AN OVERVIEW OF THE USE OF EXPERTS IN ADMINISTRATIVE PROCEEDINGS

I. INTRODUCTION

For years, people have relied on the opinion of experts as a guide when confronted with difficult decisions. Indeed, one need only look back to the later part of 1999 to see this concept come to fruition. Anyone around in late 1999 can remember the fury that became "Y2K." "Experts" were advising, among other things, that out-dated computers would no longer function, that terrorists would attack, and that the global economy would crash upon the ringing in of the year 2000. Well, even "experts" can be wrong sometimes. In reliance on these experts, many people spent their hard-earned money on new computers, gas masks, and chemical suits in fear of the worst, but with all due respect, as usual—hindsight is 20/20.

Unfortunately, the trier of fact in a court of law or an administrative proceeding is not granted the gift of hindsight. A judge and jury are often forced to make critical judgments relying heavily on the opinions of expert witnesses. In fact, expert witnesses have become increasingly prevalent in litigation.[1] The issues addressed by experts have become increasingly complex, thus increasing the significance of an expert's testimony.[2]

Today, experts are available to give opinions on just about every issue imaginable.[3] A witness is automatically more credible to a trier of fact than a lay witness if a judge deems the witness an "expert" even if the "expert" is really a fraud.[4] This reality makes the jobs of both trial judges and administrative law judges in guarding against fraudulent testimony a potential

1. *See* E. I. duPont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 552 (Tex. 1995).
2. *See id.* at 553.
3. *See id.*
4. *See id.*

nightmare. Accordingly, it is important for anyone involved in the litigation of trials or administrative proceedings to understand the reality of witnesses as "experts."

The first part of this paper will address the evolutionary process of federal courts when dealing with the potential testimony of an expert witness. The next section examines how Texas courts have adapted the federal framework to fit their own needs. The paper then discusses how all of the preceding analysis applies to administrative proceedings. Finally, there is a brief look at how the testimony of an expert witness may be even more beneficial in an administrative proceeding because the testimony may be a method of getting hearsay testimony into evidence.

II. THE CHANGING TIMES

A. The Old Frye *Standard*

In 1923, the United States Court of Appeals for the District of Columbia decided *Frye v. United States*.[5] The appellant in *Frye*, the defendant in the trial court, was convicted of second-degree murder.[6] On appeal, the appellant claimed the trial court erred by not allowing into evidence expert testimony concerning the results of a systolic blood pressure deception test the appellant had taken before trial.[7] This test analyzed the systolic blood pressure of a witness.[8] Essentially, the appellant argued scientific experiments showed that when a person lies, their blood pressure tends to rise.[9] The systolic blood pressure deception test was designed to detect this type of reaction.[10] The appellant also offered to conduct the same test at trial and the trial court again refused to allow the test into evidence.[11] The Court of Appeals for the District of Columbia affirmed.[12] The court reasoned:

> [j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from

5. 293 F. 1013 (D.C. Cir. 1923) (superseded by rule as stated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).
6. *Id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.* at 1013-14.
11. *See id.* at 1014.
12. *See id.*

> which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[13]

The court refused to allow the expert testimony about the results from the appellant's systolic blood pressure deception test because it was not yet generally accepted among physiological and psychological authorities.[14] This analysis became known as the "*Frye* test" or "general acceptance test" for the admissibility of expert testimony.[15] "In the 70 years since its formulation . . . , the [*Frye* test] has been the dominant standard for determining the admissibility of novel scientific evidence at trial."[16]

B. The United States Supreme Court Changes Its Mind

Despite the long historical acceptance of the "*Frye* test," in 1993, the United States Supreme Court held *Frye* had been replaced by the Federal Rules of Evidence.[17] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court was asked to determine the proper standard for admitting expert testimony in federal courts.[18] The plaintiffs in *Daubert* consisted of two minor children, born with serious birth defects, and their parents.[19] Together, the plaintiffs sued the manufacturer of the prescription drug Bendectin, Merrell Dow Pharmaceuticals, Inc. ("Merrell Dow"), claiming that Bendectin caused the birth defects in the children.[20] Merrell Dow had marketed Bendectin as an antinausea medication and the mothers of the afflicted children had taken Bendectin during the course of their pregnancies.[21] During discovery for its motion for summary judgment, Merrell Dow offered the affidavit of one expert witness.[22] The "well-credentialed" expert had reviewed over thirty published studies, involving more than 130,000 patients, which analyzed the relationship between Bendectin and birth defects.[23] The expert concluded that Bendectin, if used during the first trimester of a mother's pregnancy, had not been shown to be a risk factor for human birth defects.[24] In response, the plaintiffs offered the testimony of eight qualified

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13. *Id.*
14. *See id.*
15. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 584-88 (1993) (emphasis added).
16. *Id.* at 585.
17. *See id.*
18. *See id.* at 582.
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*

experts.[25] These experts used the combined results of "in vitro" (test tube) and "in vivo" (live) animal studies, analysis of the chemical structure of Bendectin, and a "reanalysis" of the aforementioned published studies to come to the conclusion that Bendectin could cause birth defects.[26] The District Court applied the *Frye* general acceptance standard for scientific evidence and ruled the plaintiffs' expert testimony inadmissible.[27] The Ninth Circuit Court of Appeals, relying once again on the *Frye* standard, affirmed.[28] "[T]he court stated that expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community."[29] The court of appeals further stated that "expert opinion based on a methodology that diverges significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be 'generally accepted as a reliable technique.' "[30] The plaintiffs appealed again, this time to the United States Supreme Court, claiming the *Frye* standard had been superseded by the Federal Rules of Evidence.[31] The Supreme Court agreed.[32]

The Court first ruled that under Rule 401 of the Federal Rules of Evidence, all relevant evidence is admissible.[33] Furthermore, Rule 401 should be applied liberally.[34] "Relevant evidence" is defined as evidence that has "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."[35] Next, the Court analyzed Rule 702 of the Federal Rules of Evidence.[36] "Rule 702, governing expert testimony, provides: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at 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.' "[37] The Court held "general acceptance" is not an absolute prerequisite to admissibility.[38] "[U]nder the [Federal Rules of Evidence] the trial judge must ensure that any

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25. *See id.*
26. *See id.* at 582-83.
27. *See id.* at 583-84.
28. *See id.* at 584.
29. *Id.* (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (9th Cir. 1991), *vacated*, 509 U.S. 579 (1993)).
30. *Id.*
31. *See id.* at 587.
32. *See id.*
33. *See id.* (citing FED. R. EVID. 401).
34. *See id.*
35. *Id.*
36. *See id.* at 588.
37. *Id.* (quoting FED. R. EVID. 702).
38. *See id.* at 588.

and all scientific testimony or evidence is not only relevant, but reliable."[39] Finally, the Court outlined four nonexclusive factors to aid trial judges in determining whether scientific evidence is relevant, reliable, and therefore admissible.[40] These factors are: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the technique's known or potential rate of error; and (4) the general acceptance of the theory or technique by the relevant scientific community.[41] The Court recognized that, "in practice, a gatekeeping role for the judge, no matter how flexible, . . . will prevent the jury from learning of authentic insights. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."[42]

III. TEXAS COMES OF AGE—THE TEXAS THREE-STEP

A. E. I. duPont de Nemours and Co., Inc. v. Robinson[43]

In *E. I. duPont de Nemours and Co., Inc. v. Robinson*, the Texas Supreme Court adopted *Daubert*.[44] "In this products liability case [the supreme court determined] the proper standard for the admission of scientific expert testimony under Rule 702 of the Texas Rules of Civil Evidence."[45] The plaintiffs in *Robinson* claimed the chemical Benlate 50 DF, a fungicide manufactured by the defendant, had damaged their pecan orchard.[46] In order to prove the defendant's chemical caused the damage to the pecan orchard, the plaintiffs offered the testimony of only one expert witness.[47] In the expert's opinion, the defendant's fungicide Benlate had been contaminated with herbicides during its manufacturing process.[48] As a result of this contamination, when the plaintiffs applied Benlate to their pecan orchard, the

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39. *Id.* at 589.

40. *See id.* at 591-94. In *Daubert*, the Court interpreted the aspect of Rule 702 of the Federal Rules of Evidence that deals with the use of scientific evidence. 509 U.S. 579 (1993). However, the Court did note that the factors and analysis it lined out could also be applied to the rest of Rule 702 (i.e. "technical, or other specialized knowledge"). *See, e.g., id.* at 590 n.8; Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). In addition, the Court refused to limit its analysis to "novel" (unconventional) scientific techniques. *See Daubert*, 509 U.S. at 592 n.11. Nevertheless, well-established scientific propositions are less likely to be challenged and more likely to be subject to judicial notice. *See id.* (citing FED. R. EVID. 201).

41. *See id.* at 591-94.

42. *Id.* at 597.

43. 923 S.W.2d 549 (Tex. 1995).

44. *See id.*

45. *Id.* at 550.

46. *See id.* at 551.

47. *See id.*

48. *See id.*

orchard was damaged.[49] The expert based his opinion on many factors including: (1) a visual inspection by the expert of the plaintiff's orchard compared to other allegedly contaminated Benlate plants which resulted in a finding of similar symptoms; (2) an experiment the expert had previously done with Benlate which showed Benlate caused stunted growth and abnormal leaf coloring in treated plants; (3) a laboratory analysis of ten boxes of Benlate showing inconsistencies in its chemical makeup; (4) a review of reports of plants treated with herbicides similar to those allegedly found in Benlate; and (5) a review of the defendant's internal documents which dealt with other claims by people who had damaged plants after applying Benlate and a recall by the defendant of several batches of Benlate.[50] Following a pretrial hearing and a subsequent non-jury trial, the trial court judge refused to allow the testimony of the plaintiff's expert witness because "it was not reliable and would not fairly assist the trier of fact in understanding a fact in issue in the case."[51]

Based upon its interpretation of Texas Rule 702, the court of appeals found the trial court had abused its discretion, and thus reversed, and remanded the case to the trial court.[52] The court of appeals reasoned that the defendant had not challenged the expert's qualifications, only the methodology and research upon which the expert had based his opinions.[53] Therefore, in the appellate court's opinion, the jury should have been allowed to hear the expert's testimony and determine the weight it should be accorded.[54] The defendant then filed a writ of error to the Texas Supreme Court.[55] The Texas Supreme Court granted the defendant's writ of error in order to determine the appropriate standard for the admission of scientific expert testimony.[56]

Rule 702 of the Texas Rules of Civil Evidence provides:

> 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.[57]

Upon analysis of *Daubert*, which looked at Rule 702 of the Federal Rules of Evidence, and a Texas Court of Criminal Appeals case interpreting Texas

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49. *See id.*
50. *See id.* at 551-52.
51. *Id.* at 552.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.* at 554.
56. *See id.*
57. TEX. R. CIV. EVID. 702.

Rules of Criminal Evidence 702,[58] the Texas Supreme Court determined that Texas Rules of Civil Evidence 702 requires three things for the admission of expert testimony.[59] Rule 702 requires a showing that: (1) the expert is qualified; (2) the expert's testimony is relevant to the issues in the case; and (3) the expert's testimony is based upon a reliable foundation.[60] "The trial court is responsible for making the preliminary determination of whether the proffered testimony meets [these] standards."[61] The supreme court did not deal with the first requirement, but it did provide an expansive analysis of the last two requirements which will now be discussed.

The supreme court looked to Texas Rules of Civil Evidence 401 and 402 in order to determine if an expert's testimony is relevant.[62] Rule 401 provides:

> "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.[63]

Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules proscribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.[64]

In order to determine if expert evidence is relevant, "the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' "[65] Furthermore, "[e]vidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury."[66]

The underlying techniques or principles of an expert's testimony must also be reliable.[67] Under Rule 702, unreliable evidence does not assist the trier of fact and is inadmissible.[68] In order to determine if the offered testimony is reliable, the supreme court offered six, nonexclusive factors that can be used

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58. *See* Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992).

59. *See Robinson*, 923 S.W.2d at 556.

60. *See id.*

61. *Id.* (citing TEX. R. CIV. EVID. 104(a) that states that the trial court is to decide preliminary questions concerning the admissibility of evidence).

62. *See id.* at 556.

63. TEX. R. CIV. EVID. 401.

64. TEX. R. CIV. EVID. 402.

65. *Robinson*, 923 S.W.2d at 556 (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985).

66. *Robinson*, 923 S.W.2d at 556 (citing 3 WEINSTEIN & BERGER, WEINSTEINS EVIDENCE, & 702 [02] (1994)).

67. *See Robinson*, 923 S.W.2d at 557.

68. *See id.*

to assist the trial court in determining the question of admissibility under Rule 702.[69] The factors that the supreme court enumerated are:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the nonjudicial uses which have been made of the theory or technique.[70]

Again, it is important to reiterate that these factors are nonexclusive.[71] "Trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence."[72]

Once a trial judge determines the testimony offered is relevant and reliable, the judge must still decide if the testimony violates Rule 403 of the Texas Rules of Civil Evidence.[73] A trial judge must still exclude relevant and reliable evidence if "its probative value is 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.' "[74] Once an adversary opposes the evidence, the proponent of the evidence has the burden of demonstrating that the evidence is admissible.[75]

The Texas Supreme Court had no problem entrusting all of this responsibility with a trial judge.[76] A judge does not have to be a scientist in order to evaluate the reliability of an expert's testimony.[77] In fact, judges have the opportunity to review documents, briefs, and freely ask questions at preliminary hearings in order to come to a better understanding of an expert's testimony.[78] The supreme court concluded that the trial judge is in the best position to determine if an expert's opinion is relevant and his research

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69. *See id.*
70. *Id.*
71. *See id.*
72. *Id.*
73. *See id.*
74. *Id.* (quoting TEX. R. CIV. EVID. 403).
75. *See id.* at 557.
76. *See id.* at 557-58.
77. *See id.* at 557.
78. *See id.* at 558 (citing Black et al., *Science and the Law in the Wake of Daubert*, 72 TEX. L. REV. 715, 788, 790 (1994)).

reliable.[79] The jury should then determine how much weight and credibility to accord to the expert's testimony.[80]

After an analysis of the expert's reliability using the factors it had previously outlined, the supreme court found that the trial court in *Robinson* did not abuse its discretion in excluding the expert's testimony and affirmed the trial court's decision.[81]

B. Merrell Dow Pharmaceuticals, Inc. v. Havner[82]

Merrell Dow Pharmaceuticals, Inc. v. Havner involved many of the same issues the United States Supreme Court had dealt with in *Daubert*.[83] The plaintiffs in *Havner* were the parents of a child who suffered from birth defects they believed resulted from the mother's ingestion of the drug Bendectin during the course of the mother's pregnancy.[84] One of the most contested issues at trial was the scientific reliability of the plaintiff's five expert witnesses, whose testimony concerned the causation element of the plaintiffs' claim.[85] The trial judge allowed the testimony into evidence and a jury found in favor of the plaintiffs.[86] A panel of the justices on the appeals court reversed and rendered a take nothing judgment; however, on rehearing, an en banc appeals court did allow the plaintiffs' actual damages.[87] The issue before the Texas Supreme Court was whether the plaintiffs' evidence was scientifically reliable, thus providing some evidence in their favor to support the jury's finding.[88]

In the supreme court's opinion, there was no question as to the qualifications of the expert witnesses.[89] However, the supreme court did not believe the expert's testimony was reliable.[90] The supreme court performed a no evidence review in order to determine if there was any probative force to support the jury's finding.[91] They were forced to view all the record evidence "in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor."[92] When examining reliability, an expert's bare

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79. *See id.* at 558.
80. *See id.*
81. *See id.* at 560.
82. 953 S.W.2d 706 (Tex. 1996), *cert. denied*, 523 U.S. 1119 (1998).
83. *See id.* at 711.
84. *See id.* at 708.
85. *See id.* at 709.
86. *See id.*
87. *See id.*
88. *See id.* at 711.
89. *See id.*
90. *See id.* at 714.
91. *See id.* at 711.
92. *Id.* (citing Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970)).

opinion will not suffice. Rather, a court should look at the substance of the testimony.[93] In a bit of humor, the court stated:

> even an expert with a degree should not be able to testify that the world is flat, that the moon is made of cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obligated to accept it as some evidence? The answer is no.[94]

A court should determine reliability by looking at the nonexclusive list of factors set out in *Robinson* and *Daubert*.[95] Furthermore, a reviewing court should use these same factors when performing a no evidence review of a trial court's reliability assessment of an expert's testimony.[96] Unreliable expert scientific testimony should not be allowed into evidence.[97] Expert testimony based on unreliable foundational data, or conclusions based on flawed reasoning and methodology, will result in the court's ruling of unreliability.[98] After an in-depth discussion of causation and the use of epidemiology, the supreme court analyzed each expert independently and held that there was "no scientifically reliable evidence to support the verdict in this case."[99]

C. Gammill v. Jack Williams Chevrolet, Inc.[100]

While *Robinson* and *Havner* dealt primarily with how experts offering "scientific testimony" under Rule 702 of the Texas Rules of Civil Evidence should be analyzed, *Gammill v. Jack Williams Chevrolet, Inc.* took this analysis to another level. *Gammill* also addressed an expert's "scientific testimony," and additionally addressed the part of Rule 702 that dealt with an expert's testimony regarding "technical or other specialized knowledge."[101]

In *Gammill*, three members of a family were injured—one of which later died—following a single vehicle accident.[102] The plaintiffs sued the manufacturer and seller claiming that the vehicle contained design defects.[103] Specifically, the plaintiffs claimed that the driver lost control of the vehicle because its gas pedal would not release after it became caught beneath the

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93. *See id.*
94. *Id.* at 712 (citing E.I. duPont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995)).
95. *See id.*
96. *See id.* at 714.
97. *See id.* at 713.
98. *See id.* at 714.
99. *Id.* at 730.
100. 972 S.W.2d 713 (Tex. 1998).
101. *See id.* at 726.
102. *See id.* at 715.
103. *See id.*

dashboard of the vehicle, and the rear seatbelt failed to restrain its passenger properly.[104] After a very long and complicated procedural history, the trial court excluded the testimony of the plaintiffs' expert and granted summary judgment for the defendants.[105] The court of appeals affirmed.[106] The issues on appeal to the Texas Supreme Court were whether the plaintiffs' experts were qualified and whether their testimony was both relevant and reliable.[107]

To begin, the Texas Supreme Court held that the trial court did not abuse its discretion in holding that the plaintiffs' experts were not qualified, which is required by Texas Rule 702.[108] The question of whether an expert is qualified is a preliminary question for the trial court judge and is reviewable by an appellate court as an abuse of discretion.[109] The party offering the expert as a witness must prove to the trial court that the expert " 'possess[es] special knowledge as to the very matter on which he proposes to give an opinion.' "[110] Furthermore, "[t]rial courts must 'ensur[e] that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.' "[111] In *Gammill*, the supreme court noted that just because a person is a mechanical engineer, does not mean he is qualified to testify as an expert in all products liability cases.[112] Only one of the plaintiffs' experts was actually qualified enough to be considered an "expert."[113]

With respect to the one qualified expert's testimony, the plaintiffs still had to show that his testimony was both relevant and reliable.[114] Addressing relevancy, the supreme court reiterated the interplay between Texas Rules of Civil Evidence 401, 402, and 702 that it had previously announced in *Robinson*.[115] However, in addition to being relevant, the testimony must also be reliable.[116] It is upon this requirement that the plaintiffs ran into trouble.[117]

The supreme court began its discussion of the expert's reliability by listing the six nonexclusive factors that should be used to aid a trial court judge in determining if an expert's testimony is reliable.[118] The plaintiffs conceded the expert's testimony was scientific in nature, but they argued that

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104. *See id.*
105. *See id.* at 715-18.
106. *See id.* at 718.
107. *See id.*
108. *See id.* at 718-20.
109. *See id.* at 718 (citing TEX. R. CIV. EVID. 104(a)).
110. *Id.* (quoting Broders v. Heise, 924 S.W.2d 148, 152-53 (Tex. 1996)).
111. *Id.* at 719 (quoting *Broders*, 924 S.W.2d at 152).
112. *See id.*
113. *See id.*
114. *See id.* at 720.
115. *See id.*
116. *See id.*
117. *See id.* at 720-728.
118. *See id* at 720.

the *Robinson* test should only apply to novel science instead of established science like mechanical engineering.[119] In addition, the plaintiffs argued *Robinson* analysis should not be determinative because the expert's opinion was based on individual skill, expertise, or training.[120] With regard to the former, the Texas Supreme Court acted much like the United States Supreme Court did when the Supreme Court overruled *Frye* in *Daubert*.[121] The Texas Supreme Court saw "no value in having a different standard of admissibility for novel scientific evidence."[122] It would simply be too difficult to determine if a science was "novel" or "established."[123] It is much easier to have the same standard for both.[124] "[T]he standard adopted in *Robinson* applies to all scientific expert testimony."[125]

In an important part of the opinion, the supreme court next addressed the plaintiffs' other argument.[126] "On the one hand, an exception for evidence based on a witness's skill and experience would easily swallow the rule. . . . On the other hand, there are many instances when the relevance and reliability of an expert witness's testimony *are* shown by the witness's skill and experience."[127] In the opinion of the supreme court "even if the specific factors set out in *Daubert* . . . do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility."[128] In agreeing with rulings from the Fifth, Sixth, Ninth, and Eleventh Circuits, the supreme court held that Texas Rule 702 should apply to not only scientific evidence, but also to technical and other specialized knowledge.[129] "It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. All expert testimony should be reliable before it is admitted."[130] The supreme court noted that the *Robinson* factors cannot be used in every situation when a trial court assesses the reliability of expert testimony.[131] However, the proponent of the expert testimony must still show some basis for the offered opinions.[132]

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119. *See id.* at 721.
120. *See id.*
121. *See id.* at 721-22.
122. *Id.* at 721.
123. *See id.*
124. *See id.*
125. *Id.* at 722.
126. *See id.*
127. *Id.* (emphasis in original).
128. *Id.* at 724 (citing Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996), *cert. denied*, 519 U.S. 1042 (1996); McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997)).
129. *See id.* at 726. *See, e.g.*, Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997); Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995); McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), *rev'd sub nom*; Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).
130. *Id.*
131. *See id.*
132. *See id.*

In certain situations, experience alone may be enough to convince a trial court that a witness is truly an "expert."[133] "The [trial] court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed."[134] In the end a trial court, while fulfilling its role as gatekeeper, may find that there is simply too great an analytical gap between the witness's data and opinion offered to allow the testimony into evidence.[135] This is precisely what happened in *Gammill* and the Texas Supreme Court agreed.[136]

IV. HOW DOES THIS ALL RELATE TO ADMINISTRATIVE PROCEEDINGS: *FAY-RAY CORP. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION*[137]

Thus far, this paper has shown the proper analysis a trial judge or lawyer should go through when deciding if the testimony offered by an expert is proper in a given proceeding. But what happens when this same issue rears itself in an administrative proceeding? The next part of this paper will address this very question. As it turns out, the analysis is not that much different.

In *Fay-Ray Corp. v. Texas Alcoholic Beverage Commission*, the Texas Alcoholic Beverage Commission ("Commission") sought to revoke Fay-Ray Corporation's ("Fay-Ray") mixed beverage permit and mixed beverage late hours permit.[138] The Commission believed that Fay-Ray had served an alcoholic beverage to an intoxicated person who later caused a fatal automobile accident.[139] If the Commission was correct, they could revoke both of Fay-Ray's permits.[140] An administrative hearing was held before an Administrative Law Judge (ALJ) to determine if Fay-Ray's permits should be revoked.[141] Following the hearing, the ALJ issued a Proposal for Decision, which the Commission adopted.[142] The Commission revoked Fay-Ray's permits.[143] Fay-Ray filed suit in the district court in hopes of gaining a reversal, but the district court affirmed the Commission's decision.[144] Fay-Ray appealed.[145]

In one of its many points of error, Fay-Ray claimed inadmissible evidence was admitted as expert testimony at the administrative hearing.[146]

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133. *See id.*
134. *Id.*
135. *Id.* (citing General Electric Co. v. Joiner, 522 U.S. 136 (1997)).
136. *See id.* at 727.
137. 959 S.W.2d 362 (Tex. App.—Austin 1998, no pet. h.).
138. *See id.* at 365.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.* at 367.

Fay-Ray argued one witness at the administrative hearing "should not have been recognized as an expert witness because his methodology and analysis were not scientifically reliable."[147] The court of appeals overruled this point of error.[148] The court of appeals relied on Texas Government Code § 2001.038,[149] which provides:

> The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is:
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> (1) necessary to ascertain facts not reasonably susceptible of proof under those rules;
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> (2) not precluded by statute; and
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> (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.[150]

The Texas Rules of Evidence for "nonjury" trials is not a separate set of evidence rules as compared to "jury" trials.[151] The main difference between the two types of trials is that the judge, acting as both judge and jury in a nonjury trial, may tend to hear inadmissible evidence that would have been kept from a jury in a normal trial.[152] "Like a trial court, an ALJ has broad discretion in deciding whether to admit expert testimony in an administrative hearing, and her decision will not be disturbed absent a clear abuse of discretion."[153] If the expert's opinion "will assist the trier of fact in understanding the evidence or in determining a fact issue," it should be admitted.[154] At the administrative hearing, the witness was questioned by Fay-Ray and the ALJ about his training and expertise.[155] The ALJ allowed the witness to testify as an expert and the court of appeals agreed.[156]

The decision in *Fay-Ray*, coupled with Texas Government Code § 2001.038, has broad implications for the both an administrative lawyer and an administrative law judge. As stated above, the Texas Rules of Evidence should be applied in administrative proceedings just as they are in nonjury trials.[157] This application would mean that the requirements laid out by the Texas Supreme Court in *Robinson* and further defined by *Havner* and

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147. *Id.*
148. *See id.*
149. *Id.*
150. TEX. GOV'T CODE ANN. § 2001.081 (Vernon 1998).
151. *See* 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 422.04[1] (2000); *see also*, Olin Corp. v. Smith, 990 S.W.2d 789, 797 (Tex. App.—Austin 1999, pet. denied).
152. *See* 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 422.04[1] (2000).
153. *Fay-Ray Corp.*, 959 S.W.2d at 367.
154. *Id.* (relying on TEX. R. CIV. EVID. 702).
155. *See id.*
156. *See id.*
157. *See* TEX. GOV'T CODE ANN. § 2001.081 (Vernon 1998).

Gammill for trial courts, applies to administrative proceedings as well. Also, remember *Robinson* was originally a bench trial, which makes it more applicable to administrative proceedings participants.[158] An administrative trial judge must make preliminary determinations in an administrative proceeding about the admissibility of an expert's testimony.[159] In addition, an administrative law judge, like a trial judge, must make sure that a potential expert witness is qualified, and his testimony is relevant and reliable before allowing the testimony to be heard before a trier of fact.[160] Accordingly, all the analysis discussed in the section "Texas Comes of Age—The Texas Three-Step" above would apply to administrative proceedings.

V. ANOTHER PRACTICAL CONSIDERATION

Participants in an administrative hearing or in a trial court should abide by the Texas Rules of Evidence that deal with the inadmissibility of hearsay testimony.[161] However, in an administrative hearing, like a nonjury trial, the presiding judge may admit inadmissible hearsay evidence because he is the one entrusted with the duty of severing what is proper and what is improper in order to arrive at a just result.[162] A potential problem arises when one takes this ideology to a higher level. Much of the testimony of an expert witness is hearsay, including secondhand "texts, studies, reports of experiments conducted by others, facts garnered from reports, engineering studies, and statistical surveys."[163] While the expert's "testimony" many times is live and in person at an administrative proceeding, sometimes this "testimony" is merely a written report stating the expert's opinion regarding a contested issue.[164] What happens when an expert attempts to base his "expert opinion" on information that, if brought independently, would be ruled inadmissible hearsay evidence by a trial court or administrative judge? The Texas Rules of Civil Evidence has answered this question.[165]

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts

158. *See Robinson*, 923 S.W.2d at 552.

159. *See id.* at 556. *See also* Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d at 718.

160. *See Robinson*, 923 S.W.2d at 556.

161. *See* Wilson v. Board of Educ. of the Fort Worth Indep. Sch. Dist., 511 S.W.2d 551, 553 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (citing Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180 (Tex. 1972)).

162. *See id.* at 555.

163. 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 422.04[4] (2000).

164. *See id.*

165. *See* TEX. R. CIV. EVID. 703.

> in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[166]

In *Lopez v. Carrillo*, the Texas Court of Appeals for San Antonio was confronted with a disgruntled patient who swallowed a drill bit during a dental exam.[167] The patient had tried unsuccessfully to recover on a medical malpractice claim against his dentist in the district court.[168] On appeal, the patient claimed the district court erred by relying on a questionable affidavit by the defendant, as an expert, in deciding to grant a motion for summary judgment.[169] Specifically, the patient claimed the defendant's affidavit was based upon a statement made by another doctor concerning the patient's medical condition.[170] This statement would constitute hearsay.[171] Relying on Rule 703 of the Texas Rules of Evidence, the appellate court ruled that the district court was correct in relying on the affidavit, even though it contained hearsay because "hearsay can be relied on by experts in forming their opinions."[172]

This concept could be very important for an administrative proceeding participant. When this idea is coupled with Rule 705 of the Texas Rules of Evidence, the results have the potential to severely damage an adversary's legal position. Rule 705(a) provides that an expert may disclose the underlying facts used as a basis of his opinion.[173] If the expert's underlying facts used to determine his conclusion are hearsay, this otherwise inadmissible testimony is now heard by the trier of fact.

One of the few safeguards to this concept appears within Rule 703 of the Texas Rules of Civil Evidence.[174] The hearsay that the expert relies upon must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences" in order to be admissible.[175] Another safeguard appears to be located within Texas Rule 705(d). "When the underlying facts . . . would be inadmissible in evidence, the court shall exclude the underlying facts . . . if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion

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166. *Id.*
167. 940 S.W.2d 232, 233 (Tex. App.—San Antonio 1997, writ denied).
168. *See id.*
169. *See id.* at 234-36.
170. *See id.* at 235.
171. *See id.*
172. *Id.*
173. *See* TEX. R. CIV. EVID. 705(a).
174. *Id.* at 703.
175. *Id. See also* 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 422.04[4] (2000); Liptak v. Pensabene, 736 S.W.2d 953, 957 (Tex. App.—Tyler 1987, no pet.) (taking judicial notice that offered hearsay evidence was admissible because it was of a type reasonably relied upon by an attorney expert in forming an opinion).

outweighs their value . . . or are unfairly prejudicial."[176] However, upon careful analysis this does not provide any relief at all to the opponent of the hearsay evidence. Since the administrative law judge has the dual role of both judge and jury in an administrative proceeding, the odds of the judge, acting as the trier of fact, not hearing what may remotely be ruled inadmissible hearsay evidence, appear to be unfavorable at best.

VI. CONCLUSION

"Agency [proceedings] are frequently the arena in which expert witnesses do battle for the respective parties."[177] Administrative law judges, lawyers, and other participants depend on an expert to explain to them complicated subject matters. The Texas Rules of Evidence and various Texas courts have attempted to keep "experts" from causing a "Y2K" panic in Texas courts and administrative proceedings as "experts" did to the public in late 1999. Lawyers, judges, and others who maintain a firm understanding of the law regarding experts will be able to ensure that only qualified experts, offering relevant and reliable testimony, will be used to assist them in reaching a just result.

by Phillip Brent

176. TEX. R. CIV. EVID. 705(d).
177. 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 422.04[4] (2000).