Professor Dave Schlueter received his B.A. degree from Texas A & M University in 1969 and his J.D. degree from Baylor University School of Law in 1971. In 1981, he received his LL.M. from the University of Virginia. He served on active duty as an Army JAGC officer from 1972 until 1981 and during that time served as an appellate counsel at the Army’s Government Appellate Division, as Chief of Criminal Law at Fort Belvoir, Virginia, and as an instructor in the Criminal Law Division at the Army’s Judge Advocate General’s School in Charlottesville, Virginia. He resigned his regular Army commission in 1981 to accept an appointment by Chief Justice Burger to the office of legal counsel to the Supreme Court of the United States. In that position, he provided general and special counsel advice to Chief Justice Burger, the Court, and the individual Justices. He retired with the rank of Lieutenant Colonel in 1997, from the United States Army Reserve, JAGC.

In 1983, Professor Schlueter accepted a position on the law faculty at St. Mary’s University in San Antonio, Texas where he has taught Evidence, Trial Advocacy, Constitutional Law, Criminal Law and Criminal Procedure. He served as an Associate Dean for Academics from 1984 until 1989. In 1999, he was appointed Director of Advocacy Programs and in January 2000, he was named Hardy Professor of Law. In 2002, he was named an Outstanding Law Faculty member.

From 1988 to 2005, he served as the Reporter to the Federal Rules of Criminal Procedure Advisory Committee, a position to which Chief Justice Rehnquist appointed him. He is a fellow in the American Law Institute and is a life fellow of the American Bar Foundation and the Texas Bar Foundation. He is regularly listed in Marquis’ Who’s Who in American and Who’s Who in American Law.


He has been married to Linda L. Schlueter, President of Trinity Legal Center, for 37 years. They have two, married, adult children, Jennifer Cooper (an elementary school teacher in Austin, Texas) and Jonathan (an attorney in San Antonio, Texas).
Evidence Update: Opinions, Hearsay & Confrontation

David A. Schlueter

Hardy Professor of Law & Director of Advocacy Programs
St. Mary's University School of Law
San Antonio, Texas

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EVIDENCE UPDATE: OPINIONS, HEARSAY & CONFRONTATION

David A. Schlueter*

I. INTRODUCTION

As a general principle, courts prefer facts over opinions and in-court testimony over hearsay. Nonetheless, the Rules of Evidence—both State and Federal—allow a proponent to present both opinions and hearsay. Those two topics seem to arise with great frequency in litigation, whether the opinion is from a lay witness concerning the value of her stolen ring or the expert out-of-court statements of lab technician about the results of a lab test. In a criminal case, if the prosecution introduces hearsay against the defendant, there is a related Confrontation Clause issue.

This presentation focuses on those topics—opinion testimony, hearsay, and the Right to Confrontation.

II. CURRENT ISSUES REGARDING OPINION TESTIMONY

A. Lay Opinions — Rule 701

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

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

Speedy Stop Food Stores, Ltd. v. Reid Road Mun. Util. Dist. No. 2, 282 S.W.3d 652, 658 (Tex. App.—Houston [14th Dist.] 2009, — —)—In a condemnation case, the appellant company offered an affidavit of the vice president of the general partner of the appellant, on behalf of the appellant; The court held that despite disagreement among appeals courts, the court extended the Texas Supreme Court’s holding in Porras v. Craig, 675 S.W.2d 503, 504-05 (Tex. 1984) that property owners who are familiar with the market value of their property, including real property, may

* Ms. Hayley Ellison, Ms. Nicole Hines-Glover, Ms. Shelly Enyart, and Mr. Clay Hackett assisted me in preparing these materials.
testify regarding that value, even if not designated as expert witnesses. Even though *Porras* only applied the "Property Owners Rule" to a natural person, the court extended the rule to apply to corporate property owner, permitting a corporate representative to testify on corporation's behalf. The court reasoned that permitting only natural persons to testify in this capacity would give natural persons greater property rights than corporate property owners; further, there is no reason to conclude that natural persons are more reliable than corporate owners regarding the value of their property.

*City of Emory v. Lusk*, 278 S.W.3d 77, 89 (Tex. App.—Tyler 2009, --- ---)—In an inverse condemnation case, the trailer park owner's testimony regarding the income he could have made by leasing a lot on his property was purely speculative and did support jury finding of lost earnings. Because owner had never rented a double-wide trailer in his park, his testimony using the income approach to value was based on pure conjecture as to how much income the leasing of a double-wide would generate. Further, he did not take expenses into account in calculating foregone income. The court said that conclusory opinions have no probative value and will not support a verdict, even if no objection was made at trial.

B. Expert Opinions—Texas Rule of Evidence 702

**RULE 702. TESTIMONY BY EXPERTS**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Before permitting a witness to offer an "expert" opinion the court must first determine that:

- The witness is an expert under Rule 702;
- The expert's opinion testimony is relevant;
- The expert's opinion is based upon an application of reliable or valid principles to a set of facts;
- The expert's opinion is relevant to the facts of the case; and
- The expert's opinion will assist the trier of fact.
The procedural mechanism for making that decision is for the trial judge to conduct a pretrial "gate-keeper" hearing. In order to properly preserve error, counsel should be prepared to object, specifically, to each of the above elements. The risk is that making a Daubert reliability objection, for example is that an appellate court will not consider that to be specific enough objection to whether the witness was a qualified expert under Rule 702.

1. In General — Is Expert Testimony Required?

City of Laredo v. Garza, 293 S.W.3d 625, 632 (Tex. App.—San Antonio 2009, — —)—The defendant relied on lay testimony to prove causation of his injuries to his accident while on the job. The court held that lay testimony was not enough to prove causation. The court ruled that it was necessary to have expert testimony regarding the defendant’s injuries. According to the court, expert testimony must be based on reasonable medical probability and expert testimony is necessary when establishing causation for medical conditions outside the common knowledge and experience of jurors. In this case, there were discrepancies regarding the defendant’s injuries that needed to be evaluated by a medical expert. The problems with the timeliness and extent of the defendant’s injuries in relationship to his claimed accident would not be easily discernable by jurors with any general experience and common sense.

Freeman v. State, 276 S.W.3d 630, 641 (Tex. App.—Waco 2008, vacated on other grounds, 286 S.W.3d 370)—At his DUI trial, the defendant presented the testimony of a forensic toxicologist that the defendant’s appearance on a jail videotape was inconsistent with his intoxilyzer results, of which there was no tape. The court held that the trial court did not abuse its discretion in excluding that testimony. The expert had previously been prohibited from testifying to a defendant’s appearance without the aid of field sobriety tests; expert did not know defendant’s blood-breath ratio; expert provided no data, scientific theory, or documentary evidence to support his position that intoxication can be determined from viewing a videotape; and expert did not attempt to establish general acceptance of this method in the relevant
community. Further, whether a person appears intoxicated is within the knowledge and expertise of average jurors; thus, the jury did not need the expert's testimony in order to evaluate defendant's appearance on the jail videotape.

2. **Who is an Expert?**

a. **There is No Bright-Line Rule**

*Quinones v. Pin*, 298 S.W.3d 806, 812 (Tex. App.—Dallas 2009, — —)—In a medical malpractice case, the trial court did not abuse its discretion in ruling that physician was qualified to opine about the appropriate informed-consent standard of care. A physician who has sufficient specialized knowledge about the risks inherent in a specific medical procedure or treatment should be qualified to render opinions about the informed-consent standard of care for that procedure or treatment, even if he or she does not possess broader knowledge about whether that procedure or treatment is the best one based on the patient's particular condition. Because the expert established in his report that he was a board-certified internist with experience in treating a wide variety of illnesses, diseases, and complaints and had had numerous occasions to prescribe the medication at issue, the expert established that he had knowledge sufficient to testify to the accepted standard of care for obtaining informed consent to the use of the medication.

*Hendrick Med. Ctr. v. Conger*, 298 S.W.3d 784, 788 (Tex. App.—Eastland 2009, — —)—Trial court erred by denying a motion to dismiss on grounds that an expert's report was inadequate. The court reversed, holding that the report by an expert physician on medical standard of care did not establish within the four corners of the expert's report that he had any familiarity, training, or experience that would allow him to opine as to that standard of care. Though expert stated in his report that he was familiar with the diagnosis and treatment of post-operative patients, he did not say that he was familiar with the formulation of policies and procedures of hospitals in the ICU setting similar to that involved in the case at bar.
Carreras v. Trevino, 298 S.W.3d 721, 726 (Tex. App.—Corpus Christi 2009, — —)—Expert’s report was inadequate because it did not demonstrate that he was qualified to render an expert medical opinion in the case at bar, and trial court abused its discretion by not granting appellant’s motion to dismiss on that ground. A medical expert from one specialty may be qualified to testify if he has practical knowledge of what is customarily done by practitioners of a different specialty under circumstances similar to those at issue in the case. But expert’s curriculum vitae blatantly contradicted his report’s summary assertion that he had knowledge of the accepted standard of medical care for knee replacement procedures, and expert’s report was conclusory in its assertion of knowledge of the subject matter in question. Further, the expert’s curriculum vitae did not demonstrate how he gained the requisite experience or training to testify as an expert on the matter.

Philipp v. McCreedy, 298 S.W.3d 682, 689 (Tex. App.—San Antonio 2009, — —)—The involved allegations of negligent emergency room treatment of an orthopedic injury. The expert physician’s qualifications, as set forth in his report and his curriculum vitae, sufficiently qualified him to offer an opinion on the proper treatment and care of a trimalleolar fracture and the complications that flow from the failure to properly treat such an orthopedic injury. The expert’s report adequately established his credentials as a board certified practitioner of emergency medicine; that expert had substantial training and experience in emergency medicine, including orthopedic injuries; and that expert was actively practicing medicine in rendering medical care services relevant to the claim. Because the claim alleged negligent provision of emergency care, the fact that expert was not certified in orthopedic medicine did not preclude trial court from properly finding that expert was qualified to testify as to the cause of appellee’s injuries. Thus, trial court did not abuse its discretion in finding that expert was qualified to testify.

Salazar v. State, 298 S.W.3d 273, 279 (Tex. App.—Fort Worth 2009, pet. ref’d)—At the defendant’s DUI trial, the trial court did not abuse its discretion by overruling the defendant’s objection to a police officer’s testimony regarding the Horizontal Gaze Nystagmus (HGN) test, which was administered to appellant before his drunk driving arrest. The State adequately established
the police officer's qualification to perform the test and to testify to defendant's performance on the test. The police officer testified that he had been a police officer since 1992; he attended an extensive field sobriety testing school in 1995; he conducted field sobriety tests on multiple test subjects during his training; he is certified to administer field sobriety tests; in the previous four years he attended two four-hour standard field sobriety courses, in which he practiced the HGN test roughly fifty times; he performed the HGN test between two hundred and three hundred times in the field; and he fully explained the technique for administering the HGN test. Thus, the police officer's own testimony adequately established that he was qualified to perform the HGN test and testify regarding its application to the defendant.

Spin Doctor Golf, Inc. v. Paymentech, L.P., 296 S.W.3d 354, 359-361 (Tex. App.-Dallas 2009, ---)---In a suit over lost profits brought by a golf club manufacturer against a credit card processing firm, the trial court did not abuse its discretion in excluding manufacturer's managing partner as an expert witness due to lack of qualification. No matter how extensive, witness's experience in evaluating business opportunities, executing marketing plans for businesses, and monitoring business results for golf club manufacturers was not knowledge, skill, experience, training, or education sufficient to qualify him as an expert about lost profits. The type of industry is irrelevant to the accounting principles used to conduct profits analysis.

Granbury Minor Emergency Clinic v. Thiel, 296 S.W.3d 261, 266-67 (Tex. App.—Fort Worth 2009, ---)---This case arose from a medical malpractice claim where the defendant, a general family practice doctor, failed to diagnose appendicitis. The plaintiff presented expert testimony from a board-certified emergency room physician. The court said that an expert can give his opinion about the causal connection between the injury claimed and the departure from the standard of care if he is otherwise qualified to give opinions on such causal connections under Rule 702. The medical condition involved in the claim determines the applicable standard of care. The expert's ability to opine on such is determined by his familiarity and experience with the condition, not by the defendant doctor's area of expertise.
Methodist Hosp. v. Shepherd-Sherman, 296 S.W.3d 193, 197-98 (Tex. App.—Houston [14th Dist.] 2009, ——) — In a medical malpractice lawsuit, the court held that a doctor was qualified as an expert witness to give an opinion about the standard of care in hospital admissions procedures when a patient requested a particular surgeon. The doctor was qualified because of his experience with the admissions process and was not automatically disqualified from giving opinions about other types of health care providers, so long as the doctor was familiar with the standard of care of the other health care providers based on his work and supervisory experience.

Champion v. Great Dane Ltd. P’ship, 286 S.W.3d 533, 545 (Tex. App.—Houston [14th Dist.] 2009, ——) — An injured truck driver brought a negligence and products liability suit against the refrigerated truck trailer manufacturer. An expert witness’s testimony as to a design defect was properly excluded because the expert demonstrated no specialized knowledge regarding the particular design of the rear uncovered gutter of refrigerated trailers. Even though the expert held the same undergraduate degree in mechanical engineering as some of appellee’s qualified experts, the expert’s degree did not demonstrate that he possessed specialized knowledge about the trailer component at issue in this case. Further, the expert’s experience in designing workplace products and in designing solutions for hazards in walking surfaces did not qualify him as experienced, by logical extension, in designing solutions for hazards in refrigerated trailers.

Bryan v. Sherrick, 279 S.W.3d 731, 733 (Tex. App.—Amarillo 2007, no pet.) — Expert testimony submitted by plaintiff in medical malpractice action was insufficient to establish causal connection between the doctor’s alleged breach of standard of care and the plaintiff’s injury, thereby supporting summary judgment ruling in favor of defendant-doctor. The expert, an emergency room physician, had no specific surgical training or experience treating the type of injury sustained by plaintiff. Further, upon cross-examination during his deposition, the expert testified that he could not say that plaintiff would not have suffered the same injury even if the defendant-doctor had immediately referred plaintiff to a surgeon, which plaintiff alleges defendant should have done.
House v. Jones, 275 S.W.3d 926, 931 (Tex. App.—Dallas 2009, pet. den.)—A medical oncologist was qualified to prepare a medical expert report necessary for medical malpractice action, specifically with regard to standard of care and alleged breach of standard by defendant physician. Though the expert was not an orthopedist like defendant, the expert was certified in internal medicine and medical oncology and had substantial knowledge and experience with patients presenting the same condition as plaintiff. Further, the expert claimed that the defendant's alleged breach fell short of accepted standards of care that apply regardless of specialty. This conclusion was sufficiently supported by the background, training, and experience the expert stated in her report. Thus, the expert's report sufficiently stated her qualifications and the trial court did not abuse its discretion by denying the motion to dismiss on basis of expert qualifications.

b. Lessons Learned—A Checklist

• The case law is clear, there are no bright line tests for determining whether a witness may offer “expert” testimony. And we do not always have an unlimited list of experts who fit perfectly within our needs in a particular case. Nonetheless the decisions in this area signal that “one size will not fit all” and that the litigator must present an expert who fits the case.

• The following factors should be carefully considered in selecting an expert---

  _____ Education? (formal or informal?)
  _____ Experience? How Obtained? When? Where?
  _____ Knowledge?
  _____ Certified? When?
  _____ Published any Articles, Pamphlets?
  _____ Teaching Experience?
  _____ Credibility?
  _____ Reputation Among Peers?
4. **Bases of Expert’s Opinion — Rule 703**

**RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

- An expert may rest his or her opinion on a variety of bases—including otherwise inadmissible evidence, a topic covered under the section on hearsay and the Confrontation Clause, *infra*.

- As discussed in the following sections, it is not always clear to the courts that the experts relied on the correct factual basis.

5. **Reliability of Underlying Theories, Principles or Methodologies**

a. **In General**

- Federal Rule of Evidence 702 and federal and Texas case law require that the proponent of expert testimony establish that the expert’s opinion be based upon reliable principles. That proposition was set out by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In that case the Court held that the Federal Rules of Evidence had replaced the *Frye* test, which required the trial judge to determine if the expert’s opinion was based on generally acceptable scientific principles. In *Daubert*, the Court also set out a list of four factors to assist the trial judge in making that decision—now commonly referred to as the *Daubert* factors.

- *Daubert* was actually preceded by the Texas Court of Criminal Appeals in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. Appeals 1992), which rejected the *Frye* test for determining whether expert testimony on novel scientific evidence is admissible. In doing so, the Court suggested a list of 7 factors for the trial court to consider. The Texas Supreme Court followed *Daubert*
in *DuPont DeNemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Court suggested a list of 6 factors to be considered by the trial judge in deciding whether the underlying theories or methodologies were reliable.

- Under *Daubert* and *Robinson*, the proponent must establish the underlying reliability by a preponderance of the evidence. *Kelly*, however requires that the proponent establish the underlying reliability by clear and convincing evidence.

The following chart demonstrates the similarities and differences in the three standards:

**COMPARISON OF ADMISSIBILITY STANDARDS**

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<td><em>Daubert</em>: Validity, i.e., reliability</td>
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<td>a. valid underlying scientific theory</td>
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Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 643 (Tex. 2009)—The Court concluded that an electrical engineer’s expert opinion in products liability action against clothes dryer manufacturer (Whirlpool), that a design defect in the dryer caused a fatal fire, was legally insufficient to support a verdict against Whirlpool. The expert did not produce or know of scientific testing (conducted by him or others) to support his theory. The expert referenced another study but could not explain how the testing data from that study supported his ultimate conclusion, as the other study involved substantially dissimilar conditions than those at issue in the case at bar. Though testing is not always required to support an expert’s opinion, lack of relevant testing to the extent it was possible is one factor that points toward a determination that an expert opinion is unreliable. Further, the expert’s theory was developed for litigation in this case, his opinions and theories had not been published for peer review, and he did not indicate that his theory had been accepted as valid by any part of a relevant scientific or expert community. The Court stated:

When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research and methodologies underlying the expert’s conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions.

Lincoln v. Clark Freight Lines, Inc., 285 S.W.3d 79, 91 (Tex. App.—Houston [1st Dist.] 2009, —)—The trial court did not err by admitting accident reconstruction expert’s testimony regarding the cause of motor vehicle accident. The expert used the test of coefficient of friction that is widely used in the field and is generally accepted as being scientifically reliable. Even though the expert used a different type of vehicle than was involved in the accident to calculate coefficient of friction, the differences were revealed and explained on the record, and the differences were immaterial and “readily understood.” Further, the expert’s testimony was properly admitted as reliable because his methodology was grounded in methods and
procedures of science and was not based merely on subjective belief or unsupported speculation.

Subirias v. State, 278 S.W.3d 406, 413 (Tex. App.—San Antonio 2008, pet. ref.)—At the defendant’s trial for intoxication manslaughter and intoxication assault, the prosecution introduced expert opinion on retrograde extrapolation by the chief toxicologist for the county’s medical examiner’s office. The court held that the expert’s testimony was reliable. The defendant argued that the expert had limited knowledge of the defendant’s individual characteristics and did not know how the blood was analyzed. However, the court said, not every individualized fact needs to be known to the expert in order for the expert to produce a reliable extrapolation. In this case, the expert was aware of the subtleties of the science, the risks inherent in extrapolation, and he had the ability to apply the science and explain it with clarity. This case differed from Mata v. State, 46 S.W.3d 902 (Tex. Crim. App. 2001) (retrograde extrapolation in that case was unreliable) because here three tests were run on the defendant over a reasonable span of time on which the expert could form an opinion; therefore, the trial court’s decision was not outside the zone of disagreement and the expert opinion was reliable.

b. Expert Testimony on Soft Sciences

In re E.C.L., 278 S.W.3d 510, 520 (Tex. App.—Houston 2009, denied)—At the defendant’s trial on charges of killing his father, the trial court excluded defense expert testimony regarding battered-child syndrome. The Court of Appeals reversed. To be admissible under Rule 702 and Kelly, the expert’s testimony must help the trier-of-fact understand the evidence or determine a fact in issue. Where “soft sciences” such as psychology, are involved, the court looks at whether the field is legitimate, whether the subject matter of the expert’s testimony is within the scope of that field, and whether the testimony properly relies upon the principles in that field. In this case, the expert properly relied upon principles in his field; it was shown that his twenty years of experience in psychology and examination
of the defendant’s records demonstrated sound methodology and should have been admissible.

6. Recurring Problems

- The cases make clear that the courts are often skeptical about expert testimony and the possibility that a jury may gave undue weight to such evidence. In accepting or rejecting expert testimony, some patterns have emerged as to what sorts of problems counsel is likely to encounter in presenting expert testimony. The following cases demonstrate several common problem areas.

a. Analytical Gaps

*Hall v. Hubco*, 292 S.W.3d 22, 29 (Tex. App.—Houston [14th Dist.] 2006, denied)—A landowner sued a fill dumper for breach of contract which required that only clean dirt be dumped. The trial court properly excluded expert testimony on the costs of removing the contaminated soil because it was unreliable. Expert testimony can be unreliable if there is too great of an analytical gap between the data relied upon and the conclusion. In this case, the expert testified that soil sampling was crucial in determining the cost to remove the waste. But the expert only based his decision on two soil samples and testified that more soil samples should have been taken. Based on the expert’s inability to accurately determine the cost, the expert’s testimony was unreliable.

*Plunkett v. Conn. Gen. Life Ins.*, 285 S.W.3d 106, 117 (Tex. App.—Dallas 2009, ——)—Testimony by expert toxicologist in a mold case, regarding property damage, failed to raise a fact issue sufficient to defeat summary judgment because the testimony was scientifically unreliable and based solely on expert’s “ipse dixit.” The expert provided no empirical evidence or methodology that explained the validity of his extrapolations, which apply evidence from one apartment to all apartments in the complex; thus, the expert failed to “close the analytical gap” between conclusions and foundational data. Further,
the expert offered no actual test data from any source specifically supporting his theory.

*Transcontinental Ins. Co. v. Crump,* 274 S.W.3d 86, 97 (Tex. App.—Houston [14th Dist.] 2008, granted)—The case arose out of workman’s compensation ruling which awarded death benefits to the appellee, the wife of the deceased employee. The court held that the trial court did not abuse its discretion in failing to apply the factors listed in *Robinson* to the appellee’s expert’s opinion on causation. That expert’s opinion, the court said, was developed through “differential diagnosis” of the deceased patient. Under that methodology, the doctor compares the patient’s symptoms with known diseases, conducts physical examinations, collects data on the patient’s history and illnesses and then analyzes the data in deciding how to best treat the patient; it “enjoys widespread acceptance in the medical community” and is the basic method of internal medicine. Thus, there was no “analytical gap” between the doctor’s opinion and the bases of which it was founded. It was therefore properly admitted.

**b. *Ipse Dixit* Opinions**

*City of San Antonio v. Pollock,* 284 S.W.3d 809, 818 (Tex. 2009)—In a lawsuit over a closed municipal landfill, the court held that a scientists’ expert testimony offered to prove in utero exposure to toxic landfill gas were the kind of naked conclusions that cannot support a judgment. Admission of the evidence constituted reversible error. Both experts relied on data that did not support their conclusions. One expert’s conclusion was directly contradicted by his own data. Although city did not challenge any part of either expert’s analysis, the fact that recovery was premised on the experts’ *ipse dixit* conclusions was harmful error.

*Penner Cattle, Inc. v. Cox,* 287 S.W.3d 370, 373 (Tex. App.—Eastland 2009, denied)—The case arose from a contract dispute over the costs of raising cattle. The court
noted that the livestock dealer was qualified to offer an expert opinion on the cattle business, and on estimates of lost profits. But the dealer failed to provide any objective facts, figures, or data to substantiate his opinion.

c. Opinions Based on Conjecture or Speculation

Ingram v. Deere, 288 S.W.3d 886, 903 (Tex. 2009)—In a breach of contract case arising out of a dispute involving a multidisciplinary pain clinic, a defense expert testified that the plaintiff’s reputation could benefit the clinic, but admitted that he did not know the plaintiff. The Supreme Court held that that expert testimony was unsupported and amounted to mere assumptions, which could not establish that the plaintiff contributed valuable property to the clinic.

Merck & Co., Inc. v. Ernst, 296 S.W.3d 81, 97-99 (Tex. App.—Houston [14th Dist.] 2009, — —)—In a wrongful death lawsuit against a drug manufacturer, concerning the use of Vioxx, the plaintiff’s experts opined that cause of death resulted from a blood clot that was either subsequently broken up or dislodged. Autopsy results showed no indication of a blood clot, and no scientific or medical literature supported the plaintiff’s theory. Citing the Robinson factors, the court concluded that the plaintiff’s experts’ opinions on cause of death were based on conjecture and speculation and were not supported by facts in evidence. The court rejected the plaintiff’s argument that by using the Differential Diagnosis method, the doctor had adequately consider alternate causes; that methodology does not exclude all other risk factors; it only requires exclusion of likely causes until “the most probable one is isolated.” The exclusion of risk factors does not amount to the exclusion of causes.

d. Consideration of Alternate Causes

Thomas v. Uzoka, 290 S.W.3d 437, 452 (Tex. App.—Houston [14th Dist.] 2009, denied)—In a wrongful death case arising from a head-on automobile collision, the court held that expert testimony by two police officers called by
the plaintiff, regarding cause of automobile collision, was properly admitted. The first officer presented expert testimony about the cause of the accident. Using that data, the second expert offered testimony about the speed of the defendant’s vehicle. The court concluded that the first officer did consider alternate causes of the collision and found them inconsistent with physical evidence found at the scene. Further, that officer was not obligated to interview eyewitnesses to the collision when none came forward and the accident occurred in “the middle of nowhere.” The second police officer’s expert testimony regarding vehicle speed based on computer program (WinCrash) computations was properly admitted because both the program itself and the input methods used are generally accepted within the accident-reconstruction community.

7. **Ineffective Assistance of Counsel?**

Counsel’s failure to raise an objection concerning the admissibility of expert testimony may result in a claim that counsel was ineffective in representing a criminal defendant.

*Hawkins v. State*, 278 S.W.3d 396, 402 (Tex. App.—Eastland 2008, no pet.)—Defendant’s counsel did not file a Daubert motion in regards to the State’s DNA expert and a forensic chemist. The court held that the failure to do so did not mean that he was rendered ineffective assistance of counsel. The defendant did not provide any evidence of what the effect of the motion could have been, so he could not overcome the presumption that his trial counsel’s conduct was reasonable.

*Weatherly v. State*, 283 S.W.3d 481, 493 (Tex. App.—Beaumont 2009, pet. ref’d)—The court held that the defense counsel was not ineffective for failing to conduct a voir dire of a police officer, who offered expert opinion testimony regarding the defendant’s “grooming” of the sexual assault victim (committing small offenses to see if the victim makes an outcry, then graduating over time to more serious offenses). The defendant argued only that the officer’s testimony was inadmissible expert opinion because it was unreliable and the officer lacked expertise. But the State established the expertise of the officer and showed that the officer had a sufficient basis for the opinion. The defendant could not establish
that objecting to the officer's testimony or conducting a voir dire of the officer would have resulted in the exclusion of the testimony.

III. **Hearsay Problems**

A. **In General — What is Hearsay?**

**RULE 801. DEFINITIONS**

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Matter Asserted.** "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(e) **Statements Which Are Not Hearsay.** A statement is not hearsay if:

1. **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

   (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;
   (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;
   (C) one of identification of a person made after perceiving the person; or
   (D) taken and offered in a criminal case in accordance with Code of Criminal Procedure article 38.071.

2. **Admission by party-opponent.** The statement is offered against a party and is:

   (A) the party's own statement in either an individual or representative capacity;
   (B) a statement of which the party has manifested an adoption or belief in its truth;
   (C) a statement by a person authorized by the party to make a statement concerning the subject;
   (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(3) Depositions. In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Rule of Civil Procedure 207. Unavailability of deponent is not a requirement for admissibility.

B. Hearsay and the Sixth Amendment — The Right to Confrontation

1. Background

- Assuming a court concludes that proffered evidence is hearsay, Rules 803 and 804 contain a long list of exceptions to the hearsay rule—e.g., excited utterances, statements made for purposes of medical treatment, past recollection recorded, business and public records, and the learned treatise exception—to name a few. Assuming that the proponent can establish a predicate for the hearsay exception, the out of court statement is admitted as “admissible hearsay.”

- There are also “exemptions” or “exclusions” from the hearsay rule, listed in Rule 801. For example, statements by a party are normally considered “nonhearsay” because the Rule says that they are not hearsay, even though they otherwise satisfy the definition of hearsay.

- In criminal cases, there is a special problem associated with hearsay statements. If the prosecution offers a hearsay statement against the defendant, the defendant’s Sixth Amendment right “confront” the hearsay declarant (a witness) may be violated.

2. Testimonial Hearsay—Crawford v. Washington

- In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court rejected 25 years of case law applying what had been labeled the Ohio v. Roberts reliability test, in deciding whether a hearsay statement violated the Confrontation Clause. The Court held in Crawford that key questions are whether the offered statement is “testimonial” hearsay and, if so, whether the accused had an opportunity to cross-examine the hearsay declarant.

- Citing historical sources, the Court said that the original intent of the Clause was not to exclude unreliable evidence but instead to exclude evidence which is considered “testimonial” and has not
been cross-examined by the accused. In addressing that question of what is considered a "testimonial" statement, the court said:

Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.

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Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

- If the trial court determines that a proffered statement is testimonial, the prosecution must either (a) produce the declarant as a witness or (b) first show that the declarant is unavailable as a witness and second, the accused was provided an opportunity to cross-examine the declarant.

3. Are Business Records & Lab Reports Testimonial Hearsay?

- A current issue is whether business and laboratory reports (which are a form of business record) are considered testimonial hearsay under *Crawford*. There are both Texas and Federal cases holding that traditional business records, not prepared for the purpose of litigation, are nontestimonial. There are other cases holding that public records
are nontestimonial. And there are cases holding that lab reports may not be testimonial if they are based upon objective analysis. But those cases must be read in light of Melendez-Diaz, infra.

- In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), the Supreme Court (by a five to four vote) held that sworn "certificates of analysis" demonstrating the results of lab tests on suspected drugs, were within the core definition of testimonial hearsay. The certificates had been sworn to before a notary public. The Supreme Court noted that although the documents were called certificates, they were clearly affidavits, which had been prepared specifically for the purpose of litigation. In a footnote, the Court noted that "documents prepared in regular course of equipment maintenance may well qualify as nontestimonial records." 129 S.Ct. at 2532, n.1. The Court apparently adopted the reasoning used by lower federal courts — that is, if the record is admissible under 803(6) or 803(8) it is nontestimonial because it is not prepared for the purpose of litigation. It is important to note that in Melendez, Justice Thomas was the crucial swing vote. He believed that the reports in the case clearly fell within the Crawford definition of testimonial, because they were "sworn" statements. It is not clear what Justice Thomas would say if the document was simply a lab report.

4. Getting Around the Testimonial Hearsay Problem—Tex. R. Evidence 703?

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert’s reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) Voir dire. Prior to the expert giving the expert’s opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert’s opinion under Rule 702 or 703, the opinion is inadmissible.
Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert’s opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Wood v. State, 299 S.W.3d 200, 213 (Tex. App.—Austin 2009, reh’g overruled)—At trial, the prosecutor called an expert medical examiner to testify as to the cause of the murder victim’s death. The witness had not conducted the autopsy but referred to the findings in the autopsy and then offered his opinion that the victim had died from blunt force trauma. The court concluded that first, the autopsy report was testimonial hearsay, based upon its ready of Melendez-Diaz, supra. The court distinguished contrary rulings from other Courts of Appeals that autopsy reports are not testimonial, because those cases preceded Melendez-Diaz. Second, citing Rules 703 and 706, the court held that the expert could rely on otherwise inadmissible testimonial hearsay to support his opinion. But the expert in this case, however, did more than merely offer his expert opinions. The expert also disclosed to the jury the testimonial statements in the autopsy report on which his opinions were based. That violated Rule 705(d)’s requirement that such disclosure must only be offered as explanation and support for the opinion—not as substantive evidence—and that its probative value is not outweighed by the danger that the facts and data will be used for another, impermissible purpose. Further, no limiting instruction was given.

But the error was harmless because the only testimonial hearsay disclosed to the jury that was of any value to the State’s case was the statement that the victim had suffered twenty-one rib fractures, and the jury already knew that the victim had been beaten to death and was already aware of the severity of that beating from the autopsy photographs. The Confrontation Clause is not violated merely because an expert bases an opinion on inadmissible testimonial hearsay. Though other report was cumulative of and added nothing to expert’s testimony, it did not contribute to appellant’s conviction or punishment.
IV. CONCLUSION

V. ADDITIONAL RESOURCES


