

RULE 702. TESTIMONY BY EXPERTS

A witness give expert testimony in the form of opinion or otherwise if the following are satisfied:

- (1) Basis for testimony. The testimony is based on scientific, technical, or other specialized knowledge.
- (2) Assistance to trier of fact. The testimony will assist the trier of fact to understand evidence or determine a fact in issue.
- (3) Qualification of witness. The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.
- (4) Reliability. The testimony is
 - (A) based upon sufficient facts or data;
 - (B) the product of reliable principles and methods; and
 - (C) the product of a reliable application of the data, principles and methods to the facts of the case.

Comments

An expert opinion derived from scientific, technical, or other specialized knowledge must assist the trier of fact. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). The opinion will not assist the trier of fact unless the opinion is relevant to a material issue and is based upon a foundation of knowledge shown to be, or known to be, reliable. *E.I. duPont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Subdivisions (a)(1), (2) and (3) retain the substance of existing Rule 702 but are changed stylistically to show the different subparts of the rule.

Subdivision (a)(4) is based on **[FRE 702 as amended December 1, 2000 and]** the three different reliability tests identified by *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Reliability requires the trial court to scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case and any data, studies, or facts that underlie, or form the foundation of, the expert's opinion.

The relevant factors for determining reliability under Rule 702(a)(4) will vary from expertise to expertise. For a list of some of the factors used by courts, see *E.I. duPont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Nenno v. State*, 970 S.W. 2d 549, 561 (Tex. Crim. App. 1998); *Kelly v. State*, 824 S.W.2d 569, 572, 573 (Tex. Crim. App.

1992). The court should also consider whether the expert has used the same principles and methodology that the expert uses in his or her field. *Kumho Tire Co. Ltd. vs. Carmichael*, 526 U.S. 137 (1999). The reliability inquiry is a flexible one and will vary according to the expert's field. In some cases, the extent of the expert's personal experience will be an important factor for determining reliability. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 712 (Tex. 1998).

The trial court's determination of admissibility should be made outside the presence of the jury.

The role of the trial court is not to determine the validity or accuracy of the opinions formed by the expert, but to determine admissibility of the opinions. The trial court's decision on admissibility and selection of the criteria for examining the principles and methodology used by the expert is subject to review for abuse of discretion. Courts may consider inadmissible evidence pursuant to Rule 104(a) in making this determination.

Particular opinions or portions of the testimony of an expert may be admissible under this rule even though other opinions or portions of the testimony from the same witness are inadmissible under this rule.