



BEING AN EXPERT  
WITNESS: WHAT YOU  
NEED TO KNOW

APRIL 13, 2011

KAREN L. T. WHITE

**KAREN L. T. WHITE, P.C.**

# BASIC RULES FOR ADMISSIBILITY OF OPINION TESTIMONY

- ❖ Depends on the Venue
- ❖ Generally, Opinion Must Be “Relevant” and “Reliable”
  - For the “particular issues” in the case
- ❖ Opinion Must Be More Than “Subjective Belief” or “Unsupported Speculation”
- ❖ There Can Be No “Great Analytical Gap” Between the Data Relied Upon and the Opinion Offered

# BASIC RULES FOR ADMISSIBILITY OF OPINION TESTIMONY

- ❖ US Federal Court (Most US State Courts are Similar)
  - Scientific, technical or other specialized knowledge
  - Assist the “trier of fact” to understand the evidence or to determine a fact in issue
  - Expert by “knowledge, skill, experience, training or education”
  - Based upon sufficient facts or data
  - Product of reliable principles and methods
  - Applied reliably to the facts of the case

# BE PREPARED TO BE CHALLENGED

- ❖ Motions to Strike Experts or Limit the Scope of Opinions are Common
  - *Daubert* motion (Federal)
  - *Robinson* motion (Texas)
- ❖ You May be Asked to Assist in an Effort to Strike an Opposing Expert

# ARE YOU QUALIFIED?

- ❖ What Is the Scope of the Assignment?
- ❖ How Will Your Opinion Be Used?
- ❖ How Specialized is the Area?

# ARE YOU QUALIFIED?

- ❖ Do You Have the Requisite Experience?  
Training? Skill?
  
- ❖ Do You Have All of the Credentials?
  - Education
  - Licenses
    - Except for a malpractice claim, not required in Texas
  - Organization membership

# ARE YOU QUALIFIED?

- ❖ If You Are Missing Something, Can You Supplement?
  - Can you rely upon another expert for a portion of your opinion?
  - Can you join an organization or get certification of an organization based on your experience?
  - Can you obtain a license in the applicable jurisdiction?

# WHAT IS THE PRINCIPLE / METHODOLOGY?

- ❖ Basic Issue is Whether the Principle / Methodology / Technique is “Reliable”
  - Has it been tested? Can it be tested?
  - Has it been subjected to peer review?
  - Has it been published?
  - Is it controversial?
  - Is it widely accepted?
  - What is the potential rate of error?
  - How much does it depend on subjective interpretation?
  - What are the “non-judicial” uses?



# DO YOU HAVE THE INFORMATION TO APPLY THE PRINCIPLE / METHODOLOGY?

- ❖ What Date or Other Information is Normally Required?
- ❖ What Date or Other Information Are You Missing?
- ❖ Are You Applying The Principle / Methodology in the Accepted Manner to the Normally Required Facts / Data?

# KNOW THE PURPOSE OF YOUR OPINION

## ❖ Who is Your Client?

- Plaintiff
- Defendant
- Independent Analysis / Court Appointed

## ❖ Will You Determine Causation?

## ❖ Will You Determine Whether Professional Negligence Occurred?

- In Texas, a professional negligence claim for damages against an architect or engineer cannot be brought without a “certificate of merit”

# KNOW THE PURPOSE OF YOUR OPINION

- ❖ Will You Assess the Work of Another Expert?
- ❖ Will You Support the Work of Another Expert?
- ❖ Will You Provide a “Second Opinion” Not to be Disclosed?

# KNOW THE SCOPE OF YOUR ASSIGNMENT

- ❖ What is Included?
  - Can you do all of it?
  
- ❖ What is Excluded?
  - Can you give your opinion without it?
  
- ❖ How Does Your Assignment Fit with Other Aspects of the Investigation or Dispute?

# KNOW THE SCOPE OF YOUR ASSIGNMENT

- ❖ Example: Failure of a Structure Could Involve
  - Analysis of a design
  - Analysis of an alternative design
  - Analysis of whether it was constructed in accordance with a design
  - Analysis of whether a material failure occurred

# KNOW WHAT DELIVERABLE IS EXPECTED

- ❖ Report
- ❖ Testimony
  - Deposition
  - Trial or Arbitration
  - Commission
- ❖ Testing
- ❖ Demonstratives or Models
- ❖ Certificate of Merit for Texas

# CERTIFICATE OF MERIT IN TEXAS

- ❖ Licensed – Same as the Defendant
  - IN TEXAS
- ❖ Competent to Testify
- ❖ Knowledgeable in the Area of Practice of the Defendant

# CERTIFICATE OF MERIT IN TEXAS

- ❖ Offer Testimony Based On:
  - Knowledge
  - Skill
  - Experience
  - Education
  - Training
  - Practice
  
- ❖ Affidavit must set forth specifically the “negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion or a similar professional skill”



# BE CAREFUL WHAT YOU PUT IN WRITING — AND WHAT YOU DON'T

- ❖ **EVERYTHING You Create is Discoverable and Will Be Provided to the Other Side**
  - Unless there is an agreement otherwise
  - Unless you are a “consulting only” expert whose work is not reviewed or relied upon by a testifying expert
  
- ❖ **Not Just Paper, but Also E-MAIL and ELECTRONIC Documents**
  
- ❖ **Generally, You’re Obligated to Save EVERYTHING**
  - Discuss with counsel any agreements that have been reached with opposing counsel or the court and your usual practices.
  - Discuss with counsel how review of preliminary opinions will occur

# BE CAREFUL WHAT YOU PUT IN WRITING — AND WHAT YOU DON'T

## ❖ Examples of Notes That Are Problems

- “don’t write anything down”
- “don’t save anything”
- “do everything on computer”
- “destroy this”
- Critical aspects of the dispute that are missing in notes

## ❖ Calculations

- If they are not there, how did you reach the conclusion?
- If you made errors in them, why is your opinion valid?

## ❖ Drafts of Reports / Opinions

- Things that are excluded initially
- Things that change

# FORMING AND PRESENTING YOUR OPINION

- ❖ Don't Over Reach Your Area of Expertise
- ❖ Know the Legal Standard for Your Opinion
  - Don't form a legal opinion – but do understand implication of opinions to the case
- ❖ Know the Position of the Client You Work For and of the Other Side
  - Do you agree with either?
    - SPEAK UP IMMEDIATELY IF YOU DISAGREE WITH YOUR CLIENT OR AGREE WITH THE OTHER SIDE
  - What big or small points are at issue?

# HAVE SUPPORT FOR YOUR OPINION

- ❖ Discuss with Counsel the Various Methodologies for Addressing the Issue and Agree on the Approach
  
- ❖ Know the Facts
  - Make sure – up front – that the counsel that hires you agrees with any assumptions you are making
  - Be sure that you understand all of the basis for each of your opinions
  
- ❖ What Assumptions are You Being Asked to Make by the Client / Lawyer?
  - Do you agree with them?

# HAVE SUPPORT FOR YOUR OPINION

- ❖ Have a Strong, Documented Basis for the Opinions You Reach
  - Be thorough with your analysis and be organized
  - Keep good records of what you looked at / asked for / didn't look at
  
- ❖ Have a Clear Methodology
  - Be sure to follow the methodology you choose
  - Be sure to explain and support as acceptable any deviations from the methodology

# GET WHAT YOU NEED

- ❖ Know what You Need and Ask For It
  - You need to be able to say that you had access to everything that you asked for and needed to form your opinions.
  
- ❖ If You Don't Have All You Need, Say So.
  
- ❖ Do You Need Information to be Created?
  - Samples
  - Photos
  - Testing

# GET WHAT YOU NEED

- ❖ Do You Need Support of Other Experts?
  - Are they qualified?
  
- ❖ Be Sure that You Have an Understanding of the “Big Picture.”
  - You may need to be familiar with the applicable contract or at least the underlying disputes to which your opinion relates
  - Quiz the counsel that hired you about what issues each side is pushing to prove its case

# KNOW YOUR AUDIENCE

- ❖ Does the “Finder of Fact” Have a Technical Background?
  - Special master
  - Arbitrator
  - Commission
  
- ❖ Is the “Finder of Fact” Well Educated?
  - Judge
  - Special master
  
- ❖ Is the “Finder of Fact” a Jury?



# SPEAK TO YOUR AUDIENCE

- ❖ Presentations to a Jury MUST Be at a Basic Level – As If Explaining It to a Child
  - You cannot simplify enough
  - You cannot repeat the basics enough
  - Consider analogies that everyone can relate to
- ❖ Presentations to Someone with a Technical Background Should Be at a Higher Level
  - Be prepared to answer questions from the arbitrator

# USE DEMONSTRATIVES

- ❖ Discuss Early What You Can SHOW the Finder of Fact to Make Your Points
  - Physical evidence
  - Model
  - Timeline
  - Animation
  
- ❖ PowerPoint

# TESTIFYING

- ❖ Be Prepared and Tell the Truth
  - Know opinions well and the basis for each
  - Never use the words "I presume" or "I suspect."
- ❖ Don't Be an Advocate to the Point You're Not Credible
  - Concede a point if it needs to be conceded
- ❖ Be Respectful
- ❖ Be Sure Not to Talk Over the Questioner

# TESTIFYING

- ❖ Be Sure to Answer Out Loud with a “Yes” or “No”
  
- ❖ Appearance is important
  - Solid color shirts are best for video / testifying.
  - Look conservative. Coat & tie.
  
- ❖ Where to look:
  - Look at the camera in a deposition.
  - Look at the jury when you answer.
  - Look at whomever is asking the question when they are talking.

# CROSS EXAMINATION

- ❖ The Opposing Lawyer is Trying to Trick You – To Get Stuff to Help His Client. You Should Assume that They Do Not Care What the Truth Is.
  - Listen to EVERY word of EVERY question. CAREFULLY.
  - Only answer what is asked
  
- ❖ This Is Not a Conversation
  - Remember that your response will be used as a sound bite if at all possible.
  
- ❖ If an Important Assumption is Inherent in the Question, Be Sure That It's in Your Answer
  - Don't be pushed into answering an absolute if there is no absolute. Include all required qualifications.

# CROSS EXAMINATION

- ❖ Watch Out for Opposing Counsel Seeking a “Yes” or a “No” Answer to a Qualified Question
  - Leave yourself room to qualify more
  
- ❖ Watch Out for Second Guessing Because You Didn’t Do Something You Were Not Asked to Do It
  - If it’s not within your scope, say so
  - Beware of the “don’t you think it’s important to do” question
  
- ❖ You Will be Asked if You’ve Stated “All” of Your Opinions or “All” of the Factors
  - Leave yourself room to add later if you think of more

# CROSS EXAMINATION

- ❖ Don't Give Opinions on Something You Weren't Asked to Do – Don't Get Caught in Answering a Question When Haven't Been Provided All of the Facts
- ❖ You Will be Asked if You've Stated "All" of Your Opinions or "All" of the Factors
  - Leave yourself room to add later if you think of more
- ❖ It's Important to Appear Credible, Not Just be Credible
  - Don't be defensive / evasive
  - Be straight forward
  - Don't roll your eyes / make faces / have excessively long pauses

# KNOW WHERE YOU HAVE WEAKNESSES

- ❖ If You Discover an Error in Your Report / Opinion, Let the Attorney that Hired You Know Immediately
  - Do NOT wait for the other side to raise it
  
- ❖ Have You Published / Taught / Taken Position on Anything in the Past that Might Be Inconsistent with Your Current Opinion?
  - Why? How is it distinguishable?
  - Even if you didn't, is there something out there contrary to what you're saying?



# KNOW WHERE YOU HAVE WEAKNESSES

- ❖ Have You Chosen to Follow a “Less Traveled” Path in Reaching Your Opinion?
  - Why is it appropriate?
- ❖ Do You Have Limitations on Your Expertise?
  - Why do those limitations not matter for the issue?

# CLIENT MANAGEMENT

- ❖ Don't Surprise the Client with the Cost for Your Services
  - Understand budgets
  - Discuss up from rates, markups, etc.
  
- ❖ What Detail does the Client Want or Need in your Bills?
  - Your bills will be used by opposing counsel
  - Privilege issues
  - Processing policies may require details
  
- ❖ Who Will Work on and Bill for the Project?
  - Be sure the client agrees with your staffing

# CLIENT MANAGEMENT

- ❖ Find Out at the Start Whether there are Milestones or Critical Dates for Delivery of Your Services
  - Does the client want to approach the analysis with interim reports?
  
- ❖ Be Sure to Discuss any “Forks In The Road” for You or the Client at the Start
  - Are there decision points for going forward or changing approaches?

# PRACTICE MANAGEMENT

- ❖ What are the Most Common Types of Assignments You Receive and How Do You Approach Them?
  - What are the typical things you know you'll need in every case?
    - Keep a list of what you always will need
  - How much does it cost?
  - How long does it take?
  - What are typical problem spots?
  
- ❖ Consider the End Product / Deliverables / Demonstratives at the Beginning

# PRACTICE MANAGEMENT

- ❖ Organize Project Documentation from the Beginning the Way You Need for Your Opinion
  - Set up a filing system and tracking system for the information you request, receive and review
  
- ❖ Do You Have any Conflicts?
  - Who are the Parties?
    - Be mindful of other ancillary parties (like insurers)
  - What is the Subject Matter?

# CONCLUSION

- ❖ “Relevant” and “Reliable”
  - Qualifications
  - Methodology
  - Facts
  
- ❖ Understand the Assignment
  - Audience Matters
  - Purpose Matters
  
- ❖ Be Prepared and Be Honest