

The Appraiser As Testifying or Consulting Expert

Part Two – The Sufficiency of Expert Testimony

In the first part of this series, we looked briefly at the importance and selection of appraisers as formal and informal expert witnesses, in and out of court. This article explores in more detail the legal elements of “expertise” and how they may be practically applied and evaluated. Initially, however, one caveat bears repeating: an appraiser may satisfy the legal requirements of an expert and still make a lousy witness. Appearance, ability to communicate effectively, general jury appeal and overall credibility cannot be ignored, even if the appraiser (or any potential witness) is a genuine expert. One simple, practical reality must inform the selection of any expert: even the greatest product in the world (in this case, an appraisal) is worthless if its creator cannot convince anyone to buy it.

A CLOSER LOOK AT THE FINAL TWO DAUBERT CRITERIA

To review, the so-called “*Daubert*” criteria (or some derivatives thereof) are used by most courts to initially to determine whether or not an individual truly qualifies as an expert from a legal perspective. Those criteria require that the expert’s work product be:

Qualified – *Provided by one qualified to state the opinion offered.*

Reliable – *Grounded in an accepted technical method.*

Relevant – *Sufficiently tied to the facts of the case.*

See, e.g., *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

RELIABILITY

Having addressed qualifications in Part One, we look now at reliability’s two elements: (1) valid data; and (2) sound methodology. Data validity requires little explanation. An expert must confirm the accuracy of the information relied on and show a connection between that data and the opinion offered. See, e.g., *Volkswagen v. Ramirez*, 159 S.W.3d 897 (Tex. 2004). Now, no true expert would deliberately use false or invalid data. That said, mistakes and misunderstandings do happen, and there is never any excuse for not checking one’s sources and verifying all calculations. As, if not more, important, many experts and other professionals have learned from sad experience that best practice suggests one never completely trust the client. Truth testing is essential. Accepting facts without considered analysis typically leaves any expert – especially appraisers – dangerously blind and vulnerable.

As for methodology, given the overall recognized confines of the cost, income and sales comparison approaches under USPAP, most *Daubert* appraisal challenges are aimed not at the expert’s particular choice of approach(es) but at the more detailed, specific *application* and *interpretation* of those approaches to the related facts. Every

appraiser knows there are times when professional appraisal judgment and creativity regarding methodology are required. However, there is no determinative checklist which guarantees a court will accept an expert's methodology, especially where, as in appraisal, determination of "truth" is to some extent both subjective and fact and issue dependent. See, e.g., *Volkswagen v. Ramirez*, 159 S.W.3d 879 (Tex. 2004). Case law nevertheless is clear there must be *some* basis for affirmatively establishing the reliability of an expert's methodology, *id.*, so the following standards typically are recognized collectively as a fairly good starting point for evaluating a methodology's reliability:

1. The extent to which the methodology has been or can be tested;
2. The extent to which the methodology relies upon the subjective interpretation of the expert;
3. Whether the methodology has been subjected to peer review and/or publication;
4. The methodology's potential rate of error;
5. Whether the underlying methodology has been generally accepted as valid by the relevant technical community; and
6. The non-judicial uses which have been made of the methodology (*i.e.*, generally, the methodology needs to have been used in "real life," not just created for litigation).

See, e.g., *E.I. DuPont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Even the reliability of generally accepted appraisal methodologies may be questioned in specific applications. For example, with complex commercial properties - including the power plants with which I primarily work - mass appraisal techniques are often insufficient to ensure an accurate appraisal. Also, in these and other cases, adjustments have to be made which, in many cases, are neither published, objective nor free from the possibility of significant error. Thankfully, the law is not blind to these more "custom" circumstances and amplifies on the *Daubert* criteria where additional creativity must be added to a generally accepted approach so that the approach best fits the specific facts at hand. The first question relative thereto asked of the expert appraiser is whether the technique ultimately used is, in fact, "legitimate." Such legitimacy depends essentially on whether the "creative" or unproven technique or procedure appears in both name and description to provide some definitive truth which the expert needs only to accurately recognize and relay to the fact finder. See, e.g., *People v. Stoll*, 49 Cal.3d 1136, 1156 (Cal. 1989). Even if the answer to this question is "yes," the expert still must be able to establish that the technique, as subjective as it may be, has "gained general acceptance in the particular field in which it belongs." *Id.* An expert simply cannot pull a unique methodology out of thin air, no matter how unique the circumstances. "General acceptance" requires a consensus drawn from a typical cross section of the relevant, qualified technical community. *Id.*

In other words, regardless of the need or uniqueness of the issue, where an expert exercises subjective creativity, she does so at her peril unless her process has a demonstrable basis in, or relation to, some "consensus" in the field. The "consensus" may be established by the credible testimony of the testifying expert herself; however, its absence could mean reversal on appeal.

Further, considerations of reliability can extend far beyond the *Robinson* and *Stoll* factors. Courts are largely free to impose their own requirements of reliability when acting as “gatekeepers” in controlling the admissibility of expert testimony, as long as they are not “arbitrary and capricious.” Additional “reliability factors” may include, but not be limited to, the following:

1. Whether the expert has extrapolated from an accepted premise to an unfounded conclusion;
2. Whether the expert accounted for obvious alternatives;
3. Whether the expert applied the same standard of care in the litigation as an expert would normally apply outside of litigation; and
4. Whether the expert’s field of expertise is known to reach reliable results on the subject of the proffered testimony (or, in other words, whether the expert’s “creative thinking” exceeds the bounds of his actual expertise).

RELEVANCY

It probably goes without saying that an expert’s opinions also must be relevant to the actual issues involved in the specific case or controversy at issue. Typically, and for obvious reasons, this is because relevant evidence is generally admissible, but irrelevant evidence – because it distracts and detracts from the focus of the case – is not admissible. See, e.g., TEX. R. EVID. 402. “Relevant evidence” is essentially evidence which tends to make the existence of any material fact more probable or less probable that it would be without the evidence. See, e.g., TEX. R. EVID. 401. To determine relevancy, the court will look at the purpose for offering the evidence and must determine that there is some logical connection either directly or by inference between the fact offered and the fact to be proved. See, e.g., *Regy v. Redic*, 408 S.W.3d 440 (Tex. App. – El Paso 2013, *no pet.*).

As but one example from the appraisal arena, relevancy is especially important in the sales comparison approach. If an allegedly comparable property is: 1) too far away from the subject; 2) too different from the subject; or 3) in other different circumstances from the subject - and not susceptible to adjustments sufficient to establish its relevancy to the subject property - introducing it as an alleged “comparable” at trial could end up injecting reversible error into the case. Thus, the expert appraiser, in consultation with counsel, bears a significant responsibility not to stretch the concept of relevancy (or comparability) beyond what is reasonably credible and acceptable in the subject industry.

The requirement of relevancy also restricts the admissibility of opinion testimony which is factually unsupported (*i.e.*, simply conclusory) or speculative because it does not tend to make the existence of any material *fact* more or less probable. See, e.g., *Coastal Transportation Company v. Crown Scent Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). As important, simple relevancy may not be sufficient to establish admissibility of expert testimony where that testimony’s probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or needless presentation of cumulative evidence. See, e.g., TEX. R. EVID. 403.

LEGAL AND FACTUAL SUFFICIENCY

Finally, simply because evidence may be *admissible* in the sense that it is deemed sufficiently relevant and reliable to be *considered* by the finder of fact does not necessarily render the evidence *legally* or *factually* sufficient to support an actual judgment. In other words, as legal scholar Professor McCormick has succinctly put it, “A brick is not a wall.” See e.g., *Transportation Insurance v. Moriel*, 879 S.W.2d 10, 24-25 (Tex. 1994). A single bit of evidence, no matter how strong, may not be legally or factually sufficient to support an entire cause of action or legal defense. Thus, from a legal perspective, the overall goal of an expert is to present evidence that *is* both legally and factually sufficient to support a jury verdict (or court decision) in the client’s favor.

To be “legally sufficient,” the expert’s opinions must provide a sufficient amount of admissible evidence of an asserted fact to at least raise the question of its existence for the finder of fact to determine; otherwise, the entire, related claim(s) or defense(s) will fail as a matter of law (assuming the absence of other legally sufficient evidence). “Legally sufficient” evidence is more than a “scintilla” of evidence – at least enough evidence that reasonable people could disagree about the existence of the fact in dispute. See, e.g., *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). This means that if an expert’s opinion/evidence does not raise any more than a mere suspicion or surmise of the contested fact, it constitutes no evidence thereof; however, in a legal sufficiency review, a court must credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *Id.*

When dueling experts both present legally sufficient evidence/opinions, the finder of fact must decide between them. In general, that fact finding will be notoriously difficult to overturn. However, it still remains possible that an appellate court will find that the resulting fact finding was nevertheless *factually* insufficient to support a judgment – *i.e.*, so against the great weight and preponderance of the evidence as to be manifestly wrong - and so reverse the finding. Typically, this happens when the appellate court determines that either: 1) the underlying data relied on by the expert is not relevant or credible; or 2) if there is too great an “analytical gap” between the data and the expert’s conclusions.

In conclusion:

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed... Where an expert basis his conclusions upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote, or conjectural, then his conclusion has no evidentiary value.... In those circumstances the expert’s opinion cannot rise to the dignity of substantial evidence.

See, e.g., *Pacific Gas & Electric Company v. Zuckerman*, 189 Cal. App. 3d 1113, 1136 (1987). In the next part of the series we will begin to look at trial tactics and “The Expert in Court.”



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