methodology which gets you to your result, Plaintiffs should use that methodology and should use the *Rushing* decision as a very persuasive argument against a *Daubert* challenge.

***Bartley v. Euclid, Inc.*, 180 F.3d 175 (5th Cir. 1999).**

The Plaintiffs in this case were employees of the Texas Utility Mining Corporation. The Plaintiffs sustained back injuries in the operation of coal hauling equipment manufactured by Euclid. The evidence clearly established that the coal hauling equipment caused an extremely rough ride. The Defendant argued that there was insufficient evidence to prove that the rough ride caused the Plaintiffs' back problems. In support of Plaintiffs' claims, the Plaintiffs offered the testimony of a radiologist Dr. Aprill. Dr. Aprill testified that the MRI films of the Plaintiffs and eighty-five other drivers of coal hauling equipment showed multiple repetitive compression fractures. The radiologist then compared the MRIs of other back patients noting no other back patients that had those same types of multiple fractures. While the radiologist concluded that the multiple repetitive compression fractures were a "finger print" of the coal

hauling occupation, he did not testify that the coal haulers caused the worker's injuries. The Fifth Circuit concluded that the radiologist's testimony was merely a comparison of otherwise admissible exhibits. Therefore, the District Judge did not abuse his discretion in admitting the testimony.

A lesson from the *Bartley* case is that should your expert be subject to a potentially successful *Daubert* challenge, creatively limit the testimony rather than give up the battle.

***Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999).**

This case involves the question of whether workers were exposed to benzene in sufficient levels to cause Plaintiffs' symptoms. In this case, the District Court granted judgment as a matter of law in favor of the Defendants' after excluding expert testimony on the above causation issue. The Fifth Circuit determined that the expert testimony was improperly excluded and had the evidence been included in the record, there was sufficient evidence to raise a jury issue. The Fifth Circuit remanded to the District Court for a trial.

The causation evidence improperly excluded was the expert testimony of Dr. Frank Stevens a Ph. D. in environmental science with experience in industrial hygiene, occupational safety and toxicology. The District Court excluded Dr. Stevens' ultimate conclusion that Plaintiffs' symptoms were caused by their exposure to benzene because he failed to demonstrate with sufficient certainty the amount of benzene to which Plaintiffs were exposed. The Fifth Circuit reversed and remanded on this point in noting Dr. Stevens had a sufficiently reliable basis to determine that refinery workers were exposed to levels of benzene that were several hundred times above the permissible exposure level. The Fifth Circuit recognized that the symptoms experience by all of the Plaintiffs were indications of exposure to benzene at levels two to three

hundred times the permissible exposure. Second, the draeger tube testing calculated exposure of at least one hundred times the permissible level. Thirdly, Dr. Stevens relied upon the testimony of Plaintiffs who testified that they were often physically soaked in a product that was made up mostly of benzene. Finally, Dr. Stevens relied on the design of the refinery which was not designed to process highly toxic chemicals such as benzene. The Fifth Circuit held that this evidence "amply supports Dr. Stevens findings that the refinery workers were exposed to benzene levels several hundred times the permissible exposure level..."

Accordingly, the Fifth Circuit, while not applying the *Daubert* factors, still reversed a District Court decision to exclude expert testimony.

B. State Cases

***General Motors Corp. v. Sanchez*, 997 S.W.2d 584 (Tex. 1999)**

This is a park-to-reverse case. The plaintiff's expert Simon Tamny testified that the transmission at issue was defective and suggested several design modifications to the "roaster comb" and "cam follower". Collectively, these design changes constitute Tamny's proposed safer alternative design. For the first time on appeal, GM attacked the safer alternative design claiming that it was inadequate under *Robinson* to prove a substantial reduction in the risk of injury. More specifically, GM contends (1) the design was not proved safer by testing; (2) the design was not published and peer reviewed; and (3) GM statistical evidence shows that the proposed design changes that exist, in part, in other vehicles does not result in a lower occurrence of a park-to-reverse situation.

The Texas Supreme Court first held that:

To allow a *Robinson* challenge here, when GM did not object at all in the

trial court to the reliability of the expert evidence, would deny the plaintiffs' expert the opportunity to pass muster in the first instance and usurp the trial court's discretion as a 'gatekeeper.'

So, it is clear that you must object at the trial court to preserve the record on appeal.

Separate from the *Robinson* challenge, GM asserts that Tamny's testimony does not amount to evidence of safer alternative design. While technically not addressing the *Robinson* requirements, the court does approve of the evidence of safer alternative design and the methodology used to arrive at the same. The Court noted that Tamny described the operation of the transmission, explained in detail how his proposed SAD would make the transmission safer by eliminating the risk of an inadvertent slip into reverse. Significantly, the Court states:

...plaintiffs did not have to build and test an automobile transmission to prove a safer alternative design. A design need only prove 'capable of being designed.'

While *Robinson* was not addressed by this second holding, it would be hard for the Court to bless the methodology and conclusions with respect to SADs and not also bless the methodology and conclusions in the context of a *Robinson* challenge.

***Morton International v. Gillespie*, 2001 WL 27911 (Tex. App.–Texarkana 2001, n.w.h.)**

This is an airbag case in which plaintiff alleges that the airbag did not deploy within the appropriate amount of time. Plaintiff retained Dr. David Renfro to testify about the manufacturing defect in the plaintiff's airbag. Dr. Renfro has outstanding qualifications, but not on airbags. Indeed, Renfro admitted that "his training, education, and experience relating to airbags and their components was

significantly lacking." During Voir Dire, Renfro admitted: he had never written about airbag modular inflators, never taught courses relating to airbags, never worked on airbags or their components, never studied airbag characteristics, and had only observed one airbag deploy.

Using other testimony in the case, plaintiff was able to limit Renfro's testimony and still prove the case. Plaintiff testified that she was sitting upright. Defendant's experts both testified that the airbag should deploy in 50 milliseconds to comply with Federal Law and that the only way plaintiff could have received the injuries is if she was within a few inches of the airbag at deployment. Taking this testimony, Renfro used a computer model (MADYMO) that is widely accepted and is used to illustrate occupant movement during a wreck. Using this computer model, Renfro showed that it would have taken 120 milliseconds for plaintiff to get within inches of the airbag as described by the defense experts. If the airbag had fired within 50 milliseconds as required, then plaintiff would not have sustained the injury. Stated the opposite, the only way the injury could have occurred is with a delayed airbag deployment.

This is another example of limiting the expert testimony and coupling it with other evidence in order to prove the case. Additionally, computer modeling is continuing to be used to provide a scientifically valid basis for expert opinions.

***JcPenney Life Ins. Co. v. Baker*, 33 S.W.3d 417 (Tex. App.–Fort Worth 2000, no writ)**

The plaintiff lost her husband in an automobile accident. Her husband has life insurance that paid "if injured by an accident while occupying a private passenger automobile." However, if the death was the result of independent causes then there is no obligation to pay. Thus, the question is did the deceased die in the accident independent of other causes. JcPenney contended that the deceased had a heart attack and drove

into a lake. Plaintiff, on the other hand contended that the deceased drown in the lake as a result of the accident, and may have had a heart attack, but only after his vehicle was in the lake.

In support of plaintiff's theory, she offered the testimony of an internal medicine physician, Dr. Kuban. Dr. Kuban relied on other evidence to determine that the heart attack must have occurred after the vehicle went in the lake. Specifically, there was evidence that the window of the deceased's truck was up before the accident, but after the incident the window was rolled down. Dr. Kuban opined that a person who had a heart attack could not physically roll down a window. Thus, the heart attack could not have occurred before the accident as plaintiff physically could not have rolled down the window. Rather the window must have been rolled down in a attempt to escape the water. Afterwards, the heart attack occurs, if at all. In short, the accident (and attempted escape) caused the heart attack; and not, the heart attack caused the accident.

The defendant attempted to exclude Kuban's testimony on *Robinson* grounds. In response the Fort Worth Courts starts:

"Recently, the Texas Supreme Court addressed the issue of scientific and non-scientific evidence under *Robinson* and determined that while all expert testimony must be reliable before it may be admitted, the factors affecting reliability as outlined in *Robinson* are not applicable to all expert testimony."

The Court acknowledged that Kuban's testimony is based largely upon his experience and observations in the medical field. Thus, the Court holds his opinion are clearly not the type of testimony that can be easily evaluated under the *Robinson* factors. Rather, the Court relies upon a determination of whether there is an "analytical gap" between the expert's opinions and the basis

for those opinions. Because Kuban's testimony was closely related to his experiences in the medical community, the Fort Worth Court determined that it was not an abuse of discretion to allow Kuban to testify.

***Astran v. Cantu*, 2000 WL 1675713 (Tex. App.–Austin 2000, no writ)(not designated for publication)**

This case involves a *Robinson* challenge against the defendant's accident reconstruction expert, Dr. Joe Thornhill. At issue was a parking lot collision. Plaintiff alleged that the Defendant was speeding. Thornhill was hired to offer opinions regarding the combined speed of the vehicles at impact. Plaintiff complained that all Thornhill did was "eyeball" the damages and reach a conclusion.

In the *Robinson* hearing, Thornhill testified that his testimony was based on his education and professional training and on his experience in analyzing property damage resulting from vehicle crash tests. Thornhill also stated that he had examined the automobiles involved in the accident as well as the accident scene and had also review deposition transcripts. Based upon this information, Thornhill opined that the cars had a combined speed of 10 mph. He also stated that the physical evidence was inconsistent with Plaintiff's account that the vehicles were traveling at a higher rate of speed.

The Court did not note whether Thornhill had performed a reconstruction, compared crush tests, run EDCRASH or other similar programs or even measured the crush zone of the vehicles. Had these items been completed, it would seem that they would have been included in the testimony and court opinion. Based upon a reading between the lines, it truly looks like a case of "eyeballing" it.

In making its ruling the Austin Court begins: "This State has a long history of allowing qualified accident reconstruction experts to testify..." The Court held that Thornhill had done enough, per above, to avoid an "analytical gap" between his conclusions and the evidence. Accordingly, the Austin Court held that the trial court did not abuse its discretion in admitting Thornhill's testimony.

Le v. Zuniga, 2000 WL 1535313 (Tex. App.–Houston [14th Dist.] 2000, writ req'd)(not designated for publication)

This cases involves a *Robinson* challenge lodged against the defendant's accident reconstruction expert, Ed Martinez.

In beginning its analysis, the Court turns again to the familiar "analytical gap" language.

In other words, an opinion is not so merely because an expert says it is so. Rather, 'a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' An impermissible analytical gap thus exists where an expert fails to demonstrate how his observations support his conclusions, i.e., to provide some explanation to show that 'what he believes could happen, actually did happen.'

Plaintiffs did not dispute Martinez's qualifications or methodology. Rather, they said he calculated a point of impact that was not supported in the physical evidence because there were no tire marks, broken glass or other physical evidence.

The Court reviewed Martinez's work. He did a full accident reconstruction including taking measurements of the scene and making calculations to determine the timing of the collision at issue. The Court found that this made his testimony sufficiently reliable

and held that the trial court did not abuse its discretion in allowing Martinez to testify. Again, the Court did not apply the tradition *Robinson* factors.

Nissan Motor Co. Ltd. v. Armstrong, 32 S.W.3d 701 (Tex. App.–Houston [14th Dist] 2000, writ req'd)

This is an "unintended acceleration" or "stuck throttle" case involving the testimony of the plaintiff's expert, Neal Mizen.

Mizen testified that the throttle control problem was caused by a boot on the throttle cable that came loose, bound the bell crank and prevented the accelerator pedal from closing. Mizen testified that Nissan subsequently redesigned the throttle cable, shortening the boot and eliminated the lining. He testified that this had solved the problem.

Nissan challenged Mizen's testimony on both his qualifications and on *Robinson* grounds. Nissan argued Mizen was not an automotive engineer, had never designed any car part, and had no background in injury causation. Nissan also complained that Mizen did not satisfy *Robinson* because he had not performed any tests of the throttle cable components. Nissan further argued that Mizen's training and education did not equip him to talk about a sticking throttle cable.

The Court rejected Nissan's arguments holding that almost any qualified mechanical engineer could testify about how the cable worked and how a loose dust boot might stick on the throttle cable and prevent the accelerator mechanism from closing. The Court stated that it did not take an explanation from a "rocket scientist" for the jury to understand. Without great analysis, the Court also approved of Mizen's methodology which included reviewing Nissan documents, depositions, photographs, videotapes, along with reports and tests made in other incidents and documents submitted by Nissan to NHTSA. Again, the

Court did not apply the traditional *Robinson* factors.

***Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252 (Tex. App.–San Antonio 1999, writ denied)**

This case involved a defective fuel pump relay and the testimony of Rex McLellan and Bob Swint. The plaintiffs’ experts determined that the fuel pump relay was outside of its protective covering referred to as a “doghouse.” The expert inspected the vehicle and reviewed testimony which was consistent with a fuel pump relay failure resulting in an engine stall. Swint eliminated other possible causes of engine failure due to stalling and tested the fuel pump relay, which failed.

Based upon this evidence, the Court held that the testimony “did not fit all of the enumerated factors of *Robinson*, and therefore applied the more general reliability test espoused in *Gammill*.” The Court used the analytical gap test. The court held that there was no “analytical gap” between the underlying data and the experts’ opinions that the fuel pump relay failed. Accordingly, the Court upheld the testimony of McLellan and Swint

VIII. PROCEDURAL APPLICATION OF DAUBERT/ROBINSON/KUMHO TIRE

Armed with an understanding of *Daubert/Robinson* and now *Kumho Tire*, a litigant should be in a position to defend its experts against a *Daubert/Robinson/Kumho* challenge. Likewise, a litigant should be equipped to challenge defense experts. This section of the paper deals with the procedure for challenging and defending experts under *Daubert/Robinson/Kumho*.

A. Challenging Experts

Many plaintiff’s counsel view *Daubert* as a tool exclusively with the province of the defense. However, in an appropriate case, a plaintiff can effectively use a

Daubert/Robinson challenge to strike a defense expert. Consider the following:

- *Whether to challenge*

Whether to challenge an expert sounds like a fairly elementary question. But there are numerous factors to consider in making this decision. Foremost, one should seriously consider the downside of lodging a *Daubert/Robinson* attack. Making the challenge will most certainly educate the opposing counsel and the opposing experts. First, you will educate your opposition on your style of cross-examination. Every lawyer has a unique method and manner of cross-examination. Unveiling that manner and method for the first time in front of the jury gives the lawyer a distinct advantage. That advantage is lost if the opposing expert has become accustomed to and comfortable with your cross-examination style during a *Daubert/Robinson* hearing. In addition to educating the opposition on your style of cross-examination, a *Daubert/Robinson* hearing educates the opposition on their substantive weaknesses. Cross-examination during a *Daubert/Robinson* hearing will necessarily overlap with substantive cross-examination planned for the jury. Conducting a pretrial *Daubert/Robinson* hearing will give the opposition a chance to plan better substantive responses to your jury cross-examination.

In deciding whether to challenge an expert it is important to not only to evaluate the potential downside of educating your opponent, but also to consider the upside of a successful challenge. Too often, the upside of a successful pretrial *Daubert/Robinson* challenge is limited. If you are successful in a pretrial challenge of a critical expert, many judges will be inclined to grant a continuance. If this happens, then you have gone to a great expense to conduct the challenge; you now have educated your opponent on their own weaknesses; the judge has allowed them an opportunity to

repair those weaknesses; and, you have lost your trial setting.

In light of the above, perhaps the most important consideration in determining whether to strike an expert (next to the merits of your motion) is your judge. It is absolutely essential that you know how your judge views *Daubert/Robinson* challenges. Is he/she inclined to grant *Daubert/Robinson* motions? Has he/she granted motions in the past? Will he/she grant a plaintiff's *Daubert/Robinson* challenge of a defense expert when doing so will not dispose of the case as it often does with a defendant's challenge of a plaintiff's expert. At a minimum, contact counsel who have been successful in making pretrial *Daubert/Robinson* challenges in your court. The more you can learn about your judge before you make a pretrial challenge, the better.

Plaintiffs should anticipate a challenge in every case. To challenge or not to challenge is a strategic call that must be considered very carefully in every case.

- When to challenge

If after weighing the above factors, you are still inclined toward a *Daubert/Robinson* challenge of the defendant's experts, then equal consideration should be given to when that challenge should be made. There are several times during the development and trial of a case when a *Daubert/Robinson* challenge is appropriate: a pretrial motion to exclude; a motion for summary judgment; a motion-in-limine; and an objection at the time the opposing expert is called to testify.

Making a pretrial *Daubert/Robinson* challenge has advantages and disadvantages. Most judges prefer *Daubert/Robinson* challenges to be made as early as possible. Their motivation stems from the disposal of cases that often accompany the granting of a motion, and fewer interruptions during the trial as is necessitated by the evidentiary hearing

required in response to a *Daubert/Robinson* challenge. Based upon judicial preference and your particular judge, she may be more inclined to grant a *Daubert/Robinson* challenge in a pretrial motion. Scheduling Orders are frequently controlling on this issue.

Absent Scheduling Orders, nothing prohibits making a *Daubert/Robinson* challenge for the first time when the expert witness is called to testify at the trial. A disadvantage to bringing the objection for the first time at trial is, again, a judicial reluctance to grant such a motion during the trial. Further, an objection during trial will slow the presentation of evidence, which generally is a disadvantage to the plaintiff. While there are disadvantages to *Daubert/Robinson* challenges made for the first time at trial, in most instances, it is the most beneficial time for plaintiffs to urge such challenges.

- How to challenge

When faced with a proffer of expert testimony, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the proffered opinion is reliable and relevant. *Daubert*, 113 S. Ct. at 2794-96.

- Always Make an Objection

____ The party opposing the admission of expert testimony need only assert a proper objection. *Robinson*, 923 S.W.2d at 557. Indeed in *Robinson*, defendant's entire challenge was based upon argument of defense counsel. *Id.* While an objection alone is sufficient, do not rely on the other pretrial motions to properly preserve error. If you seek to exclude an expert by way of a motion to exclude, a motion for summary judgment or a motion in limine, and are not successful, always reurge your objection at the proffer of the expert's testimony. Once a proper objection is lodged the proponent of the evidence has the burden to prove that the proffered expert testimony is both reliable and

relevant. *Id.* This showing is made pursuant to Rule 104(a)

- Rule 104(a)

The mechanism for conducting the *Daubert/Robinson* hearing is provided in Rule 104(a). Rule 104(a) provides as follows:

Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). **In making its determination it is not bound by the rules of evidence except those with respect to privileges.** Rule 104(a).

Both *Daubert* and *Robinson* expressly hold that the trial court is to conduct its gatekeeping function pursuant to Rule 104(a). *Daubert* 113 S. Ct. at 2794-96. A Rule 104(a) hearing is a hearing that takes place outside the presence of the jury. It is important to note that in a 104(a) hearing, the trial court is not bound by the rules of evidence. Thus, articles, texts, prior testimony and other non-admissible evidence may be used to attack the opposing expert.

- Burden of Proof

The burden for proving reliability and relevance is placed on the proponent of evidence and is by a “preponderance of evidence.” *Daubert*, 113 S. Ct. at 2796 n.10.

- Standard of Review

____The trial court’s decision to admit or to exclude expert testimony will be reviewed by the appellate court on an abuse-of-discretion basis. *Robinson*, 923 S.W.2d at 558.

- Practice Pointers

As with most of trial practice, success depends on early preparation and planning. This is particularly true with *Daubert/Robinson* challenges. If you believe that you will or may move to strike the opposing experts, preparation to do so must start at the outset of the case. First, conduct research to determine the reliability factors that will be applied to the expert in question. As previously discussed, in the Fifth Circuit, this will be the methods and principles found in the field of knowledge involved. If there are no cases speaking to the methods, send written discovery addressing these issues. An interrogatory seeking the protocol used would be appropriate. Also, requests for admission confirming that certain factors apply can be invaluable. (e.g. Admit that testing is required to properly validate your expert’s findings.) Regardless of how they are discovered (case law or discovery), you will need to define the battleground by knowing which reliability factors will apply to the expert you are seeking to strike.

Once you have a grasp on the reliability factors that will apply, conduct discovery relating to those factors. Written discovery seeking details regarding the basis of the expert’s opinions is essential. With a knowledge of the applicable factors, you can also propound more pointed discovery directed at the work performed by the expert to satisfy the necessary factors (e.g. “Explain all testing performed to verify...” or “admit that your expert has conducted no testing to verify...”) Written discovery is important in laying the foundation for the expert challenge, but it is just the beginning.

After you have researched the law to find the applicable reliability factors and after you have obtained written discovery, thoroughly preparing for the expert’s deposition is a must. Most important in preparing for the deposition is an understanding of the science underlying the expert’s opinion and the methodology followed by the expert. The best method for quickly learning the science is a tutoring session with your own expert.

Also, your expert may be able to recommend a text in the field that is easily understood by laymen. Do everything you can to arrive at the deposition with a solid understanding of the science. At the deposition, have the opposing expert concede the methods and principles used in his field, and that the use of those methods and procedures are to insure reliable results. After you have obtained these admissions, consider covering the expert's efforts (or lack thereof) to satisfy the applicable reliability factors.

After conducting the appropriate discovery, consider whether and when to challenge under Rule 702 and *Daubert/Robinson*. As discussed above, unless you have a strong challenge on the merits and a favorable judge, consider just making an objection at the time of the proffered testimony. Once the objection is lodged, the court must conduct the 104(a) hearing described above. Any serious attempt to exclude an opposing expert should be accompanied by a brief which outlines the applicable factors and their application. Also, you should plan to cross examine the opposing expert on his efforts in satisfying the various reliability factors. Finally, you may affirmatively proffer evidence such as your own expert's testimony.

B. Defending Challenged Experts

Since a *Daubert/Robinson* challenge may be raised by either party, or *sua sponte*, by the court, litigants should always be prepared to respond to the challenge.

1. Thoroughly Investigate Your Own Expert's Qualifications

Most of us are extremely thorough in our investigation of opposing experts. Unfortunately, many of us are guilty of not being as diligent in the investigation of our own experts. The *Broders* decision and the trend among appellate courts in general should be enough to dissuade any lawyer

from this bad habit. Before retaining and designating an expert:

- *Thoroughly Review the Expert's Curriculum Vitae*

Your expert's curriculum vitae should provide a road map of his/her career, area of expertise and published works. Begin the investigation of your expert with a review of the curriculum vitae. Look to see if your expert has real-life experience in the area-at-issue. Has he/she worked for a manufacturer actually designing the subject product, or does he/she have consulting only experience. Determine the area(s) of expertise professed by your expert. Are there unaccounted for time periods contained in your expert's curriculum vitae? If so, account for those or be assured your opposing counsel will. Finally, look at your expert's curriculum vitae with the eye of a cross-examiner.

- *Confirm the Facts Contained in Your Expert's Curriculum Vitae*

Contact educational institutions, prior employers, licensing agencies and professional organizations to confirm claims made by your expert on his/her curriculum vitae. This task can be done with little time and effort. Remember, anything easily discovered by you will certainly be discovered by your opposing counsel. Be certain that your expert witness does not have mail-order degrees or fake credentials.

- *Read Your Expert's Written Works on the Subject-at-Issue*

Has your witness published on the area-at-issue. If not, is there a plausible reason--no one in the industry publishes? Naturally, publication on the topic-at-hand bolsters your expert. If your expert is published on a related issue, read it.

- *Contact Other Lawyers Who Have Experience With Your Expert*

Your expert should have information regarding prior cases in which he has offered opinions or has testified. Obtain this list and contact the lawyers who have dealt with your expert. Do not solely rely on your expert for references. Obviously, he or she will provide only those with whom they have had a favorable experience. Rather, contact the lawyer who opposed your expert or who lost a case with your expert. Often, lawyers are happy to brag on their cross of your potential expert and may even be willing to provide you with details and underlying materials. Conversely, lawyers are also willing to blame a defeat on a bad expert witness. The ATLA webpage, litigation groups/sections, and TTLA Depo Connect are outstanding sources of initial information on expert witnesses. In short, contact with other lawyer is the best source of information on expert witnesses.

2. Thoroughly Explore Your Witness's Expertise on the Subject-At-Issue

The good 'ole days, when experts were jacks-of-all-trades, are over! We must be particularly diligent in assuring that our expert is, indeed, an expert on the subject matter at issue. To accomplish this task, consider the following:

- Know the Subject-At-Issue

An obvious prerequisite to exploring your expert's knowledge on the topic-at-hand is having an understanding of the topic yourself. Review treatises, operating manuals, reference materials, and the Internet to bring yourself up to speed on the subject-at-issue.

- Interrogate Your Potential Witness on Her Expertise

With knowledge of the subject, you can better communicate with your expert. Likewise, you can better explore the witness's true expertise. For instance, most industries have adopted standards. Find those standards and ask your expert what they are.

If they do not know, or more likely, try to bluff, do not hire them. Simply stated, once you have an understanding of the subject, you will be better equipped to recognize those who won't meet the *Daubert/Robinson* challenge.

- Identify Areas of Prior Testimony

Another indicia of your witness's area of expertise, is the witness's prior areas of testimony. Does your witness have a track record of success giving testimony on the subject-at-issue? While sometime the best expert is one who has never or rarely testifies, you do not want an expert that has testified on numerous and varied topics. Aside from a potential damaging trial cross-examination, a witness who is an expert on too many topics is more vulnerable to a Rule 702/*Broders* attack.

- Identify Non-Litigation Experience With the Subject

Does your expert have real-world experience with the subject-at-issue. Experience, outside the litigation context, is almost an essential. Nothing makes juries and judges more suspect than an expert who is a courtroom only expert. The absence of real-world experience is an indication of potential trouble.

In conclusion, as a threshold matter, your expert will have to pass the outer "gate" by demonstrating (1) that she is qualified and (2) that her qualifications are in the area of her proffered testimony. See *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996). Implementing the above practical pointers will help assure your success in passing the outer "gate."

3. Monitor Your Experts

As with challenging experts, properly defending against a challenge begins well before the 104(a) hearing. Indeed, defending a potential *Daubert/Robinson* challenge should be a foremost consideration when

interviewing potential expert witnesses. Prior to retaining an expert, research the applicable reliability factors. From the time of the initial meeting, begin explaining to your expert what must be done in order to defend against a challenge. A clear understanding of what is required should foreclose the vast majority of *Daubert/Robinson* challenges. If your expert can not, or economy does not allow for completion of one or more of the reliability factors, a litigant should know this information up front. With this knowledge, you can properly assess the risks of proceeding, and so advise your client.

After you have retained your expert, periodically monitor his compliance with the appropriate standards. In a significant case, you may even consider having a consulting expert monitor the reliability of your testifying expert's efforts. If a *Daubert/Robinson* challenge is lodged this consulting expert could testify at the 104(a) hearing. The best defense to a *Daubert/Robinson* challenge is an offensive position with your own experts--make sure they are doing their job.

Finally, if it is not obvious, look at the cases where the court has excluded experts and the reasons for exclusion. Fill all the holes you can! If *Daubert* factors exist, satisfy them. Use alternatives if and only if *Daubert* factors do not apply, or when all else has failed! (and after you have explained why *Daubert* doesn't apply).

4. Investigate the Gatekeeper

The Honorable Bob McGrath, a Fort Worth State District Judge, recently gave a speech on *Daubert/Robinson* entitled "Texas Judges Get Even Taller And Better Looking". A review of case law in this area clearly demonstrates that this fact is true. Trial judges are granted enormous leeway in determining both the factors that apply in assessing an expert's reliability and then the application of those factors to the expert's methodology and opinions. Trial judges have vastly differently approaches to their "gate

keeping" functions. In a complex case or a case that involves science which pushes the proverbial envelope, great consideration should be given to filing cases in trial courts with favorable *Daubert/Robinson* histories.

5. Flush Out a Potential Challenge

If you expect a *Daubert/Robinson* challenge, do not wait for the trial ambush. The earlier you are aware of the problem; the more readily that problem is fixed. Consider some of the following tactics to flush out any potential challenges.

- Send a contention interrogatory asking if the defendants contend that plaintiff's experts are not reliable or relevant as defined in Rule 702 and *Daubert*.
- Seek an agreement with the opposing counsel that no challenges will be made.
- Ask the court to include a deadline for challenging experts in its pretrial scheduling order.
- File a motion to admit your expert's testimony under Rule 104(a).

If you have a *Daubert/Robinson* problem, it is best to discover that problem early so that you may obtain a continuance and redesignate expert witnesses.

6. Bill of Exception

If you have been unsuccessful in your defense of a *Daubert/Robinson* challenge, remember to make a bill to preserve your right on appeal. The bill must show all of the evidence required to pass the "gates" discussed at length in this paper.

IX. CONCLUSION

As with most "Rules," the holdings in *Daubert/Robinson* and *Kumho Tire* are easy to recite. The application of the Rules is the challenge. To the fullest extent possible, one should err on the side of caution to fill the record with every possible indicia of *Daubert/Kumho* compliance.

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