Hiring an Expert Witness in Massive Exposure Transportation Suits

William F. Allred
Shareholder
COOPER & SCULLY, P.C.
900 Jackson Street
Suite 100
Dallas, Texas 75202
(214) 712-9500
(214) 712-9540 (fax)
william.allred@cooperscully.com

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HIRING AN EXPERT WITNESS IN MASSIVE EXPOSURE TRANSPORTATION SUITS

Presented by: William F. Allred and Amy L. Agnew
Prepared by: Alex Pilawski

In massive exposure transportation cases, especially when an eighteen wheeler is involved in an accident causing severe injuries or death, many cases will turn on how the accident happened and how the accident could have been prevented. A plaintiff's approach is to always look at the regulations and take a hyper-technical interpretation of the rules related to trucking equipment and the hiring of drivers. Many cases will deal with an expert's interpretation of the Department of Transportation regulations and the Federal Motor Carrier Safety statute. The need for a quality expert who can communicate effectively to a jury is paramount in such cases.

Set forth in this paper are the basic rules a court will look at in qualifying expert witnesses. This paper outlines the applicable rules and cases that set forth the basic guidelines and criteria for qualifying an expert witness in Texas. This paper deals with the technical requirements for hiring an expert witness, but the presentation will deal with the practical effects of what you will need to look at when meeting with and hiring an expert witness. This paper discusses the preservation of evidence in anticipation of a claim or lawsuit. Finally, this paper discusses E-discovery, the applicable rules in Texas, and an approach to protecting your business regarding E-discovery.

EXPERT TESTIMONY

APPLICABLE RULES

The admissibility of evidence, and more specifically expert evidence, is governed in both the Texas and Federal Rules by Rules of Evidence 401, 402, 403, and 702. The Texas and Federal Rules are substantively identical.

The Texas Rules state as follows:

- Rule 401: "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

- Rule 402: All relevant evidence is admissible, except as otherwise provided by the Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

- Rule 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

- Rule 702: 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.

In summary the rules only allow for expert testimony from properly qualified experts whose testimony is relevant and reliable without being unfairly prejudicial, confusing, or misleading to the jury. Additionally, the expert testimony must help the jury to understand certain evidence or determine a fact in issue.

I. CASES REGARDING EXPERT TESTIMONY

The key for expert testimony is relevance and reliability. In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the Supreme Court declared that trial judges have the responsibility to act as a gatekeeper to exclude unreliable expert testimony and gave trial court judges great discretion to determine whether the expert testimony is reliable. The Supreme Court later clarified this gatekeeper role, stating it applies to all expert testimony, not just expert testimony based in science. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

In Daubert, the Court set forth a non-exclusive checklist of specific factors for trial courts to use in assessing the reliability of scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards of controls; and (5) whether the technique or theory has been generally accepted in the scientific community. Prior to Daubert scientific expert evidence was only admissible if the principles and methods used had achieved "general acceptance" in the relevant field. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Daubert reduced this requirement to merely a factor in determining reliability. 509 U.S. at 588. The Court in Khumo stated that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, but would depend upon "the particular circumstances of the particular case at issue." 526 U.S. at 150.

The Texas Supreme Court embraced Daubert and held that Texas Civil Evidence Rule 702 requires the proponent of an expert opinion to show that the expert's testimony is relevant to the issues in the case and is based on a reliable foundation. E.I. DuPont De Nemours v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995). The Court adopted the Daubert standards for assessing reliability and also added two additional guidelines: (1) the extent to which the technique relies on the subjective interpretation of the expert; and (2) the non-judicial uses that have been made of the theory or technique. Id. at 557. Later, the Court explained that the existence of an analytical gap between the date upon which the expert relies and the conclusion the expert reaches can be an indicator the expert's testimony is unreliable. Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997). The Texas Supreme Court has made clear that the factors set out in Robinson for assessing the reliability of expert testimony are nonexclusive and will differ with each particular case and the nature of the evidence offered. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998). While all of the Robinson factors are not required to be establish prior to

admission of the expert testimony, the court should not admit testimony where "there is simply too great an analytical gap between the data and the opinion proffered." Id. at 727.

II. PRACTICAL APPLICATION

1. Qualifications

The first step in choosing an expert is to review the expert's credentials and experiences in order to ensure the expert is qualified to testify under Rule 702. In determining if an expert is qualified under Rule 702, the litigator should first review the expert's curriculum vitae for his knowledge, skills, experiences, training, or education that is relevant to the case at hand.

Next, the litigator should interview the expert to determine any additional information regarding the extent of the expert's relevant experience and expertise; the amount of effort required to achieve any designations; areas of responsibilities attributable to a title or position; whether articles were published in peer review journals; and whether presentations were made before peer groups.

If the expert is retained to testify, then the expert's deposition should be taken so this information can be used in establishing the expert's qualifications at trial. The litigator should also try to uncover any weaknesses in the expert's qualifications that could be used by opposing counsel to challenge the expert. Additionally, the litigator should inquire whether the witness has been qualified as an expert on the same subject matter in other cases. The litigator should also inquire if the expert's testimony has ever been disallowed by another court, and if so, why the testimony was disallowed.

2. Personality

In addition to the expert's qualification, you also want to consider the expert's personality. An ideal expert witness is one who is confident and charismatic; the jury is more likely to believe somebody that they like. The best practice is to meet with the witness and have an informal interview, taking enough time to adequately gauge the expert's personality and determine if this expert will serve as a valuable addition to your client's case. It can be a struggle to get the expert to meet with you before you have hired him because the expert wants to be hired as quickly as possible in order to begin charging for his time.

However, it is important to explain the importance of this meeting to the expert, as you do not want to end up with an expert who will not serve your client well. Expert witnesses are expensive and you do not want to end up with a scenario where the expert, though very knowledgeable, is not liked by the jury and thus his or her testimony is given little weight, adding nothing to your case but a large bill. Although qualifications are very important because they serve as a precursor to admissibility, a likeable personality, however, is also important as it is a precursor to credibility which will result in an effective and positive impact on the case.

3. Relevance

To ensure that the expert's testimony is relevant to the case at hand, make sure the expert properly documents the facts used in coming to his or her conclusions. Also, make sure the expert discloses any assumptions. In terms of facts, the litigator should ensure that the expert had enough facts to reach a conclusion and whether the facts used were from a credible source.

Additionally, the litigator should inquire whether the expert verified any facts received from the client and whether the expert conducted any independent investigation to gather more facts. In terms of assumptions, make sure the expert clearly states any assumptions used and properly justifies the use of the assumption. Overall, the goal is to plainly show how the expert's conclusions and opinions directly relate to the facts and circumstances of your case. This will guarantee the expert's testimony is relevant and also makes the testimony easy to follow for the jury which will also have a positive impact on your client's case.

4. Reliability

Both Daubert and Robinson state that expert testimony must be reliable to be admissible and give the trial court the responsibility to act as a gatekeeper and keep unreliable expert testimony from reaching the jury. In Texas, the litigator should evaluate the reliability of the testimony in terms of:

- The extent to which the theory has been or can be tested
- The techniques' potential rate of error
- Whether the theory has been subjected to peer review and publication
- Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community
- Whether the underlying theory or technique relies upon the subjective interpretation of the expert; and
- The non-judicial uses that have been made of the theory or technique

Though expert opinions that meet all of these criteria will almost certainly be deemed reliable, every factor on the Robinson list does not have to be met. See Gammil, 972 S.W.2d at 726. It is also important to remember that these factors are nonexclusive and the trial court has a great deal of discretion in its decision to admit the expert testimony.

III. PREPARING THE EXPERT WITNESS TO HAVE A POSITIVE IMPACT AT TRIAL

After selecting a qualified expert, the next step is to prepare the expert witness in order to have a positive impact at trial. This step is often overlooked but is very important in obtaining effective expert testimony. A prepared expert's testimony has a greater chance of coming across as clear and credible to the jury.

A. Basics and Importance of Preparing Your Expert Witness

The first point that you want to stress with your expert witness is to always remain truthful and to make sure the expert does not give evasive or tricky answers. See Stephen D Easton, The Power of the Truth: An Honest Attorney's Guide to Winning Jury Trials in a Dishonest World, 62 Tex. B. J. 234, 238 (March 1999). Additionally, you should instruct the witness to avoid speculation and listen carefully to the questions asked. See Richard C. Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1, 14-15 (1995). You want to tell your expert to simply answer the question asked without volunteering additional information, yet to always remain truthful and non-evasive. Easton, supra note 1 at 238. Another key point to explain to the

expert is that although he has been hired by you, he or she is not to act as your advocate while testifying. Remind the expert to concede points if necessary, otherwise the testimony may be considered unreasonable by the jury, resulting in severe damage to or complete loss of his credibility. Further, that credibility is the main technique in persuading the jury to believe you client's side. Id. at 238-39. Expert witnesses are more likely to be familiar with this concept than lay witnesses but it is still a good idea to reiterate the importance of credible testimony.

After going over the general guidelines with your expert you'll want to disclose all the relevant facts regarding your case. Although the expert is very knowledgeable on the subject matter of his testimony, it is important to explain any nuances that are particular to this case. You should also explain the case strategy so the expert's testimony can be successfully integrated into the presentation of the case. This will also help the jury to follow the expert's testimony, thus maximizing its impact.

Before the expert testifies, you should also discuss any weaknesses that you perceive in the expert's proposed testimony. Opposing counsel will undoubtedly attempt to cast the expert as not being credible and simply a "hired gun," by attacking the expert's qualifications, methods, and/or conclusions. By anticipating these attacks, and discussing them with the expert, there is a greater chance that the impact of opposing counsel's cross-examination will be minimal.

B. Rules Governing Witness Preparation & Ethical Considerations

The American Bar Association has established rules governing attorney conduct though these rules do not provide much guidance regarding witness preparation. The Texas State Bar also has set forth the Rules of Professional Conduct and the rules are almost identical to the rules established by the American Bar Association.

In Texas, the pertinent rules to preparing expert witnesses are Rule 3.04(b) and Rule 8.04(a)(3). First, Rule 3.04(b) states that a lawyer shall not "counsel or assist a witness to testify falsely." This rule simply states that you cannot ask the witness to lie on the witness stand or ask the witness to alter his or her usual methods in order to reach conclusion that, though false, would benefit your client's case. Also, Rule 8.04(a)(3) states that a lawyer shall not engage in any conduct involving dishonesty, fraud, deceit or misrepresentation. This broad rule encompasses all conduct by the lawyer, however, in the context of witness preparation, states the lawyer cannot present the expert's conclusions in a manner that misrepresents the expert's true conclusions or deceives the jury.

Preservation of Evidence

A. What is spoliation?

Spoliation is the improper destruction of evidence. Proof of the improper destruction may give rise to a presumption that the missing evidence would be unfavorable to the spoliator. Walker v. Thomasson Lumber Co., 203 S.W.3d 470, 477 (Tex. App.—Houston [14th Dist.] 2006, no pet.). In Texas, the spoliation of evidence is not an independent cause of action. Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1998).

Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the non-producing party had a

duty to preserve the evidence in question. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722. This duty only arises when a party knows or should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. Id. This duty serves as a prerequisite to the two circumstances where the spoliation instruction is appropriate: (1) The deliberate destruction of evidence; and (2) The failure of a party to produce relevant evidence or to explain its non-production. Id. Under the first circumstance, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. See Williford Energy Co. v. Submergible Cable Serv., Inc., 895 S.W.2d 379, 389-89 (Tex. App.—Amarillo 1994, no writ). Under the second circumstance, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it. See Watson v. Brazos Elec. Power Co-op., 918 S.W.2d 639, 643 (Tex. App.—Waco 1996, writ denied).

B. Remedies for spoliation of evidence

Courts determine the remedies for spoliation of evidence on a case-by-case basis. Wal-Mart Stores, Inc., 106 S.W.3d at 721. Some courts have chosen sanctions, while others have opted for a spoliation-presumption instruction. Dismissal of the spoliator's action, granting default judgment against the spoliator, or excluding evidence or testimony are all examples of proper sanctions. Trevino, 969 S.W.2d at 959-60 (Baker, J. Concurring).

Also, courts have given two types of spoliation-presumption jury instructions: First, a rebuttable presumption that the destroyed evidence is unfavorable to the spoliating party, where the burden shifts to the spoliating party to disprove the presumed fact, or second, an adverse presumption that the evidence would not have been favorable to the spoliating party, under which the burden does not shift, but remain on the non-spoliating party to prove his case. Id. at 960-61. There is currently no case law which gives a court the authority to issue an instruction of a non-rebuttable presumption. Thus, a defendant has two separate opportunities to overcome an allegation of spoliation. The first opportunity is with the court, which makes a determination before trial of whether a spoliation instruction will be issued. The second opportunity is at trial where the jury will decide if the evidence would have been unfavorable to the non-producing party.

C. Practical Application: How to avoid a spoliation instruction

Avoiding a spoliation instruction hinges on recognizing when a duty arises to preserve the information. Thus, evidence should not be destroyed or disposed of when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that the evidence in its possession or control will be material to that claim. If a company has procedures for the routine destruction of information, these procedures should be halted in the face of a possible claim.

Also, in a situation where it is unclear if a claim will be filed, the best practice is to err on the side of caution and halt the destruction or disposition of information until the party knows whether a claim will be pursued. By recognizing when a duty to preserve evidence arises, the likelihood of such evidence being preserved is increased, thus reducing the possibility of a spoliation instruction and the adverse effects associated with such an instruction.

IV. E-DISCOVERY

A. Introduction

"E-Discovery" refers to the use of electronically stored information as evidence in litigation. The phrase "electronically stored information" is meant to include any type of information that can be stored electronically. The term is intended to be broad enough to cover all current types of computer-based information and also flexible enough to encompass future changes and technological developments. E-discovery encompasses several different methods of technology such as e-mails, word processing files, voicemail and other audio files, websites and raw data, among others. Given the world's shift towards a technology driven society, E-discovery is becoming more widely used.

However, electronically stored information is more difficult to identify, manage, and dispose. One reason it is difficult to manage is the sheer volume of electronically stored information generated during the normal operation of a business. It can also be difficult to dispose of because deleted documents are still recoverable until they are written over. Another issue regarding E-discovery is "metadata," the information that describes how, when, and by whom the electronically stored information was created, collected, accessed, modified, formatted, or deleted. In some case the metadata will be very important to the plaintiff as it may uncover the chronology of events, who received certain information and when that information was received.

B. Electronic Discovery Rules

(1) Federal

The Federal Rules of Civil Procedure were amended by the Supreme Court in order to provide guidance regarding the discovery of electronically stored information. The amendments encompassed 6 rules: Rules 16, 26, 33, 34, 37, and 45, plus Form 35. Also, the amendments cover five interrelated area: (1) definition of discoverable material; (2) early attention to electronic discovery; (3) discovery of electronically stored information that is not reasonably accessible; (4) procedure for assertion claim of privilege or work product protection after production; and (5) a "safe harbor" limit on sanctions under Rule 37 for loss of electronically stored information as a result of the routine operation of computer systems.

Rule 16 addresses scheduling orders regarding "disclosure or discovery of electronically stored information and any agreements for asserting claims of privilege or protection as trial-preparation material after production."

Rule 26(b)(2)(B) excuses a party from providing discovery of electronically stored information that is not reasonably accessible because of the undue burden or cost if the producing party can make such a showing. Rule 26(b)(5)(B) provides a procedure for a party to maintain a claim of privilege or trial-preparation material. Rule 26(f) requires the parties to meet "as soon as practicable" after litigation has begun to discuss the scope of e-discovery for the matter. Each side must discuss the type of information sought, the system each side maintains regarding the electronically stored information, and the "native" file format of the information. Any issues that either side foresees regarding E-Discovery are to be

discussed and a report (Form 35) delivered to the court at the conclusion of the conference.

Rule 26(b)(5) addresses the inadvertent production of privileged information. If the information produced is subject to a claim of privilege or work product protection, the producing party can notify the receiving party of this inadvertent production, along with the basis for the claim of privilege or work product. After being notified, the receiving party must promptly return, sequester or destroy the information and not disclose the information until the underlying claim has been resolved. If the receiving party has already disclosed the information prior to being notified, it must take reasonable steps to retrieve it. This rule does not address, however, the substantive question of whether the privilege or protection has been waived.

Rule 33(d) was revised to include electronically stored information as an appropriate business record from which an interrogatory answer may be derived.

Rule 34 outlines production of electronically stored information, as well as other materials and documents. This rule provides a procedure for specifying the form in which the electronic information is to be produced and how to object to the form of the information. The rule sets the default format for electronic information as the form in which it is ordinarily maintained. The rule also states that a party is not required to produce the same electronically-stored information in more than one form.

Rule 37(e) provides a safe harbor from sanctions for loss of electronically stored information "as a result of the routine, good-faith operation of an electronic information system." This good-faith operation requires this routine operation to be suspended pending a litigation hold, a directive for corporate employees to preserve records and data that might be relevant to litigation. This safe harbor rule in no way gives a party the right to destroy data that is not "reasonably accessible," routinely or otherwise, in the ordinary course of business or not.

(2) Texas

The Texas Rules of Civil Procedure specifically address e-discovery in Rule 196.4. This rule requires the production of all responsive electronic data which is "reasonably available to the responding party in the ordinary course of business" and allows for the responding party to object if the information cannot be retrieved by "reasonable efforts." The rule also provides a distinction between electronic information available in the ordinary course of business and that which is not reasonably available. Information available in the ordinary course of business is discoverable while that which is not is only discoverable pursuant to a court order. Additionally, the court has discretion to order the requesting party to pay the costs of production.

The Texas rules also have a provision regarding the inadvertent production of privileged information. Rule 193.3(d) states that a party who inadvertently produces such information does not waive the claim of privilege if the producing party amends their response and states the asserted privilege within 10 days of actually discovering that the inadvertent production was made. If the producing party amends its response by claiming the privilege, the requesting party must promptly return the specified material or information and any copies pending a ruling by the court denying the privilege or protection asserted.

C. Practical Application: Protecting Your Company

(1) Establishing a Document Retention Policy

The first step in protecting your company in the realm of e-discovery is to establish a comprehensive document retention policy. Or if your company already has such a policy, ensure that it is up-to-date and encompasses all the electronically stored information created in the course of business. The best practice in creating or updating the policy is to create a task force consisting of members from the different departments of the company in conjunction with the IT department.

By having members from all departments in the task force, they should be able to formulate a policy that is consistent with the needs of the business in terms of cost, storage, and expansion. This policy should outline which employees it applies to and if the policy differentiates by department or level of management, the reasons for such distinctions should be noted. The task force should identify each type of document or source and create retention periods for each document or source and state why these periods were chosen. A good policy will aim to be consistent among the various sources and if different retention periods are to be used, note the reasons for such differences.

Next, the method of retention needs to be addressed. This includes how often each type of document will be backed up, and the type of storage media to be used for each type of file. The policy should also contain a procedure for the methodical destruction of documents. The company must decide what types of files or records must be maintained and for how long. The company should then purge any unnecessary information.

The policy should also outline procedures for a litigation hold. It is very important that any periodic destruction of documents be halted in the event of a possible lawsuit. Each employee needs to be trained to follow the litigation hold and promptly notified when the litigation hold is in effect. Having a litigation hold policy will significantly reduce the chance that documents relevant to the litigation be inadvertently destroyed which would likely result in a spoliation instruction against the company in the litigation.

(2) Implementing the Policy

It is not enough to have a document retention policy on the books; it must be followed by the employees. A policy that is not followed is just as good as no policy at all. Further, explaining why the retention policy was not followed is more difficult than explaining why there is no policy at all. Each employee needs to be notified of the policy and trained on how to follow the policy. For most employees the training necessary will be minimal as a majority of the work will be done by the IT department. The important task of enforcing the policy will fall on the IT department which will ensure the policy is being properly followed.

(3) Cost Considerations

Cost is a key consideration for every company when dealing with electronically stored information. E-discovery can be very expensive due to the large volume of information that must be screened. In order to keep costs of E-discovery to a minimum, the best practice is to implement a system that is well organized and that is easily searchable. Such a system will allow the information to be screened effectively and

efficiently for relevance and privilege. While this type of system may cost more upfront than others, such as non-searchable back-up tapes, it will save a significant amount of money in the event of litigation where the relevant documents need to located and reviewed. With a non-searchable method of storage this could take a considerable amount of time and money. Planning ahead and staying organized will avoid the risk of substantial unexpected and associated headaches when dealing with discovery requests for electronically stored information. In short, spending a little more now can save a lot of time, money and frustration down the road.