

RULES CONCERNING EXPERT WITNESSES
FOR TSCPA SEMINAR

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I.

Introduction

As expert witnesses, you are not necessarily interested in the rules of evidence and rules of procedure that govern the presentation of your testimony to the judge or jury. However, I believe you should know certain important rules that could have a substantial impact of *how* and *whether* your testimony will be presented. You should not assume that the attorney with whom you are working knows all of the applicable rules of procedure and evidence. However, even if you are working with the wisest attorney in the world, a knowledge *on your part* of certain rules will facilitate your preparation and, perhaps, avoid certain problems at trial that may have a damaging effect on your ability to present your full opinion.

II.

Summary of Rules

What follows is my summary of the rules of evidence and procedure that relate to expert testimony. The summary is based on the Texas Rules of Evidence and the Texas Rules of Civil Procedure, but I have noted important points about the federal rules, where they are different. In notes in the outline, I also briefly discuss significant court rulings that interpret these rules.

I. Experts (Article 7 of the Texas Rules of Civil Evidence)

A. Opinion testimony by lay witnesses, TEX. R. CIV. EVID. 701:

1. Non-expert may testify on
 - a. Opinions, and
 - b. Inferences
2. If

- a. Rationally based on perception of witness, and
- b. Helpful to
 - (1) A clear understanding of his testimony, or
 - (2) The determination of a fact in issue

B. Testimony by experts, TEX. R. CIV. EVID. 702:

1. Rule:

- a. A person qualified as an expert
- b. May testify in the form of
 - (1) opinion or
 - (2) otherwise^{1/}
- c. If the testimony will assist the trier of fact to
 - (1) Understand the evidence, or
 - (2) Determine a fact in issue.

2. Subject areas of expert testimony:

- a. Scientific,
- b. Technical, or
- c. Other specialized knowledge.

3. Means by which one may be qualified as an expert:

- a. Knowledge,

^{1/} TEX. R. CIV. EVID. 703 refers to an “opinion or *inference*“ which an expert may base upon the “facts or data” of a case.

- b. Skill,
- c. Experience,
- d. Training, or
- e. Education.

C. Bases of opinion testimony, TEX. R. CIV. EVID. 703^{2/}:

- 1. Expert's "opinion or inference"
 - a. May be based upon
 - (1) Facts or
 - (2) Data
 - b. Either
 - (1) Perceived by the expert, or
 - (2) Made known to the expert.
 - c. When?
 - (1) At the hearing, or
 - (2) Before the hearing.

^{2/} Rule 703 "allows an expert to predicate his opinion on:

- (1) his personal observations;
- (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and
- (3) information otherwise inadmissible in evidence, if it reasonably relied upon by experts in the witness' field."

J. Sutton, *Article VII: Opinions and Expert Testimony*, 20 U. HOUS. L. REV. 445, 462 (1983) (Texas Rules of Evidence Handbook).

2. The “facts or data” need not be admissible in evidence if they are of the type
 - a. Reasonably relied upon by experts
 - b. In the particular field
 - c. In forming “opinions or inferences” upon the subject.^{3/}
- D. Opinion on ultimate issue, TEX. R. CIV. EVID. 704:
 1. Opinion or inference testimony otherwise admissible is not objectionable because it
 2. Embraces an ultimate issue^{4/} to be decided by the trier of fact.
 3. Notes:
 - a. Make sure the question on an ultimate issue is predicated on a correct statement of the applicable legal rules or definitions
- E. Disclosure of facts or data underlying expert opinion, TEX. R. CIV. EVID. 705:

^{3/} You should remember that, although you may rely on inadmissible hearsay (subject to the requirements stated above), you are probably not permitted to testify as to the *substance* of the inadmissible hearsay. In other words, if you are examining the solvency of a company, you may rely on hearsay statements that would not otherwise be admissible, but you probably cannot state the substance of those hearsay statements. You should speak with your attorney at a very early stage about the information on which you relied in forming your conclusions, so that the attorney can decide whether special steps need to be taken to make the underlying information admissible.

^{4/} Rule 704 codifies the holding in *Carr v. Radkey*, 393 S.W.2d 806, 812 (Tex. 1965), which had been ignored by some later decisions.

There was some question under Rule 704 as to whether the expert could use legal terms such as “negligence.” The answer is now “yes” after *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 365 (Tex. 1987), as long as (i) the “opinion is confined to the relevant issues” and (ii) the opinion “is based on proper legal concepts.” The Texas Supreme Court has recently stated that an expert opinion will be inadmissible unless it states the “legal basis” and “reasoning” for the opinion. *Anderson v. Snider*, 34 Tex. Sup. Ct. J. 516, 517 (April 13, 1991).

1. Expert may state opinion or inference and
 - a. Give his reasons therefore
 - b. Without prior disclosure of the underlying facts or data
 - c. Unless the court otherwise requires.
2. But the experts may be required on cross-examination to disclose the underlying facts or data.

II. Hearsay (Article 8 of the Texas Rules of Civil Evidence)

A. Definitions, TEX. R. CIV. EVID. 801:

1. Statement is either
 - a. An oral or written verbal expression^{5/}, or
 - b. Nonverbal conduct of a person, if it is intended by him as a substitute for verbal expression
2. Declarant: Person who makes a statement
3. Matter asserted: Either
 - a. Any matter explicitly asserted, or
 - b. Any matter implied by a statement^{6/}, *if the probative value of the statement as offered flows from the declarant's belief as to the matter.*
4. Hearsay:

^{5/} FED. R. EVID. 801 more restrictively speaks in terms of “assertions” instead of “expressions,” so as to exclude from the definition of hearsay non-assertive verbal expression.

^{6/} FED. R. EVID. 801 does not consider this type of indirect assertion (assertion used inferentially) to be hearsay.

- a. Statement
 - b. Other than one made by the declarant while testifying at trial or hearing
 - c. Offered in evidence
 - d. To prove the truth of the matter asserted.
5. Statements which are not hearsay:
- a. Prior statement by witness. Declarant testifies at trial and is subject to cross-examination, and the statement is
 - (1) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a
 - (a) Trial
 - (b) Hearing
 - (c) Other proceeding
 - (d) Deposition
 - (2) Consistent with his prior testimony and is offered to rebut an express or implied charge of
 - (a) Recent fabrication
 - (b) Improper influence
 - (c) Improper motive.
 - (3) One of identification of a person made after perceiving him.
 - b. Admission by a party opponent. Statement is offered against a party and is
 - (1) His own statement in either
 - (a) Individual capacity, or

- (b) Representative capacity.
- (2) A statement by someone else of which he has manifested his
 - (a) Adoption or
 - (b) Belief in its truth.
- (3) A statement by a person authorized by him to make a statement *concerning the subject*
- (4) A statement made by his agent or servant
 - (a) Concerning a matter within the scope of his agency or employment and
 - (b) Made during the existence of the relationship.
- (5) Statement by a co-conspirator of a party
 - (a) During the course and
 - (b) In furtherance of the conspiracy.
- c. Depositions taken and offered in accordance with TEX. R. CIV. P. 207
 - (1) Deposition must have been taken from same proceeding
 - (2) Unavailability of deponent is not a requirement for admissibility (*accord* TEX. R. CIV. P. 207(1)(a))
- B. Hearsay rule, TEX. R. CIV. EVID. 802:
 - 1. Hearsay is not admissible except as allowed by
 - a. These rules
 - b. Other rules prescribed by the Supreme Court

- c. Law^{7/}
2. Inadmissible hearsay
 - a. Admitted without objection
 - b. Shall not be denied probative value merely because it is hearsay
- C. Hearsay exceptions: availability of declarant immaterial, TEX. R. CIV. EVID. 803 (total of 24 exceptions to the hearsay rule)^{8/}
 1. “Business records” exception. TEX. R. CIV. EVID. 803(6). Requirements for such documents:
 - a. Document created at or near the time of the event described in the document
 - b. By a person with knowledge of the event,
 - c. If kept in the course of a regularly conducted business activity, and
 - d. If it was the regular practice of the business to create such documents.
 2. Absence of entry in business records. TEX. R. CIV. EVID. 803(7). Lets you establish that documents satisfying the requirement of TEX. R. CIV. EVID. 803(6) to not contain an entry relating to a matter, as long as the matter was usually recorded by the company.
 3. Public records and reports. TEX. R. CIV. EVID. 803(8). Documents produced by a public agency that pertain to
 - a. The activities of the agency,
 - b. Matters that the agency must observe by law and must report by law, or

^{7/} The FDIC has a special hearsay exception in 12 U.S.C. § 1820(e), which makes former bank records in the custody of the FDIC admissible for the truth of the matter asserted.

^{8/} I have not list all 24 exceptions in Rule 803. I have listed only the ones likely to be encountered by CPA expert witnesses.

- c. Factual findings resulting from an investigation made pursuant to authority granted by law.
- 4. “Learned treatises.” TEX. R. CIV. EVID. 803(18). Portions may be read into evidence but the treatise may not be received as an exhibit. The treatise must
 - a. Concern a subject of history, medicine, or other science or art, and
 - b. Be established as a reliable authority by
 - (1) Testimony of the witness,
 - (2) Admission of the witness,
 - (3) Other expert testimony, or
 - (4) Judicial notice.^{2/}
- D. Hearsay exceptions: declarant must be unavailable, TEX. R. CIV. EVID. 804 (3 exceptions to the hearsay rule)
 - 1. Definition of “unavailable”
 - a. Witness is exempted from testifying by a ruling of the court on the ground of some privilege
 - b. Witness refuses to testify despite an order from the court to testify
 - c. Witness states that he or she has a lack of memory on the subject matter of the testimony
 - d. Witness is unable to testify because of death or a physical or mental infirmity
 - e. Witness is absent from the hearing (including trial) and the proponent of his or her statement has been unable to procure the witnesses’ testimony by subpoena or other reasonable means

^{2/} The judge may take “judicial notice” of a fact (such as reliability of a treatise) if the fact is generally known and not seriously in dispute.

2. Exceptions to hearsay rule which require unavailability of the witness to be established:
 - a. Former testimony
 - (1) At another hearing of the same or a different proceeding, or
 - (2) A deposition take in another proceeding,
 - (3) But only if the person against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
 - b. “Dying declarations,” which consist of
 - (1) Statements made while the declarant believed death was immanent,
 - (2) Concerning the cause of what the declarant believed to be his or her impending death.
 - c. “Statement of personal or family history,” concerning the declarant's birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history.

III. Rules of Procedure Concerning Depositions

- A. Depositions may be read to the judge or jury at trial (or played back on videotape), regardless of whether the witness is “available”^{10/} for trial. *See* TEX. R. CIV. EVID. 801(e)(3); TEX. R. CIV. P. 207(1)(a).
- B. All evidentiary objections to the deposition testimony are reserved until the deposition testimony is offered at trial, except that the following objections will be waived unless made during the deposition:
 1. Objections to the form of the questions; and

^{10/} A witness is usually considered to be “unavailable” if he or she is beyond the subpoena power of the jurisdiction in which the trial is pending (usually 100 miles). *See* TEX. R. CIV. EVID. 804(a)(5).

2. Objections to the responsiveness of answers. TEX. R. CIV. P. 204(4).

IV. Experts and Discovery

- A. For testifying experts, the opposing party is entitled to the following, based on TEX. R. CIV. P. 166b(2)(e)(1):
 1. Name, address, and phone number of the expert;
 2. Subject matter of the testimony for the expert;
 3. The mental impressions and opinions held by the expert; and
 4. The facts known to the expert which relate to or form the basis of the mental impressions and opinions held by the expert.
- B. The work product of a consulting expert is privileged, and so are the communications between that expert and the attorney, as long as the work product of that expert is not relied upon by a testifying expert. TEX. R. CIV. P. 166b(2)(e)(1).

V. New Rule For Admissibility of Expert Testimony in Federal Courts

- A. The federal rules on expert testimony are virtually identical to the Texas rules. However, a recent decision from the Fifth Circuit may give federal trial judges far more discretion in deciding *whether* an expert may testify.
- B. The new rule stated in *Christophersen v. Allied Signal Corporation*, 939 F.2d 1106, 1110 (5th Cir. 1991), applies the following test for determine whether expert testimony is admissible:
 1. Whether the witness is qualified to express an expert opinion, FED. R. EVID. 702;
 2. Whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, FED. R. EVID. 703;
 3. Whether in reaching his conclusion the expert used a well-founded methodology; and

4. Assuming the expert's testimony has passed Rules 702 and 703, and the *Frye* test [dealing with methodology], whether under FED. R. EVID. 403 the testimony's potential for unfair prejudice substantially outweighs its probative value.
- C. The opinion in *Christophersen* stresses the fact that an expert's testimony may be inadmissible if he or she is relying on “critically” incomplete or erroneous data.