SMU | Dedman School of Law

SMU Law Review

Volume 54
Issue 3 *Annual Survey of Texas Law*

Article 5

2001

Civil Evidence

Michael W. Shore

Kenneth E. Shore

CIVIL EVIDENCE

*Michael W. Shore**
*Kenneth E. Shore***

TABLE OF CONTENTS

I. INTRODUCTION

THE most significant developments in civil evidence for 2000 occurred in the fields of expert testimony, privileges, and hearsay. In an effort to aid federal trial courts and practitioners cope with the vague gatekeeping standards for expert testimony created by *Daubert* and *Kumho*, Federal Rule of Evidence 702 was amended. Texas appellate courts provided contradictory decisions in the fields of expert testimony and the application of basic privileges. Witness statements discoverable last year became privileged in Texas' Second Judicial District. This article cannot encompass every development in the area of civil evidence, nor can it include every interesting case, but the authors

* B.A., B.B.A., Southern Methodist University, 1987; J.D., *cum laude*, Southern Methodist University School of Law, 1990. Michael Shore is a partner with the firm of Shore♦Fineberg, L.L.P., in Dallas, Texas. He specializes in complex civil litigation, representing plaintiffs in medical malpractice, catastrophic personal injury, and complex commercial cases.

** B.A., *cum laude*, Texas A&M University, College Station, 1995; M.P.A., University of Texas at Austin, 1996; J.D. *magna cum laude*, Southern Methodist University School of Law, 2000. Kenneth Shore is a law clerk to the Honorable David Folsom, United States District Judge for the Eastern District of Texas.

hope that it will give the reader some idea of significant developments in vivil evidence during the last Survey period.

II. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Some minor but important changes in the Federal Rules of Evidence went into effect on December 1, 2000. Rule 103 has been amended to clarify that "[o]nce the court makes a definitive [evidentiary] ruling," a party need not renew an objection or offer of proof to preserve the issue for appellate review.[1] Rule 404(a)(1) now provides that when an accused attacks a victim's character, he opens the door to allow evidence that he possesses that same character trait.[2] There have also been important amendments to the rules concerning expert opinions and the authentication of business records.

A. PRESERVING ERROR & EVIDENTIARY MOTIONS

The amendment to Rule 103 addresses the confusion over preservation of error related to evidentiary rulings. Previously, conflicting opinions existed regarding whether a party must renew an objection or offer of proof at trial to preserve error when a court had ruled prior to trial on a motion to admit or exclude the same evidence.[3] The new rule states: "Once the court makes a *definitive* ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[4]

Under the revised Rule 103, a party must still renew its objections when the court has (1) reserved its ruling; (2) made a conditional ruling; or (3) changed a previously definitive ruling.[5] Rule 103 requires attorneys to seek clarification if the definitiveness of an in limine or other evidentiary ruling is in doubt, as the rule does not define "definitive ruling." Michael Smith noted in his presentation to the Federal Bar Association

1. FED. R. EVID. 103(a)(2) (amended Dec. 1, 2000).
2. FED. R. EVID. 404(a)(1) (amended Dec. 1, 2000).
3. *Compare* Tanner v. Westbrook, 174 F.3d 542, 545 (5th Cir. 1999) ("[T]o preserve error on the admissibility of the [plaintiffs'] experts' testimony, [the defendant] had to object at trial."); Marceaux v. Conoco, Inc., 124 F.3d 730, 734 (5th Cir. 1997) (stating "[t]he general rule in this Circuit is that 'an overruled motion in limine does not preserve error on appeal'"–objection at trial is still required); and *compare* Rojas v. Richardson, 703 F.2d 186, 189 (5th Cir. 1983) ("The overruling of a motion in limine is not reversible error; only a proper objection at trial can preserve error for appellate review."), *with* United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999) (holding that a definitive ruling on motion in limine preserves error and no renewal is required); Wilson v. Williams, 182 F.3d 562, 565 (7th Cir. 1999); Palmerin v. City of Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986) (holding "that where the substance of the objection has been thoroughly explored during the hearing on the motion *in limine*, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence."), *and* Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-25 (3d Cir. 1985) (holding that no formal objection at trial is necessary where the pretrial motion adequately resolves the admissibility of the disputed evidence "with no suggestion that [the trial court] would reconsider the matter at trial.").
4. FED. R. EVID. 103(a)(2) (emphasis added).
5. *Id.*

for the Eastern District of Texas that if a lawyer wants a pretrial ruling that actually admits or excludes evidence, the lawyer should title the pleading a motion to admit or exclude evidence, ask the court to hold a hearing, and seek an order specifically admitting or excluding the subject evidence.[6]

B. Expert Testimony

1. *Rule 701*

Rule 701 now states that a lay witness' opinion testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[7] The Advisory Committee Note explains that the change was made "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."[8] This change should place courts on alert to guard against lay witnesses using "scientific" data to bolster their testimony.

2. *Rule 702*

Prior Federal Rule of Evidence 702 stated: "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."[9] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[10] the United States Supreme Court interpreted Rule 702 to also "[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."[11] Thus, based upon old Rule 702's language and *Daubert/Kumho Tire*, a party trying to admit expert testimony had three hurdles to overcome:

(1) Expert testimony must assist the trier of fact;

(2) The proffered expert must be qualified by knowledge, skill, experience, training, or education; and

(3) The expert's testimony must be reliable.

Before analyzing the changes in Rule 702's language, we will examine these three requirements under the prior language. First, the expert's opinion had to assist the trier of fact to understand the evidence or determine a fact in issue. This means that the opinion must be relevant to the

6. Michael C. Smith, *The 2000 Amendments to the Federal Rules of Civil Procedure and Evidence and the Local Rules for the Eastern District of Texas*, *available at* http://www.rothfirm.com (last visited December 8, 2000).

7. Fed. R. Evid. 701 (amended Dec. 1, 2000).

8. Fed. R. Evid. 701 advisory committee's note.

9. Fed. R. Evid. 702.

10. 509 U.S. 579 (1993).

11. *Id.* at 579-80.

facts at issue.[12] Relevance of expert testimony meant that the reasoning or methodology could be applied properly to the disputed facts.[13] Second, the expert had to be qualified in order to testify. The party offering expert testimony was required to show that the expert possessed a higher degree of knowledge, skill, experience, training, or education than an ordinary person.[14] A lack of specialization, however, did not affect the admissibility of the expert opinion, but only the weight to be given to that opinion.[15] Furthermore, the focus of the analysis was on the expert's "knowledge, skill, experience, training, or education" in the subject matter upon which he offered testimony and not on his specific title or occupation.[16] Third, the expert's opinion had to be reliable. Reliability meant that the "reasoning or methodology underlying the expert's proffered opinion . . . [was] supported by adequate validation to render it trustworthy."[17] The Supreme Court listed several factors that trial judges could consider when determining if the scientific testimony was reliable. The *Daubert* factors included, and still include:

(1) Whether the theory or technique has been scientifically tested;[18]

(2) Whether the theory or technique has been published or subject to peer review;[19]

(3) The error rate of a particular technique;[20] and

(4) Acceptance of the theory in the scientific community.[21]

The *Daubert* Court cautioned, however, that these factors were not a "definitive checklist or test,"[22] and that the gatekeeping inquiry must be "tied to the facts" of a particular case.[23] By making the analysis ex-

12. Wintz v. Northrop Corp., 110 F.3d 508, 512 (7th Cir. 1997); *see also* Westberry v. GislaVed Gummi AB, 178 F.3d 257, 260 (4th Cir. 1999).

13. *Daubert*, 509 U.S. at 592-93; Schudel v. Gen. Elec. Co., 120 F.3d 991, 996 (9th Cir. 1997); *see also* Hose v. Chicago N.W. Transp. Co., 70 F.3d 968, 972 (8th Cir. 1995) ("Relevance means there must be 'a valid scientific connection to the pertinent inquiry' in the case"); *see, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 144-45 (1997) (finding experts did not explain how and why opinions could be extrapolated from animal studies which were dissimilar to the facts of the case).

14. *See* FED. R. EVID. 104(a), 702; *see also* McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2d Cir. 1995); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 741 (3d Cir. 1994).

15. Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir. 1996); *see* Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 782 (3d Cir. 1996) ("[a]buse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or . . . have the specialization that the court considers most appropriate.").

16. *See* FED. R. EVID. 702 (amended Dec. 1, 2000); *see also* St. Martin v. Mobil Exploration & Producing U.S., Inc., 224 F.3d 402, 405-06 (5th Cir. 2000).

17. *See Westberry*, 178 F.3d at 260.

18. *Daubert*, 509 U.S. at 593; Raynor v. Merrell Pharms., Inc., 104 F.3d 1371, 1375 (D.C. Cir. 1997); Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341, 344 (7th Cir. 1995).

19. *Daubert*, 509 U.S. at 593; *Raynor*, 104 F.3d at 1375.

20. *Daubert*, 509 U.S. at 594.

21. *Id.* ("Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community,' may properly be viewed with skepticism.").

22. *Id.* at 593.

23. *Id.* at 591.

tremely flexible, *Daubert* allows trial courts to decide what factors to consider on a case-by-case basis.

For some time there was confusion as to whether *Daubert* applied to testimony based on "technical or other specialized knowledge."[24] The Supreme Court clarified that issue when it decided *Kumho Tire Co., LTD, v. Carmichael*.[25] In *Kumho Tire*, the Court held that *Daubert*'s "gatekeeping" duty applies to all expert testimony.[26] The Supreme Court also stated in *Kumho Tire* that the purpose of the reliability analysis is to ensure that the expert employs the same level of intellectual rigor as other experts in the same field.[27]

The revised Rule 702 states:

> 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 methods reliably to the facts of the case.[28]

The Evidence Advisory Committee's (the "Committee") comment notes for revised Rule 702 state that "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert."[29] The Committee also explained that it was not attempting to set procedural requirements for *Daubert* proceedings and emphasized that trial courts shall enjoy broad discretion in fashioning their analytical methods.[30] On its face, however, the revised Rule 702 does add a component to a trial court's gatekeeper duties—a quantitative assessment of the foundations for the expert's opinions.

The three new factors will likely do little to clear up the confusion and inconsistency in Rule 702's application. The revised rule's first new factor, whether testimony is based upon "sufficient facts or data," adds un-

---

24. FED. R. EVID. 702 (amended Dec. 1, 2000).
25. 526 U.S. 137 (1999).
26. *Id.* at 138.
27. *Id.* at 152.
28. FED. R. EVID. 702 (amended Dec. 1, 2000).
29. FED. R. EVID. 702 advisory committee's note (citing *Kumho Tire*, 526 U.S. at 152 (noting that the trial court has discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises")).
30. *See id.*; *see also Kumho Tire*, 526 U.S. at 152 ("That [abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion."); Michael W. Shore, *Civil Evidence*, 53 SMU L. REV. 699, 701-03 (2000) ("As long as the trial court uses a method that is not arbitrary or capricious in reviewing expert testimony for relevancy and reliability, the trial court's decision on admissibility should stand on appeal."); Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.").

necessary incentives for advocates to "pile up" foundation evidence, ensuring Rule 702's application will become more time-consuming and expensive. The Committee's notes say very little about this requirement other than it is a "quantitative rather than qualitative analysis."[31] Judges already look at the amount of data analyzed by an expert and then make their own determination, under an abuse of discretion standard, whether these facts or data are "sufficient." How has this change helped? It likely has only ensured that litigants will add excessive amounts of background data and "foundation" evidence to the trial record to ensure that their experts are quantatively qualified. This will add cost and time to an already burdensome and expensive process.

The second and third new factors in revised Rule 702 require the trial court to first determine the reliability of the principles or methods underlying the expert's testimony and then determine whether the expert has applied those principles or methods reliably to the facts of the case. Thus, the new rule essentially codifies the *Daubert/Kumho Tire* analysis. Under *Daubert*, the trial court would analyze the relevance and reliability of the expert's *testimony*.[32] Under *Kumho*, the trial court was directed to first analyze the reliability of the principle or method, and then determine whether the expert "has applied the principles and methods reliably."[33]

The *Daubert* factors had caused some confusion in the lower courts. In *Daubert*, the trial court was called upon to analyze the reliability of an epidemiological and pharmacological studies on whether Bendectin caused human birth defects. The four *Daubert* factors are arguably not relevant when analyzing the reliability most types of experts' testimony.[34] *Daubert's* importance was not its list of factors, but the establishment of the trial court's gatekeeper function. The decision, however, left the lower courts in a state of confusion as many strained their analysis of other types of expert testimony to apply *Daubert's* reliability factors to all expert testimony.

The Supreme Court clarified *Daubert* in *Kumho Tire* when it stated that the *Daubert* factors may not be pertinent in every case and that the trial judge should determine reliability based upon a "rational methodology" specific to each case.[35] The Court explained that under *Daubert*, the district court's responsibility "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."[36] This left the trial courts with broad discretion in designing ways to test the reliability of expert's testimony. Revised Rule 702 reaffirms the trial courts' basic gatekeeper function created under *Daubert* and requires the courts to

31. FED. R. EVID. 702 advisory committee's note.
32. *Daubert*, 509 U.S. at 594.
33. FED. R. EVID. 702; *see also Kumho Tire*, 526 U.S. at 152.
34. *Daubert*, 509 U.S. at 593-94.
35. *Kumho Tire*, 526 U.S. at 152.
36. *Id.*

create reasonable and articulated methods for carrying out that function as outlined in *Kumho*.

All of the *Daubert* factors continue to apply: (1) whether the theory or technique underlying the expert's testimony can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the expert's theory or technique enjoys "general acceptance" within a relevant scientific community.[37] The Committee noted the already well-established concept that the *Daubert* factors are not exclusive.[38] It then combed through reported opinions to cite different factors that courts have considered. These non-*Daubert* factors listed by the Committee include:

(1) Whether the expert is "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying."[39]
(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.[40]
(3) Whether the expert has adequately accounted for obvious alternative explanations.[41]
(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."[42]
(5) Whether the type of opinion the expert would give is one that is known to reach reliable results.[43]

While the Committee's notes warn that "no single factor is necessarily

37. *Daubert*, 509 U.S. at 593-94.

38. FED. R. EVID. 702 advisory committee's note.

39. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995); *see also* Lust v. Merrell Dow Pharms., Inc., 89 F.3d 594, 597 (9th Cir. 1996); Braun v. Lorillard, Inc., 84 F.3d 230, 235 (7th Cir. 1996). *But see Daubert*, 43 F.3d at 1317 n.5 (noting that some expert disciplines "have the courtroom as a principal theater of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration").

40. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 178 F.3d 1035, 1040 (8th Cir. 1999) (stating that although the expert "utilized a method of analysis typical within his field, that method is not typically used to make statements regarding causation without considering all independent variables that could affect the conclusion").

41. *See* Claar v. Burlington N. R.R., 29 F.3d 499, 502 (9th Cir. 1994); *see also* Ambrosini v. Labarraque, 101 F.3d 129, 140 (D.C. Cir. 1996) (possibility of some unexplained causes presents a question of weight, so long as expert has considered the most obvious causes).

42. Sheehan v. Daily Racing Form, 104 F.3d 940, 942 (7th Cir. 1997); *see also Kumho*, 526 U.S. at 152.

43. *See Kumho*, 526 U.S. at 151. Where the discipline itself lacks reliability or credibility, the fact that the expert's theories or methods are generally accepted in that field does not render his opinions reliable under *Daubert*. The Court noted that generally accepted principles in disciplines such as astrology and necromancy still lack reliability. *See id.*; *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based upon "clinical ecology.").

dispositive of the reliability of a particular expert's testimony,"[44] some courts may look to the Committee's notes for guidance and treat these examples as five additional *Daubert* factors.[45]

After *Kumho Tire*, courts began to use two different types of analysis - one for scientific evidence and one for non-scientific. The difference between scientific and non-scientific evidence is that scientific evidence is based upon scientific-principles that can be readily tested under the *Daubert* factors, while the nonscientific evidence is based upon technical or other specialized knowledge acquired through experience or observation. After *Kuhmo Tire*, when courts analyzed scientific evidence, they tended to focus on the reliability of the underlying theory using the *Daubert,* or similar factors. When courts analyzed non-scientific evidence, they tended to focus on whether an expert logically applied his "technical or other specialized knowledge" to the facts of the case. Revised Rule 702 requires courts to analyze both the reliability of the principle or method and its application to the facts in every case. This may prove to be a problem for attorneys who seek to present a witness whose testimony is based upon "technical or other specialized knowledge" to which the factors listed in the advisory notes may not apply. While the Committee's notes indicate that attorneys may continue to proceed under the established *Daubert/Kumho Tire* analysis, the safer course is to organize the analysis to fit the inquiry as set forth in the Committee's notes and revised Rule 702.[46]

The three-part test for admissibility of expert testimony now becomes a five-part test. The five hurdles to admission of expert testimony under revised Rule 702 include:

(1) Expert testimony must assist the trier of fact;
(2) The proffered expert must be qualified by knowledge, skill, experience, training, or education;
(3) The testimony must be based upon sufficient facts or data;
(4) The testimony must be the product of reliable principles and methods; and
(5) The witness must be applying the principles and methods reliably to the facts of the case.

Under Rule 104(a), a party may challenge the admissibility of an expert before trial on any one of these five grounds.[47] While this five-factor

44. FED. R. EVID. 702 advisory committee's note.

45. A plurality of the Supreme Court has stated that the Advisory Committee Notes are a "useful guide in ascertaining the meaning of the Rules." Tome v. United States, 513 U.S. 150, 160 (1995). In his dissent in *Tome*, Justice Scalia stated that while he has approved of the use of Notes in the past, "[m]ore mature consideration has persuaded me that is wrong." *Id.* at 167 (Scalia, J. dissenting). *See also* Libretti v. United States, 516 U.S. 29, 41 (1995) (rejecting assumption in Committee note); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1302 (1995) ("[T]he Advisory Committee Notes are not just a brick, but rather a part of the foundation of the wall of evidence, and ought to be regarded as such.").

46. *See Smith*, *supra* note 6; *see also* United States v. Charley, 189 F.3d 1251, 1266 n.20 (10th Cir. 1999) (noting that proposed Rule 702 requires a "three-part reliability inquiry.").

47. FED. R. EVID. 104(a); *see also Kumho Tire*, 526 U.S. at 149-50.

test seems to provide a rigid structure under which a narrow-minded trial court could analyze expert testimony, district judges should remember to be flexible and develop their own "rational methodology" specific to each case.[48] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[49]

3. Rule 703

Courts have been confused regarding to how to treat inadmissible evidence reasonably relied upon by an expert in forming his or her opinion. Some courts used Rule 703 as a hearsay exception.[50] Other courts admitted the underlying facts for the limited purpose of explaining or supporting the expert's opinion.[51] Finally, some trial courts erroneously permitted experts to bring inadmissible information before the jury without limitation.[52]

Revised Rule 703 now prohibits disclosure of inadmissible evidence relied on by an expert unless its "probative value in assisting the jury to evaluate the expert's opinion substantially outweighs [its] prejudicial effect."[53] This revision establishes a "presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert."[54] Thus, when the expert's proponent seeks to admit otherwise inadmissible evidence to help explain to the jury his expert's opinion, the court must carefully weigh the probative value of the evidence in assisting the jury to understand the expert's testimony against the potential dangers of the jury misusing the information for other impermissible purposes. If the trial court decides to allow admission of such testimony, the court "must give a limiting instruction upon

48. *Kumho Tire*, 526 U.S. at 152-53.

49. *Daubert*, 509 U.S. at 596.

50. *See, e.g.*, United States v. Rollins, 862 F.2d 1282, 1292 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, statements of informant); Stevens v. Cessna Aircraft, Co., 634 F. Supp. 137, 142-43 (E.D. Pa. 1986) (holding, as properly admitted under Rule 703, expert's testimony describing hearsay statements of friends and associates of deceased pilot, in support of opinion that pilot was under great deal of stress); Durflinger v. Artiles, 563 F. Supp. 322, 327 (D. Kan. 1981) (admitting, as "validated by Rule 703 of the Federal Rules of Evidence," deposition testimony of psychiatrist containing expert opinion and hearsay basis of that opinion).

51. *See, e.g.*, Marsee v. United States Tobacco Co., 866 F.2d 319, 323 (10th Cir. 1989) (noting that inadmissible basis could be considered by jury, but only for purpose of evaluating expert's testimony); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) (citing Rules 703 and 705 as permitting the disclosure of otherwise inadmissible hearsay evidence, but only for illustrating the basis of the expert witness opinion).

52. *See, e.g.*, Huthinson v. Groskin, 927 F.2d 722, 724-25 (2d Cir. 1991) (finding reversible error where medical expert was allowed to refer to letters from three prominent physicians, and to testify that his conclusion was consistent with those doctors, because this tactic revealed hearsay to jury and impermissibly bolstered expert's testimony); *see also* Boone v. Moore, 980 F.2d 539, 542 (8th Cir. 1992) (finding harmless error where trial court allowed report relied on by medical expert to be admitted into evidence).

53. FED. R. EVID. 703 (amended Dec. 1, 2000).

54. FED. R. EVID. 703 advisory committee's note.

request, informing the jury that the underlying information must not be used for substantive purposes."[55] Parties opposing or cross-examining an expert must be careful not to "open the door" to the admission of otherwise excludable evidence. Attacks on the foundation of an expert's opinions may allow the expert to disclose the otherwise inadmissible testimony.

C. Foundation & Authentication for Business Records

The 2000 amendments to Rules 803(6) and 902(11), (12) allow all business records to be certified or self-authenticated rather than being introduced by a testifying foundation witness, as was previously required. The old Rule 803(6) business records exception required that the foundation for the exception be laid by "the testimony of the custodian or other qualified witness."[56] Under the revised rule, such foundation may also be laid "by certification that complies with Rule 902(11), 902(12), or a statute permitting certification."[57]

Rule 902(11) allows for the foundation required for admissibility of "a domestic record of regularly conducted activity" to be laid "by a written declaration of its custodian or other qualified person."[58] A party intending to offer a record into evidence under Rule 902(11) must provide written notice to all adverse parties and make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge the record's admissibility or the adequacy of the foundation in the declaration. Rule 902(12) allows for foreign records to be admitted in the same manner, but limits the procedure for foreign documents to civil cases.[59] It also requires that the declaration be "signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed."[60] This change was long overdue and should reduce the expense and time required for trial.

III. EXPERT TESTIMONY

There were several notable opinions from Texas courts last year regarding expert testimony. The Texas Supreme Court and the Texarkana Court of Appeals reminded us that juries do not always need experts to help them determine the reasonableness of someone's actions.[61] Texas'

55. *Id. See* Fed. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

56. Fed. R. Evid. 803(6).

57. Fed. R. Evid. 803(6) (amended Dec. 1, 2000).

58. Fed. R. Evid. 902(11) (amended Dec. 1, 2000).

59. Fed. R. Evid. 902(12) (amended Dec. 1, 2000).

60. *Id.*

61. K-Mart Corp. v. Honeycutt, 24 S.W.3d 357 (Tex. 2000); Park v. Larson, 26 S.W.3d 106 (Tex. App.—Texarkana 2000, no pet. h.).

appellate courts also discussed qualifications of experts, stating that trial courts should focus on an expert's knowledge, training, and experience in the subject matter upon which he proposes to testify and not on his job title or specific area of expertise.[62] Finally, two appeals courts addressed the confusion left in the wake of the Texas Supreme Court's 1997 decision in *Merril Dow Pharmaceuticals, Inc. v. Havner*.[63]

Texas Rule of Evidence 702 states: "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."[64] Two years after the United States Supreme Court decided *Daubert*, the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*[65] adopted *Daubert*'s reliability and relevancy requirements for determining the admissibility of scientific expert testimony under Texas Rule of Evidence 702. In *Robinson*, the Texas Supreme Court prescribed a list of six factors that trial courts should consider when determining the admissibility of expert testimony:

(1) [T]he extent to which the theory has been or can be tested;
(2) [T]he extent to which the technique relies upon the subjective interpretation of the expert;
(3) [W]hether the theory has been subjected to peer review and/or publication;
(4) [T]he technique's potential rate of error;
(5) [W]hether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) [T]he non-judicial uses which have been made of the theory or technique.[66]

The court added that a particular case may require a trial court to consider other factors to determine scientific reliability.[67] Thus, *Robinson*'s factors are not exclusive.

In *Gammill v. Jack Williams Chevrolet, Inc.*,[68] the Texas Supreme Court held that "Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule"—not just scientific expert testimony.[69] The difference between scientific and non-scientific evidence is that the former is based upon scientific principles that can be readily tested under the *Robison* factors, while the latter is based upon technical or other specialized knowledge acquired through experience or observation.[70] When a party seeks to introduce non-scientific expert testimony, the test for admissibility is whether "there is simply

62. Spivey v. James, 1 S.W.3d 380 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
63. 953 S.W.2d 706 (Tex. 1997).
64. TEX. R. EVID. 702.
65. 923 S.W.2d 549 (Tex. 1995).
66. *Id.* at 557.
67. *Id.*
68. 972 S.W.2d 713 (Tex. 1998).
69. *Id.* at 726.
70. *See In re* D.S., 19 S.W.3d 525, 529 (Tex. App.—Fort Worth 2000, no pet. h.).

too great an *analytical gap* between the data and the opinion offered."[71] With little expert testimony being scientific in the traditional sense of the word, many *Robinson* factors do not apply in most cases. Therefore, courts now analyze the admissibility of most expert testimony under *Gammill.* In applying *Gammill* to expert testimony based upon experience or other specialized knowledge, Texas courts have conducted detailed analyses of the basis for the expert's opinions and how the expert's conclusions reasonably relate to the case's disputed facts. It is important, therefore, that experts provide a detailed description of their experience, training, and methodology. Furthermore, non-scientific experts should walk the trial court through each fact upon which they relied and through each step used in their analysis, clearly demonstrating both how the experts' opinions were formed and how they relate to the disputed issues in a manner helpful to the fact finder.

With such emphasis being placed on the *Daubert/Robinson* relevance and reliability test, Texas lawyers, when challenging their opponent's experts, have sometimes overlooked the most obvious requirement—that the expert's testimony bears on a subject that is beyond the common knowledge of jurors. During the Survey period, however, at least two courts seized upon this requirement to exclude expert testimony.

In *K-Mart Corp. v. Honeycutt,*[72] the Texas Supreme Court held in a per curiam opinion that the testimony of a human factors expert was unnecessary to aid the trier of fact in determining whether K-Mart was negligent. In *K-Mart,* the plaintiff, Ms. Honeycutt, was injured while in the checkout line next to the cart corral - the area where carts are kept inside the store. Normally, two rails separated the checkout line from the carts, but on that day, the upper rail was missing. Ms. Honeycutt sat on the lower rail, and a K-Mart employee pushed some additional carts into the corral causing other carts to move forward and hit her.[73] At trial, Ms. Honeycutt offered the testimony of Dr. Wayne Johnston, a Ph.D. in Industrial Engineering with a specialty in Human Factors and Ergonomics.[74] Dr. Johnston planned to testify that (1) the lack of a top rail was an invitation for customers to sit on the second rail and that the missing rail was therefore an unreasonable risk and the proximate cause of the accident; (2) K-Mart failed to properly train its employee in returning the cart; (3) the K-Mart employee did not keep a proper lookout; (4) K-Mart's failure to replace the top rail constituted negligence; and (5) Honeycutt was not contributorily negligent.[75]

The Corpus Christi Court of Appeals concluded both that Dr. Johnston was qualified to testify as an expert and that his opinions were relevant

71. *Gammill,* 972 S.W.2d at 727 (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (emphasis added)).

72. 24 S.W.3d 357 (Tex. 2000) (per curiam).

73. *Id.* at 359.

74. *Id.*

75. *Id.*

and reliable.[76] The Supreme Court stated, however, that the fact that "a witness has knowledge, skill, expertise, or training does not necessarily mean that the witness can assist the trier-of-fact,"[77] and a trial court should exclude expert testimony "when the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury."[78] The decision dissected each of Johnston's proposed opinions and noted that none of them were beyond the common knowledge of the jury. First, the jury did not need Johnston's assistance to determine whether it was unreasonable to allow the top railing to remain missing. Second, the jury was capable of determining the missing railing's role in causing the accident. Third, the jury could determine whether the K-Mart employee was improperly trained. Fourth, the jury did not need an expert to tell it the proper way to push a shopping cart. Finally, the jury was capable of determining on its own whether the employee or Honeycutt was negligent.[79] The K-Mart opinion demonstrates the Texas Supreme Court's general skepticism for human factors experts, citing several cases in which courts have excluded their testimony because their opinions did not aid the trier of fact.[80]

Similarly, in *Park v. Larison*,[81] the Texarkana Court of Appeals excluded the plaintiff's proposed human factors expert because his proffered testimony did not assist the trier of fact. In *Park*, the parents of a boy severely injured in a four-wheeler accident sued the vehicle owners. Fifteen-year-old Tommy Park went with his friend, Jacob Boles, to Jacob's father's deer lease.[82] Jacob's father, Mark, owned the deer lease with his friend, John Larison. Larison and Boles also jointly owned a four-wheeler used at the deer lease. Both owners saw the warnings clearly posted on the vehicle. The warnings stated that anyone who drives the four-wheeler should (1) wear a helmet; (2) take a safety course;

76. *See* Honeycutt v. K-Mart Corp., 1 S.W.3d 239 (Tex. App.—Corpus Christi 1999, pet. granted), *rev'd*, 24 S.W.3d 357 (Tex. 2000).

77. *See K-Mart*, 24 S.W.3d at 360 (citing Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996)).

78. *Id. See also* $18,800 in U.S. Currency v. State, 961 S.W.2d 257, 265 (Tex. App. – Houston [1st Dist.] 1997, no writ); Glasscock v. Income Prop. Servs., Inc., 888 S.W.2d 176, 180 (Tex. App.– Houston [1st Dist.] 1994, writ dism'd); Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055 (4th Cir. 1986) ("[Federal] Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance.").

79. *K-Mart*, 24 S.W.3d at 361.

80. *See Scott*, 789 F.2d at 1055 (holding that it was error to permit human factors expert to testify that women wearing high heels tend to avoid walking on grates); Persinger v. Norfolk & W. Ry., 920 F.2d 1185, 1188 (4th Cir. 1990) (excluding expert testimony about whether the weight the plaintiff had to carry was unreasonable because the testimony "did no more than state the obvious"), Stepney v. Dildy, 128 F.R.D. 77, 80 (D. Md. 1989) ("Nor is the testimony of a human factors expert required to advise the jury that moisture will freeze at 32 degrees or colder."); Douglas R. Richmond, *Human Factors Experts in Personal Injury Litigation*, 46 ARK. L. REV. 333, 337 (1993) ("[M]any experts misuse human factors expertise in litigation by either testifying about matters clearly within the jury's common knowledge or offering opinions without adequate foundation.").

81. 28 S.W.3d 106 (Tex. App.—Texarkana 2000, no pet. h.).

82. *Id.* at 108.

(3) be at least sixteen years old; and (4) not carry a passenger.[83] When the accident occurred, neither boy was wearing a helmet, they were both fifteen, neither had taken a safety course, and Matt Park was driving with Jacob Boles riding as a passenger.[84] The plaintiffs sued Larison and Boles for failing to supervise the boys and for allowing them to ride the four-wheeler.

The Plaintiffs offered the testimony of Dr. Edward Karnes.[85] Karnes has a Ph.D. in experimental psychology and is a board certified human factors engineer.[86] He had also authored eight published articles on all-terrain vehicles.[87] These articles reported the results of his tests on the reaction of adults and adolescents to the vehicles' warning signs. Karnes proposed to testify that the warnings on the four-wheeler were adequate to inform an adult of the risks involved in riding the vehicle and that allowing Matt to ride the four-wheeler under those circumstances, which violated every warning, was negligent.[88] Karnes also proposed to testify that adolescents perceive risks differently from adults and that adolescents model their use of the vehicles after adults they observe using it. Matt Park had seen Boles and Larison ride the four-wheeler without a helmet and with passengers. Based upon his studies and his observations concerning the case, Karnes planned to testify that in his expert opinion Boles and Larison were negligent and that Matt Park was not. The trial court, however, excluded Karnes' testimony, and the jury found that Matt was 100% negligent. The trial court entered judgment against the plaintiffs. On appeal, the Texarkana Court of Appeals affirmed.[89] The court stated that Karnes' testimony merely went to whether the conduct of Larison, Boles, and Matt was reasonable and prudent.[90] "As such, the expert's testimony involved issues within the common knowledge of the average juror."[91]

During the Survey period, two cases from the Texas appellate courts emphasized that trial courts should not dwell on an expert's job title or particular area of expertise when determining whether the expert is qualified to testify. Instead, the focus of the trial court's analysis should be on the expert's knowledge, training, or experience in the subject matter upon which the expert proposes to testify.

In *Spivey v. James*,[92] the Texarkana Court of Appeals held that the trial court abused its discretion when it excluded the plaintiff's standard of care and causation expert in a dental surgery malpractice case, even though the expert had never practiced in the defendant's field.

---

83. *Id.*
84. *Id.* at 109.
85. *Id.* at 110.
86. *See id.* at 111.
87. *Id.*
88. *Id.*
89. *See id.* at 114.
90. *See id.* at 112.
91. *Id.*
92. 1 S.W.3d 380 (Tex. App.—Texarkana 1999, pet. denied).

The plaintiff in *Spivey* sued the defendant, an oral surgeon, for a permanent injury she suffered to her temporomandibular joint (TMJ) during oral surgery.[93] The plaintiff argued that the defendant had improperly inserted a device called a bite block into her mouth, stretching her jaw joint and muscles out of place.[94] The plaintiffs offered Dr. Michael Neeley's testimony as to both the standard of care and causation. Dr. Neeley possessed a degree in dental surgery and was a licensed dentist; however, he had never practiced dental surgery.[95] Dr. Neeley had examined the plaintiff, taken her medical history, reviewed her medical records and x-rays, and reviewed her deposition. Based upon these observations, he would have testified that the defendant breached the standard of care of a dental surgeon and that his improper use of the bite block had caused the plaintiff's TMJ disorder.[96] But because he had never practiced as a dental surgeon, the trial court excluded his testimony.

The appellate court held that the trial court's refusal to allow Dr. Neely's testimony was an abuse of discretion. The court noted that while Dr. Neeley had not practiced as a dental surgeon, he had training as a dental surgeon and was therefore familiar with the standard of care.[97] Furthermore, Dr. Neeley had developed a particular interest in TMJ disorders having been a TMJ patient himself. He had attended continuing education courses on TMJ disorders and had devoted at least fifteen percent of his practice treating TMJ disorders. The appellate court concluded that the trial court abused its discretion in excluding Dr. Neeley's testimony based upon the fact that he did not practice in the same field as the defendant without considering Dr. Neeley's other background, training, and experience.[98]

Similarly, in *Blan v. Ali*,[99] the Houston Court of Appeals held that a trial court abused its discretion when it excluded the affidavit of the plaintiff's neurology expert after the trial court concluded that the neurologist was not qualified to testify to as the standard of care for a cardiologist's or emergency room physician's treatment of a stroke victim. In the absence of the neurologist's affidavit, the trial court held that the plaintiffs failed to produce any evidence of a breach of the standard of care or causation and granted the defendants' summary judgment.[100]

The appellate court analyzed the neurologist's qualifications under both Rule 702 and the Texas' Medical Liability and Insurance Improvement Act (the "TMLA"), which outlines the required qualifications to testify as an expert in a medical negligence case in Texas.[101] Section

93. *See id.*
94. *Id.* at 382.
95. *Id.* at 384.
96. *Id.*
97. *See id.* at 384.
98. *See id.*
99. 7 S.W.3d 741 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
100. *Id.*
101. *See id.* at 746.

14.01(a) of the TMLA states:

> (a) a person may qualify as an expert witness on the issue of whether the physician departed from the accepted standards of medical care only if the person is a physician who:
>
> (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
>
> (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the *illness, injury, or condition* involved in the claim; and
>
> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.[102]

The plaintiff's neurology expert admitted in his deposition that he was not familiar with the standard of care of either an emergency room physician or a cardiologist.[103] Based upon this admission, the trial court determined that the neurologist was not qualified to testify as to the standard of care. The court of appeals stated that to categorically exclude a medical expert's testimony solely because he is from a different school of practice than the defendant ignores the criteria set out in Rule 702 and section 14.01(a) of the TMLA.[104] These standards, the court noted, focus "not on . . . the doctor's area of expertise, but on the *condition* involved in the claim."[105] The court stated: "Despite the fact that we live in a world of niche medical practices and multilayer specializations, there are certain standards of medical care that apply to multiple schools of practice and any medical doctor."[106] The *Blan* court further noted that the neurologist's lack of knowledge of the standard of care for cardiologists and emergency room physicians would be "persuasive, if not determinative," if he were offering opinions in matters particular to those fields.[107] In this case, however, the plaintiff's expert was offering an opinion as to the standard of care that would apply to *any* physician treating a stroke or lupus patient—regardless of the physician's particular area of expertise.[108] Therefore, the *Blan* court correctly held that the trial court abused its discretion in excluding his testimony.

While it is common for lawyers to challenge the qualifications of their opponent's expert when the expert does not practice in the exact same area as the defendant, it is clear that the challenge should focus on the expert's experience within the disputed subject matter, and trial courts should not categorically exclude experts from different fields or areas of

---

102. TEX. REV. CIV. STAT. ANN. art. 4590i, § 14.01(a) (Vernon Supp. 2000) (emphasis added).

103. *See Blan*, 7 S.W.3d at 746.

104. *See id.*

105. *See id.* (emphasis added).

106. *Id.*

107. *Id.*

108. *See id.* at 746-47 ("Given [the expert's] testimony that the standard he describes applies to any physician who undertakes to treat and care for a patient suffering from stroke, [he] is qualified to testify as to the appellees/doctors' treatment of Blan's stroke.").

expertise.[109] Instead, the trial courts should focus on whether the proposed expert's "knowledge, skill, experience, training, or education" in the relevant subject matter will help the jury understand the disputed issues.[110]

In another case, *Texas Workers' Compensation Ins. Fund v. Lopez*,[111] the San Antonio Court of Appeals clarified that the statistical guidelines that the Texas Supreme Court set out in *Merrill Dow Pharmaceuticals v. Havner*[112] are not hard rules for the admissibility of epidemiological studies and opinions in toxic tort cases. In *Havner*, the Texas Supreme Court reversed a $3.75 million judgment in favor of a child born disfigured as a result of her mother's taking the morning sickness drug Benectin.[113] In rendering a take-nothing judgment, the Supreme Court found that the plaintiffs' experts' testimony, based in part on epidemiological studies, was unreliable and therefore no evidence at all.[114] The *Havner* court stated that in conducting a legal sufficiency review, an appellate court should look beyond the expert's testimony to determine reliability.[115]

The issue in *Havner* was the reliability of scientific testimony concerning the cause of the plaintiff's birth defects. The plaintiff's experts relied partially on epidemiological studies in forming their opinion.[116] Before applying the *Robinson* factors to the evidence, the court was concerned with "arm[ing] [itself] with some of the basic principles employed by the scientific community in conducting studies. . . ."[117] The *Havner* court explained that in toxic tort cases, there is general causation and specific causation.[118] General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury. In the absence of direct proof of specific causation, plaintiffs in toxic tort cases may use epidemiological studies to demonstrate to the jury an association between the plaintiff's disease or condition and the drug or substance to which the plaintiff was exposed.[119] The court advised that to be reliable, however, epidemiological evidence should have a relative risk of 2.0, meaning that the risk of an injury or condition in the

109. *See* Helena Chem. Co. v. Wilkins, 18 S.W.3d 744 (Tex. App.—San Antonio 2000, pet. filed). In *Wilkins*, the trial court allowed an agronomist to testify as to a plant's ability to tolerate charcoal rot. The opposing party challenged the expert because he was not a plant pathologist. The court stated that an expert's "occupational status" does not undermine his ability to testify if he has experience addressing the issues about which he proposes to testify. *See id.* at 753-54; *see also* Nunley v. Kloehn, 888 F. Supp. 1483, 1488 (E.D. Wis. 1995) ("The focus . . . is on the 'fit' between the subject matter at issue and the expert's familiarity therewith, and not on . . . the expert's title. . . .").

110. TEX. R. EVID. 702.

111. 21 S.W.3d 358 (Tex. App.—San Antonio 2000, pet. denied).

112. 953 S.W.2d 706 (Tex. 1997).

113. *See id.* at 706.

114. *Id.* at 711.

115. *Id.* at 712.

116. *See id.* at 708.

117. *Havner*, 953 S.W.2d at 724.

118. *Id.* at 714.

119. *See id.* at 715.

exposed population should be more than double the risk in the unexposed or control population.[120] The *Havner* court also noted that the generally accepted significance level or confidence level in epidemiological studies is 95%, which means that if the study were repeated numerous times, the confidence interval would indicate the range of relative risk values that would result 95% of the time.[121] The court stated that "[t]he use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science."[122]

Because the *Havner* court focused on the expert testimony's reliability, subsequent courts have held that the *Robinson/Gammill* standard applies both to admissibility under Rule 702 and for an appellate court's determination of legal sufficiency.[123] The Texarkana Court of Appeals noted that under *Havner*, "a defendant has two bites at the same *Daubert* apple."[124] Courts have also held that the statistical guidelines for reliability set forth in *Havner* also apply in the trial court's initial determination of reliability under Rule 702.[125]

In *Texas Workers' Compensation Ins. Fund v. Lopez*,[126] the San Antonio Court of Appeals clarified that *Havner* did not require that every study fall within *Havner*'s statistical guidelines in order to be admissible under Rule 702. Lopez claimed that he had developed chronic obstructive pulmonary disease (COPD) from exposure to dust and silica while working as a sandblaster for T.B. Moran Company. The key issue in the case was causation. At trial, Lopez called board-certified pulmonologist, Dr. Muhammed Majahid Salim, to testify that exposure to small particles of silica and dust caused Lopez's COPD.[127] On appeal, the Fund asserted that Salim's testimony was not scientifically reliable citing *Havner*.[128] Salim based his opinion on two articles that studied the relationship between occupational dust and COPD. The defendant appealed the trial court's decision to admit Salim's testimony because these studies did not meet *Havner*'s requirement that they demonstrate Lopez's risk of contracting COPD was at least double that of the general population.[129]

---

120. *See id.* at 717-18.

121. *Id.* at 724.

122. *Havner*, 953 S.W.2d at 718.

123. *Id.* at 714; Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183 (Tex. App.—Texarkana 1998, pet. denied); *see also* Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 376 (1999) (recognizing this and other Texas courts as having interpreted *Daubert* as eroding the distinction "between the admissibility of evidence and the sufficiency of that evidence to prove causation").

124. *Atterbury*, 978 S.W.2d at 192.

125. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 286-87 (Tex. App.—Texarkana 2000, no pet. h.).

126. 21 S.W.3d 358 (Tex. App.—San Antonio 2000, pet. denied).

127. *Id.* at 366.

128. *Id.* at 363.

129. *Id.* at 365.

The appellate court correctly distinguished *Lopez* from *Havner*. The Texas Supreme Court had stated in *Havner* that it did not intend to establish a relative risk of 2.0 as litmus test—trial courts may consider other factors.[130] The San Antonio Court of Appeals noted that in *Lopez* there were over thirty studies introduced in *Havner* that concluded that Benectin *did not* cause birth defects, contradicting the plaintiffs' expert. "Against this backdrop, the supreme court criticized the Havner's scientific evidence and set a high standard for the use of epidemiological studies in the face of contrary scientific belief."[131] The *Lopez* court then noted that the scientific evidence was "overwhelmingly in favor of Lopez's proposition," and therefore the studies could not be found unreliable simply because they failed to meet *Havner*'s statistical guidelines.[132] *Lopez* correctly teaches that the level of statistical certainty is but one factor for a court to use in evaluating epidemiological evidence. If the offered evidence is contrary to or in conflict with other similar studies, the court may require a higher level of statistical confidence. *Lopez*'s holding demonstrates the careful case specific analysis of expert testimony required of trial courts post-*Robinson* and *Gammill*.

IV. PRIVILEGES

A. PHYSICIAN-PATIENT PRIVILEGE

Texas Rules of Evidence 509(c)(1) and 510(b)(1) protect confidential communications between a physician and a patient relative to the patient's mental health.[133] Rules 509(c)(2) and 510(b)(1) protect the patient's medical records as well.[134] In *In re Doe*,[135] the Austin Court of Appeals reaffirmed that a patient does not automatically waive the physician-patient or mental health privilege by pleading mental anguish damages. In *Doe*, a prison guard raped Jane Doe while she was in the Travis County Community Justice Center. She sued the rapist, the rapist's supervisor, and Wackenhut Corrections Corporation ("Wackenhut"), which operated the facility. In her petition, Doe alleged that she had suffered mental anguish. She claimed she was scared of men who look like the

130. *Havner*, 953 S.W.2d at 718 ("[E]ven if a particular study reports a low relative risk, there may in fact be a causal relationship.").

131. *Lopez*, 21 S.W.3d at 365.

132. *Id.*

133. Rule 509 is the physician-patient privilege. Rule 509(c)(1) states: "Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed." TEX. R. EVID. 509(a)(1). Rule 510 is the mental health privilege. Rule 510(b)(1) states: "Communication between a patient and a professional is confidential and shall not be disclosed in civil cases." TEX. R. EVID. 510(b)(1).

134. Rule 509(c)(2) states: "Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed." TEX. R. EVID. 509(c)(2). Rule 510(b)(2) states: "Records of the identity, diagnosis, evaluation, or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases." TEX. R. EVID. 510(b)(2).

135. 22 S.W.3d 601 (Tex. App.—Austin 2000, orig. proceeding).

rapist, felt uneasy around men, remains jumpy and anxious when people touch her, and has trouble sleeping.[136] Wackenhut sent Doe discovery requests seeking Doe's mental health records and the identity of her treating physicians or therapists. Wackenhut claimed that it was entitled to this information under the litigation exception to the physician/patient privilege, or alternatively, the offensive use exception.

The litigation exception to the physician/patient privilege states that communications or records relating to a particular condition are no longer privileged when the patient relies upon the condition as part of his or her claim or defense.[137] The Texas Supreme Court stated in *R.K. v. Ramirez*:[138]

> As a general rule, a mental condition will be a " part" of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself. In other words, information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.[139]

Wackenhut claimed that Doe had mental and emotional problems before the incident, and if it was not allowed access to her mental health records, the "jury [would] be left with the faulty impression that Doe was in perfect emotional health before the incident. . . ."[140] The trial court agreed and required Doe to answer the discovery. Doe filed a writ of mandamus to the Austin Court of Appeals, which reversed the trial court's ruling.

At the court of appeals, Wackenhut cited in support of the trial court's ruling the Supreme Court's decision in *Groves v. Gabriel*.[141] Wackenhut claimed that *Groves* was dispositive to the privilege issue in the case. In *Groves*, the plaintiff had brought several claims including one for intentional infliction of emotional distress.[142] The elements of intentional infliction of emotional distress are: "(1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe."[143] The supreme court held that since the *Groves* plaintiff had alleged severe emotional distress, including "post-traumatic stress disorder," she placed her mental and emotional condition into issue.[144] Severe emotional distress was an ele-

136. *Id.* at 610.
137. TEX. R. EVID. 509(e)(4) (stating that an exception to the privilege exists "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as part of the party's claim or defense"); TEX. R. EVID. 510 (d)(5)(same).
138. 887 S.W.2d 836 (Tex. 1994).
139. *Id.* at 843.
140. *Doe*, 22 S.W.3d at 610.
141. 874 S.W.2d 660 (Tex. 1994).
142. *Id.* at 660-61.
143. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993).
144. *Groves*, 874 S.W.2d at 661.

ment of a claim for intentional infliction of emotional distress, and "the jury [had to] make a factual determination concerning the condition itself."[145]

In *Doe*, the Austin Court of Appeals distinguished *Groves* in that the *Doe* plaintiff's mental condition did not affect whether or not Wackenhut was negligent.[146] In addition, she had "not alleged any 'severe emotional condition' that would place her mental condition in issue so as to trigger the litigation exception and waive her privilege regarding her mental health records."[147]

Doe is an important case in that it provides a proper and limited reading of *Groves*. In any personal injury, especially intentional torts, the victim will suffer some emotional distress. A plaintiff in such cases should be able to recover damages for that emotional distress without being required to waive the physician-patient or mental health privilege generally. To avoid unfairness, however, the trial court should view the disputed records in camera to ensure that relevant information is not withheld. For instance, if the *Doe* plaintiff's records had indicated a prior rape or fear of men, they should have been produced. Arguably unrelated disorders, like an eating disorder in high school or episodic depression over a parent's remote death might not be deemed relevant or discoverable.

In *In re Xeller*,[148] the real party in interest, Richard Locke, a Brown & Root employee, sued Brown & Root's compensation carrier, Highlands Casualty Company ("Highlands") and Dr. Charles Xeller, the physician whom the Texas Workers' Compensation Commission (the "Commission") chose to evaluate him under Texas Labor Code sections 408.122 and 408.125. Locke alleged causes of action for bad faith, fraud, and civil conspiracy claiming that Highlands, Dr. Xeller, and Dr. Xeller's employer, Medical Evaluation Specialists, Inc. ("MES"), conspired to defraud him by depriving him of deserved workers' compensation benefits. As part of his case, Locke attempted to subpoena records, correspondence, and payments between Highlands, MES, Dr. Xeller, and other MES physicians. He also sought Commission reports of medical examinations related to other Brown & Root employees, presumably to show a pattern of behavior.

Highlands, MES, and Dr. Xeller objected to providing the Commission reports on other employees as violating the physician-patient privilege found in Texas Rule of Evidence 509 and Texas Occupations Code section 151.001. The employee countered that the litigation exception should apply to allow the records' production and that a confidentiality order could protect the patients' rights to privacy. The court correctly brushed aside the plaintiff's argument, citing the fact that both civil and

145. *Ramirez*, 887 S.W.3d at 843.
146. *Doe*, 22 S.W.2d at 610.
147. *Id.*
148. 6 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

criminal penalties for unauthorized disclosure could not be overcome by a confidentiality order,[149] and that the litigation exception only applied when the patients, not a third party, were involved in litigation related to their medical condition.[150]

The case represents a common sense application of well-established statutory and constitutional privacy rights.[151] The case also makes it clear for the first time that individual patient's rights to privacy are to be protected, even in situations where large numbers of patients' information may be relevant or useful to demonstrate a pattern of illegal activity by a health insurer, workers' compensation insurer, or health maintenance organization. Litigants in HMO and insurance bad faith cases should see this opinion cited several times in the coming years. It remains to be seen if the reasoning will hold in the class action context where the lawyer may putatively represent the patients upon the date of filing, but not possess an express authorization from each for their medical records to be reviewed or produced.

B. Peer Review Privilege

In *In re Osteopathic Medical Center*,[152] the Fort Worth Court of Appeals expanded the medical peer review privilege to documents created as a result of a hospital slip and fall. After a slip and fall in an Osteopathic Medical Center ("OMC") bathroom, Maxine Erickson filed suit against the facility. During discovery, OMC asserted the medical peer review committee privilege to avoid the production of two documents, a Patient Quality Event Tracking Report (the "Patient Quality Report") and a Security Services Incident Report (the "Security Report"). After a hearing and inspection of the documents, the trial court ordered both produced. The Fort Worth Court of Appeals reversed the trial court as to the Patient Quality Report, but denied protection to the Security Report.[153]

The reasoning used by the court to protect the Patient Quality Report was simplistic and mechanical. The court emphasized that the Patient Quality Report was on a pre-printed form that included in bold type the phrases "For Quality Assurance Committee Use Only," "Do Not Copy," "Privileged and Confidential," and "Not Part of [the] Medical Record."[154] In addition to the pre-printed, self-serving language on the form, OMC's counsel offered the affidavit of OMC's peer review committee chairman. The chairman averred that the committee "evaluates cases involving patient care" and explained that "incident reports are prepared

149. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 4495, § 5.08(1) (Vernon 1976 & Supp. 2001); Tex. Lab. Code Ann. §§ 402.083, 402.086, 402.091 (Vernon 1996).
150. *See Xeller*, 6 S.W.3d at 625.
151. *See id.*
152. 16 S.W.3d 881 (Tex. App.—Fort Worth 2000, orig. proceeding) [hereinafter "OMC"].
153. *Id.* at 886.
154. *Id.*

immediately following an unusual occurrence to facilitate the peer review investigation process."[155] The committee chairman's affidavit went on to explain that the report was sent to the Hospital Quality Counsel Committee for analysis and then forwarded to him as chairman of the medical peer review committee.

The Fort Worth Court of Appeals completely misinterpreted the Texas Occupational Code in protecting the Patient Quality Report. The document referenced "the medical and health care provided to Ms. Erickson by members of . . . the staff . . . ."[156] It also described the victim's condition before and after the fall, a description of events, and the identities of witnesses. Nothing in the document described the deliberations of a peer review committee. Nothing in the case indicates that the document contained any comments evaluating patient care.[157] Nothing in the opinion indicates that a doctor or other health care provider covered by the privilege caused the bathroom fall. The opinion did indicate that *every* unusual occurrence (i.e. a slip and fall) would as a matter of facility policy result in a Patient Quality Report. Despite the fact that every "unusual" event would result in the creation of a Patient Quality Report, the Fort Worth Court of Appeals concluded that such reports are not made in the "ordinary" course of OMC's business.[158] In essence, every reaction, even a reaction required by published policies, to anything "unusual" cannot be considered within the ordinary course of business. The logic is astounding.

The Court's emphasis on the pre-printed form's recitation of peer review buzz words also mocks the privilege's real purpose. It is obvious from the opinion that OMC created the forms to expand the peer review privilege to any report of an accident, or unusual occurrence on OMC's premises. To the Fort Worth Court of Appeals, the emperor is apparently fully dressed.

The shallow analysis is apparent from the opinion's blatantly inconsistent statements. When the Patient Quality Report's use is initially described, the court admits it is first forwarded to the Hospital Quality Counsel Committee, a group whose purpose is never explained in the opinion. That committee then forwards copies of the Patient Quality Reports to the chairman of the medical peer review committee. Nothing in the record indicates that the peer review committee ever discusses or conducts deliberations on the reports. The only evidence offered was that the reports are forwarded to the medical peer review committee chairman. Later in the opinion, however, the Fort Worth Court of Appeals inconsistently states, "It is apparent from the face as well as the content

155. *Id.* at 884.
156. *Id.* at 886.
157. TEX. OCC. CODE ANN. § 151.002(a)(7) (Vernon 2000) defines medical peer review to mean "the evaluation of medical and health care services, including evaluation . . . of patient care provided by" those [professional health care] practitioners."
158. The peer review privilege does not protect records made in the regular course of business. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.032(c) (Vernon 1992).

of the Patient Quality Event Tracking Report that it was made *exclusively* for the Hospital's medical peer review committee."[159] The court justifies its gross expansion of the medical peer review committee privilege by ignoring the existence of the group that actually uses the Patient Quality Reports, the Hospital Quality Counsel Committee. This case stands for the proposition that a hospital can hide anything under the cloak of medical peer review if they use the right pre-printed form, send a copy to someone on the medical peer review committee, maintain the form's confidentiality, and obtain venue in the Second Judicial District.

C. ATTORNEY-CLIENT PRIVILEGE

In *Harlandale Indep. Sch. Dist. v. Cornyn*,[160] the Austin Court of Appeals holds that a lawyer's factual investigation on behalf of a client, if such investigation was made in the capacity of an attorney primarily retained to provide legal services, is protected from disclosure by the attorney-client privilege found in the Texas Government Code sections 552.107(1) and 552.103.[161] The Harlandale Independent School District's Board of Trustees, (the "Board of Trustees") filed suit against the Texas Attorney General seeking a declaration that a retained attorney's investigative report of a campus police officer's grievance is excepted from public disclosure.[162] When asked for an opinion prior to suit, the Open Records Division of the Texas Attorney General's office had concluded that the factual recitations in the report were required to be disclosed to a newspaper reporter under the Public Information Act. The Attorney General's opinion did not require the Board of Trustees to disclose the legal advice and opinions included in the report.[163]

The Board of Trustees filed suit in district court claiming that all of the report should be treated as privileged under the Texas Government Code section 552.107(1) and 552.103 and Texas Rule of Evidence 503. The district court agreed with the Attorney General and ordered the factual recitations in the report disclosed. The Board of Trustees appealed and prevailed before the Austin Court of Appeals, which held that all of the report, including the details discovered during the attorney's factual investigation, were privileged because the "primary" purpose for hiring the attorney was the Board of Trustee's seeking of legal advice. In reaching its decision, the *Harlandale* court looked closely at the Board of Trustee's reasons for hiring an attorney, as opposed to an investigator.[164]

In its decision, the Austin Court of Appeals concedes the long-established rule that the attorney-client privilege does not apply to communications between a client and a person licensed as an attorney if the

159. *OMC*, 16 S.W.3d at 886 (emphasis added).
160. 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. filed).
161. TEX. GOV'T CODE ANN. §§ 552.107(1), 552.103 (Vernon 1994 & Supp. 2001).
162. *Harlandale*, 25 S.W.3d at 329.
163. *Id.*
164. *Harlandale*, 25 S.W.3d at 334.

attorney is being employed in a capacity other than a lawyer, such as an accountant or notary.[165] The fact-sensitive question for the Austin Court of Appeals in *Harlandale* was whether the attorney, Peggy Pou, was retained to act primarily as an attorney or an investigator. After looking at the evidence closely, the *Harlandale* court concluded that the school district retained Ms. Pou "primarily" for legal advice and that "the investigative fact-finding was not the ultimate purpose for which she was hired."[166]

The proof the Austin Court of Appeals used to reach its conclusion provides lawyers with an excellent example of circular logic. The court relies upon an affidavit from one board member stating that although an investigator was considered, an attorney was chosen expressly because the Board of Trustees wanted the report to be confidential.[167] The same logic could be used to hire an attorney to act as an accountant, auditor, claims investigator, or notary. Instead of looking at the client's desire for confidentiality as the determining factor, the more reasoned approach is to look at the attorney's actions.

The *Harlandale* opinion appears to be at odds with a case reported in the Survey last year, *In re Texas Farmers Insurance Exchange*,[168] wherein the Texarkana Court of Appeals held that when an insurance company hires an attorney to conduct a routine claim investigation, the communication between the lawyer and insurance company about the results of the investigation do not fall under the attorney-client privilege.[169]

Justices Hecht and Owen penned a stinging dissent to the Texas Supreme Court's refusal to hear *Texas Farmers,* stating, "[t]his sole rationale of the court of appeals is simply anti-insurer and overlooks the fact that attorneys in all manner of situations routinely investigate their clients' claims, hire investigators to do the same, and report the results to the clients."[170] Justice Hecht and Owen are correct, but so is Attorney General Cornyn and the *Texas Farmers* court. The factual recitations in an investigating attorney's report to a client should be discoverable, but not the legal analysis that accompanies it. If the legal analysis cannot be dissected or redacted from the actual report, the reasonable alternative is to allow the factual information in the report to be fully produced in another format, with the court ensuring that no facts are "lost in the translation."[171] Justices Hecht's and Owen's dissent in the *Texas Farmers* case may in fact be calling for a compromise position similar to the one proposed here - the facts in the report may need to be disclosed in some manner depending on the availability of the information from other

165. *Id.* at 332.
166. *Id.* at 334.
167. *Id.*
168. 990 S.W.2d 337 (Tex. App.—Texarkana 1999, orig. proceeding).
169. *Id.* at 341.
170. *In re* Tex. Farmers Ins. Exch., 12 S.W.3d 807 (Tex. 2000) (Hect, J. & Owen, J., dissenting).
171. Ramirez v. Tex. State Bd. of Med. Exam'r, 995 S.W.2d 915, 924 (Tex. App.—Austin 1999, pet. denied).

sources, but the actual client communication should, if possible, be held sacred and inviolate.

In *Nguyen v. Excel Corp.*,[172] the Fifth Circuit reviews a trial court's order allowing the deposition of defense counsel in an action brought under the Fair Labor Standards Act (FLSA). The employees sued Excel, a meat processing company, alleging that they were entitled to payment for time spent donning and doffing protective and sanitary clothing and time spent washing themselves both before and after their shifts.[173] In partial response to the employees' action, Excel asserted that its actions in refusing to pay the employees for the donning, doffing, and cleaning time were not willful because, consistent with 29 U.S.C. § 260, its actions were in good faith, and Excel had reasonable grounds for believing that its acts or omissions did not violate the FLSA.[174] As part of its efforts to overcome Excel's good faith defenses, the employees sought the depositions of Excel's counsel to determine whether Excel could have reasonably relied upon legal advice that the disputed work periods were not subject to pay.[175]

Although Excel conceded that it had consulted with its counsel regarding its obligations under the FLSA, it did not assert as part of its good faith defense under 29 U.S.C. § 260, reliance on advice of counsel.[176] Despite its assertions that it was not relying upon its counsel's advice to prove its good faith defense, the employees claimed that Excel executives could not articulate the basis for the company's good faith belief that the disputed time was non-compensable without first taking breaks in their depositions to confer with counsel.[177] The employees contended that they were entitled to depose the lawyers because what those lawyers told the executives about the FLSA's requirements became part of the executives' knowledge at the time the good faith defense arose. The executives did refer to their attorneys' advice generally during their depositions.[178]

In Excel's appeal of the trial court's order requiring the deposition of its counsel, the company contended that, "despite the fact that the advice of counsel might be relevant to the inquiry as a permissible basis of establishing the good faith defense, [Excel] did not and never intended to raise reliance-on-advice-of-counsel as support for its good faith defense."[179] Excel further argued that "generic" references to reliance on the advice of counsel in the executives depositions did not waive the attorney-client privilege.[180]

172. 197 F.3d 200 (5th Cir. 1999).
173. *Id.* at 202.
174. *Id.* at 203.
175. *Id.* at 204.
176. *Id.*
177. *Id.* at 209.
178. *Nguyen*, 197 F.3d at 208.
179. *Id.* at 205.
180. *Id.*

The employees took the position that any assertion of a 29 U.S.C. § 260 good faith defense requires that every basis of that defense be examined, not just those bases that the defendant intends to specifically rely upon at trial. The employees focused on section 260's subjective element, arguing that if a defendant could pick and choose particular pieces of knowledge available to it and discard others, the full knowledge of the defendant, and its true subjective state of mind, could not be known. The employees relied upon precedents from the Eleventh and Second Circuits holding that the invocation of the "good faith" defense waives the attorney-client privilege.[181]

The Fifth Circuit declined to address the issue of whether assertion of a good faith defense under 29 U.S.C. § 260 waives the attorney-client privilege. It instead ruled more narrowly that under the facts of the case, Excel waived the attorney-client privilege under traditional common law analysis, giving guidance to all Fifth Circuit practitioners about how the privilege can be waived through deposition testimony. In reviewing the executives' testimony, the *Nguyen* court held:

> By failing to assert the attorney-client privilege when privileged information was sought, Excel waived the privilege. Then, Excel selectively disclosed portions of the privileged confidential communication, thereby implicitly waiving the privilege.... A client waives the attorney-client privilege, however, by failing to assert it when confidential information is sought in legal proceedings. Inquiry into the general nature of the legal services provided by counsel does not necessitate an assertion of the privilege because the general nature of services is not protected by the privilege. Further inquiry into the substance of the client's and attorney's discussions does implicate the privilege and an assertion is required to preserve the privilege.[182]

The court held that because Excel's executives were allowed to testify in their depositions in response to questions designed to elicit privileged information, Excel waived the attorney-client privilege by its failure to assert objections. The court also held that Excel waived its attorney-client privilege by selectively disclosing some confidential communications.[183]

The *Nguyen* court next turned to deciding the extent of Excel's waiver. The Excel executives had disclosed the directions they provided to their counsel and the legal research undertaken by their attorneys. Objections were raised by Excel's counsel when the executives were asked to disclose the "conclusions" of their attorneys' research. The *Nguyen* court held that these objections were "too little, too late," and found that the disclosed communications were significant enough to require waiver of the "whole" communication.[184]

---

181. *Id.*
182. *Id.* at 206.
183. *Id.* at 206-07.
184. *Nguyen*, 197 F.3d at 208.

The last part of the *Nguyen* opinion focuses on how discovery of the attorney-client communications may take place. Excel argued, and the court accepted, the three factors used by the Eighth Circuit in determining when and if counsel may be deposed. First, there must be no other means exists to obtain the information. Second, the information sought must be relevant and non-privileged. Third, the information must be crucial to preparation of the case.[185] In looking at the first criteria, the court rejected Excel's argument that the employees' counsel must first re-depose the Excel executives.

In reviewing the trial court's reasons for allowing the defense counsel's depositions, the *Nguyen* panel noted that the executives had provided vague and non-specific answers in their depositions and interrogatory responses that were "so incomplete and ambiguous that they were without meaning. . . ."[186] Although the panel stated it might have given the executives another chance to be candid and responsive, the trial court's decision not to do so did not rise to the level of an abuse of discretion.[187]

The *Nguyen* court summarily found the information sought, advice from the lawyers to Excel on whether non-payment of wages for the disputed time periods was legal under the FLSA, both relevant and non-privileged.[188]

The third factor, whether the information sought was crucial to case preparation, required the *Nguyen* court to look at the order permitting the depositions to determine if reasonable limits were placed upon their scope. The court correctly held that the only evidence in possession of the attorneys crucial to the issue of the Excel's executives' subjective knowledge under 29 U.S.C. § 260 was the information provided by the attorneys to the Excel executives at the time the decision was made not to compensate employees for the disputed time. Presumably, the executives' reactions to that information would also be crucial. The court reviewed the order allowing the attorneys' depositions to determine if it limited the testimony subject matter accordingly. The *Nguyen* court found that the parts of the magistrate's order requiring the attorneys to disclose their opinions regarding the case, regardless of whether those opinions were limited to the good faith defense and regardless of whether those opinions had yet been communicated to the client, were overly broad. The court determined that inquiries into areas of work-product not part of the communications related to the FLSA good faith defenses and the attorneys' opinions on the merits of the lawsuit were off limits to the employees' counsel.[189]

The *Nguyen* court obviously believed that attorney-client waivers are to be assessed on a communication-by-communication and subject-by-

185. *Id.*
186. *Id.* at 209.
187. *Id.*
188. *Id.*
189. *Id.* at 210-11.

subject basis. If part of a communication is disclosed, a determination must be made if the part is significant enough to require disclosure of the whole communication. Disclosure of a communication on a particular topic or issue does not necessarily mean that the entire subject matter of the attorney-client relationship is open for inquiry. Areas worthy of special protection include attorney work product and mental impressions. Key elements in determining waiver and the extent of waiver are whether the information is relevant, and if so, crucial to the parties' presentation of their case.

In *In re Fontenot*,[190] the Fort Worth Court of Appeals held that a questionnaire/narrative sent by a physician to his medical negligence liability carrier prior to suit being initiated was not a "witness statement" discoverable under Texas Rule of Civil Procedure 192.3(h), but was instead privileged under Texas Rule of Evidence 503(b)(1)(B) and (D). In doing so, the Fort Worth Court of Appeals ignored the literal language of Rule 192.3(h) and two of its sister courts that came to the opposite conclusion.

Rule 192.3(h) states in relevant part:

> A party may obtain discovery of the statement of *any person* with knowledge of relevant facts—a "witness statement"—*regardless of when the statement [is] made.* A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording.[191]

The rule is clear that parties to a suit are to be included. The application of the rule to statements like the one at issue in the case was simple and straightforward in *In re Jimenez*,[192] *In re Team Transp., Inc.*,[193] and *In re W & G Trucking, Inc.*[194] To support its incorrect and legally baseless decision, the Fort Worth Court of Appeals makes the following slippery slope argument:

> To make a physician's confidential communications with his malpractice insurer and attorneys during that time period discoverable would not only have a chilling effect on the free flow of information between a client and his attorney or legal representative, but also defeat the purpose of the statutory scheme by increasing litigation and insurance costs.[195]

The above statement on its face is nonsensical. Litigation cannot be "increased" by holding that documents created prior to litigation must be produced *after* litigation is filed as a part of Rule 192's disclosure requirements. The issue only arises in the case of filed suits, so cases evaluated and settled before trial have no relevance to the analysis.

---

190. 13 S.W.3d 111 (Tex. App.—Fort Worth 2000, orig. proceeding).
191. TEX. R. CIV. P. 192.3(h) (emphasis added).
192. 4 S.W.3d 894 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).
193. 996 S.W.2d 256 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).
194. 990 S.W.2d 473 (Tex. App.—Beaumont 1999, orig. proceeding).
195. *In re Fontenot*, 13 S.W.3d at 114.

The court also implies that making well-defined witness statements discoverable is the equivalent of making "a physician's confidential communications" discoverable.[196] The assumption is both simplistic and untrue. Rule 192.3(h) does not cover all communications, only written and/or recorded statements. A physician can communicate freely with his insurer without worrying about Rule 192.3(h) by telephone, direct discussions, and other methods.

The *Fontenot* court also seems to want to create a new privilege, the insurer/insured pre-suit investigation privilege. The *Fontenot* court apparently believes that communications between a *potential* client and representative of a *potential* client are privileged, as it holds the insurance company was a "client representative" under Texas Rule of Evidence 503(a)(2)(A).[197] To be a client representative, the client must have already formed an attorney-client relationship with an attorney. Nothing in the record or opinion indicates such a relationship existed at the time the insurer received the physician's questionnaire/narrative. The fact that previous correspondence to an attorney was enclosed with the questionnaire/narrative does not make the physician a client or the insurer a client representative. The *Fontenot* court simply assumes an attorney-client relationship existed because the insurer was burdened with an obligation to provide the insured physician with a legal defense under his insurance policy.[198] The record is void of any evidence that the defense was actually being provided at the time the questionnaire/narrative was mailed.

The insurance company desiring to protect a statement from a client should tell its insured not to send written communications on the matter until a lawyer has been retained. Once a lawyer is retained and an attorney-client relationship is established, the communications between the attorney and the client, even if thereafter forwarded to the insurer, should be covered by the attorney-client privilege. If an attorney has not yet been retained for the purpose of handling the claim for the physician, no attorney-client relationship can exist, so the insurance company cannot be a "client representative" under Texas Rule of Evidence 503(a)(2). The Fort Worth Court of Appeals holding that an insurance company is a client representative simply because it possesses an obligation under an insurance contract to provide a defense to any suit subsequently filed is legally unsupportable, denigrates the very relationship it seeks to protect, and creates a new privilege, the insurer/insured privilege.

V. CONCLUSION

The development of civil evidence jurisprudence continues. The twin goals of limiting the use of evidence deemed irrelevant or unreliable and maintaining the integrity of our jury system still pull against one another at times. Some courts and judges still express fundamental doubts about

196. *Id.*
197. *Id.* at 113.
198. *Id.*

the competence of peer juries and our founding fathers' faith in the jury as the best representative of societal values. On balance, however, recent opinions indicate the desire to curtail the right to trial by jury is ebbing in favor of the more enlightened and traditional approach.