



Vidaurri, Lyde, Rodriguez & Haynes, LLP

A South Texas Law Firm
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Newsletter

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In This Issue: The Role of Experts in Litigation

OUR FIRM

Vidaurri, Lyde, Rodriguez & Haynes, LLP, is a full service insurance defense law firm representing insured individuals, professionals and companies across a broad spectrum of industries, including healthcare, transportation, retail, and manufacturing.

KEY POINTS

- Expert testimony must assist the jury.
- An expert must be qualified by his knowledge, skill, experience, training, or education.
- There are two main tests for determining the reliability of expert testimony.
- Regardless of which test is employed, the trial judge remains the gatekeeper of expert testimony.

NEWS

VLRH would like to welcome Glenn D. Romero to the firm. Glenn will serve as "Of Counsel" to the firm, focusing on defense of catastrophic personal injury defense matters. Welcome to the firm, Glenn!

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One question that may come up in several different situations is the use of experts in litigation. The use of an expert involves balancing several factors, including whether the testimony is relevant, whether the expert is qualified, whether the expert's opinions are reliable, and what test to use to determine reliability.

Rule 702 of the Texas Rules of Civil Procedure provides that, "[i]f 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."

The main question to be asked is whether the jury's resolution of a disputed fact question will be aided by an expert's opinion. For example, if an investigating police officer did not see an auto accident, take any measurements, take any photos, or make field notes regarding the scene, then he may have little in the way of expert "opinions" to help the jury in deciding the cause of the accident. On the other hand, a qualified accident reconstructionist who takes measurements of the accident scene, inspects the vehicles involved in the accident, and reviews statements/deposition testimony from the participants and eyewitnesses may be able to provide the jury with valuable "opinions."

The next step is to determine if the expert's opinions are reliable. The Gold Standard for determining reliability is found in the seven (7) *Daubert/Robinson* factors. These factors include:

1. The extent to which the expert's opinion or theory can or has been tested.
2. The extent to which the expert's proffered opinion or theory has been subjected to peer-review and publication.

3. Whether the potential rate of failure has been calculated for the expert's opinion or theory.
4. The extent to which the expert's proffered opinion has been generally accepted in the scientific community.
5. The extent to which the expert's proffered opinion or theory relies upon subjective interpretation.
6. Whether the expert's proffered opinion or theory was generated solely for litigation purposes.
7. The extent to which the expert attempts to rule out potential explanations or theories other than his own.

Not all of these factors must be met in order for the opinion to be deemed reliable. An alternative test for determining reliability is the *Gammil* analytical gap test. This test provides that an expert must explain his opinions to a point where there is no analytical gap between the facts and his opinions.

There is a lot of debate regarding *Daubert/Robinson* and *Gammil*. Some believe that the two are mutually exclusive, and others believe that they can overlap. In the end, the use of one test over the other depends on the type of case and the type of expert utilized. As a general rule, courts tend to be more willing to use *Gammil's* analytical gap test in auto accident cases.

There is no debate about the role of the trial judge in expert testimony. The trial judge is the gatekeeper of evidence—including expert testimony. Just like the requirements that the proffered expert opinion must assist the jury and the proponent of such opinion must have his expertise determined by the trial judge if challenged, the determination of whether a proffered opinion is reliable is also made by the trial judge.