



Should Your Next Expert Witness Be A Licensed Private Investigator?

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Most lawyers would agree that an expert witness who collects independent data for use in formulating his or her opinion is following the standard set out in the Texas Rules of Evidence and case law.¹ What many do not know is that such an expert may also be violating the law, subjecting both the expert witness and the hiring attorney to criminal prosecution, because of a little-known provision in Section 1702 of the Texas Occupations Code that governs the licensing of private investigators.²

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The problem arises from how the code defines “private investigator” and how the code interacts with the requirements of Rule 702 of the Texas Rules of Evidence, Rule 702 of the Federal Rules of Evidence,³ and the holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. Dupont De Nemours and Company, Inc. v. C. R. Robinson*, 923 S.W.2d 549 (Tex. 1995) (adopting standard set forth in *Daubert*); *Merrell Dow Pharmaceuticals Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998); and *General Motors Corp. v. Sanchez*, 997 S.W.2d 584 (Tex. 1999).

The code defines a private investigator as a person who engages in the business of obtaining or furnishing, or accepts employment to obtain or furnish, information related to the cause or responsibility for a fire, libel, loss, accident, damage,

and/or personal injury to a person or to property.⁴ The code also defines a private investigator as a person who engages in the business of securing, or accepts employment to secure, evidence for use before a court, board, officer, or investigating committee.⁵ Further, the code makes it a Class A misdemeanor for a person to act as a private investigator without a license⁶ or knowingly hire an unlicensed investigator.⁷ The provisions defining the functions of a private investigator and the penalties for hiring unlicensed investigators raise serious concerns for lawyers.

The problem first arises with the language “obtaining or furnishing . . . information related to the cause or responsibility for a fire, libel, loss, accident, damage, and/or personal injury to a person or property.” Under the Rules of Evidence and prevailing case law, experts must not only rely upon sound and accepted scientific principles, but also base their work upon a reliable foundation.⁸ In many cases, particularly products-liability and personal injury cases, this involves conducting tests, taking measurements, or performing some other task that gathers data related to the cause of an accident or injury. Experts frequently “furnish information” related to the cause or responsibility for a “fire, accident, damage, and/or personal injury.” This can take the form of underlying data gathered to support the expert’s opinion, a written expert report, or testimony in a deposition or in court.

A second concern is the language “[engaging] in the business of securing, or accepts employment to secure, evidence for use before a court, board, officer, or investigating committee.” Many experts secure evidence for use before a court in support of their opinions. Hiring a professional photographer to take pictures of an accident scene for use as an exhibit before a court may violate the act.

How on Earth Did We Get Into This Situation and Why Haven’t I Heard of It Before?

Section 1702 of the Texas Occupation Code is currently administered by the Private Security Board of the Texas Department of Public Safety. In 2003, the 78th Legislature abolished the old

Texas Commission on Private Security and transferred its functions to the Private Security Board.⁹ Like the former commission, the board has a board of directors. (Five of the seven members currently serving terms on the board were commissioners on the former commission.)¹⁰ Additionally, the former commission’s executive director, Cliff Grumbles, serves in that capacity on the new Private Security Board. Although the board has not issued any policy statements regarding the issues presented in this article, given the current board’s makeup, it is likely the board’s position has not changed.

To understand how the law got into this position one must understand how the former Texas Commission on Private Security viewed the current code provisions and the prior act regulating private investigators. This, in turn, will provide insight into how the new Private Security Board will likely interpret Section 1702 of the Texas Occupations Code. Prior to 1999, the laws governing private investigators were found in the Texas Revised Civil Statutes; however, the legislature codified those laws into the Occupations Code at that time. Under the original act, there was a “safety valve” provision that specifically exempted expert witnesses from the statute’s scope.¹¹ That exemption excluded a person who:

(A) by education, experience, or background has specialized expertise or knowledge that would qualify or tend to qualify the person as an expert witness, authorized to provide opinions in proceedings conducted in a court, administrative agency, or governing body of this state or of the United States, in accordance with applicable rules; and

(B) does not perform any other service for which a license is required under this chapter. . . .

There was tension between the way some attorneys and their expert witnesses interpreted this section, and how the former commission interpreted it. The commission interpreted that provision to mean that an expert witness may testify before a court and offer an opinion based upon a review of evidence and materials gathered by independent sources (med-

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ical records, police accident reports, witness statements, depositions, or discovery). However, once the expert witness undertook to gather information on his or her own (take measurements at the accident scene or photograph an accident scene), the expert witness violated the code because he or she was performing another "service for which a license is required under this chapter." Attorneys, however, felt that as long as expert witnesses acted "in accordance with applicable rules" in formulating their opinions, then an expert was exempt from the requirements of the statute. As *Daubert* and its progeny evolved, especially regarding the gathering of data upon which the experts would base their opinions, significantly greater tension arose between the differing interpretations of the statute.

The expert exemption was added to the statute governing private investigators in 1983 after the legislature perceived conflicts with the definition of a private investigator under the act and expert witnesses. The bill analysis from the Committee on Law Enforcement stated with regard to the background of the amendment:

The Section 3 of Article 4413(29bb) lists persons exempt from this Act. Currently, Section 3 does not list persons with certain experience or knowledge that would qualify such persons to appear as expert witnesses. Discussing the amendment's purpose, the analysis further stated:

This bill proposes to add to Section 3 persons with certain education or experience to qualify as expert witnesses in court proceedings.

The committee bill analysis discussing the amendment makes clear the legislature's intent in 1983: to make expert witnesses exempt from the scope of the act.

The former commission had long sought to bring accident reconstructionists within its reach, requiring them to be licensed private investigators. Much of the conflict under the differing interpretations of the old act was in the context of motions to exclude accident reconstructionists who were not licensed private investigators on the ground that because they did not possess a private

investigator's license, they were not qualified to testify.

Case law, under the former exemption, wasn't favorable to the commission's argument, especially after the evolution of *Daubert*. An expert's qualifications are measured under Rule 702 of the Texas Rules of Evidence. Rule 702 states: "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."¹² The leading cases on expert testimony in Texas are: *E.I. Dupont De Nemours and Company, Inc. v. C. R. Robinson*;¹³ *Merrell Dow Pharmaceuticals Inc. v. Havner*;¹⁴ *Gammill v. Jack Williams Chevrolet, Inc.*;¹⁵ and *General Motors Corp. v. Sanchez*.¹⁶

In *Robinson*, the Texas Supreme Court stated that Rule 702 contains three requirements: (1) the witness must be qualified; (2) the proposed testimony must be "scientific ... knowledge"; and (3) the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁷

In determining whether an expert is qualified to testify, there are two further considerations: (1) the expert's "qualifications" (training, education, knowledge, expertise, or skill); and (2) the foundational basis of the expert's testimony.¹⁸ *Havner* discusses at length the importance of weighing an expert's underlying foundational data, stating:

The view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely has likewise been rejected by other courts. The underlying data should be independently evaluated in determining if the opinion itself is reliable.¹⁹

The *Havner* court also stated: "If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury."²⁰ An expert's opinion must rely upon a sound foundation of data.

Although no cases discuss the statute regulating private investigators, there are cases that discuss licensing requirements

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and the criteria of Rule 702. None was favorable to the Texas Commission on Private Security's interpretation of the old statute. The most significant case is *State v. Northborough Center, Inc.*²¹ The 14th Court of Appeals held that a requirement that a witness be licensed in order to testify as an expert does not comport with the language or purpose of Rule 702.²² *Northborough* is the most instructive case because it construed a similar statute. In *Northborough*, the appellant complained that the trial court had permitted an expert witness to testify as to matters requiring expertise in surveying, engineering, architecture, and landscape architecture, even though he was not licensed in any of those professions. Texas law requires a license to practice any one of those professions.²³ The appellant argued that because the appellee's expert witness was not licensed, he was not qualified. The 14th Court of Appeals rejected that argument, relying on a case from the Texarkana Court of

Appeals, *Southland Lloyd's Insurance Company v. Tomberlain*,²⁴ stating:

The Texas Engineering Practice Act, although requiring an individual to have a license to practice engineering, does not require an individual to be a licensed engineer when testifying or preparing exhibits to be presented at trial:

Nothing in this Act shall be construed or applied so as to prohibit or in any way restrict any person from giving testimony or preparing exhibits or documents for the sole purpose of being placed in evidence before any administrative or judicial tribunal of competent jurisdiction.²⁵

The engineering statute, unlike the current private investigator statute, contains a savings clause regarding expert testimony. However, the court in *Northborough* stated that "there is no language in Rule 702 which can be construed as requiring a witness to have a license in order to tes-

tify as an expert."²⁶ The 14th Court of Appeals quoted the Texarkana court:

A requirement that an expert witness hold a professional license does not comport with the language or purpose of Rule 702. The rule is meant to insure that if specialized knowledge will help the trier of fact examine the evidence, a person who has acquired such knowledge through any one of a number of methods may testify based on that knowledge.²⁷

With the expert exemption in place and case law running against it, the commission sought alternative means of accomplishing its goals. It took its fight to the legislature, and, in 1999, succeeded in getting the legislature to strike the expert witness exemption from the statute. The result of the removal of this protective measure appears to require not just accident reconstructionists, but also most other expert witnesses who gather data, to now be licensed private investigators, unless another specific exemption applies.

Exactly how the amendment striking the exemption came about is a mystery. During the course of hearings before the Sunset Commission, testimony was taken on March 23 and March 30, 1999. Nineteen witnesses testified. The tapes of those hearing contain no testimony regarding the expert witness exemption. Nor does there appear to be anything in the online legislative history regarding the removal of the exemption.

Some enlightenment could, at one time, be found on the Texas Commission on Private Security's website, www.tcps.state.tx.us, where the Commission published its public policy regarding the expert witness exemption, and its subsequent deletion from the code. This policy statement was in the form of a letter from Jay Kimbrough, who at that time was a member of the commission, to Ben Nix, then-presiding officer of the commission, on Sept. 29, 1999. In the letter, Kimbrough stated:

Questions have arisen with respect to the deletion of a specific exemption from our former statute related to "expert witnesses." This particular exemption was overbroad in scope and abused by some that



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the legislature indeed intended to be regulated by our statute. The deletion of the “expert witness” exemption, however, will not intrude on those that have generally been considered as “experts” under the Texas Rules of Procedure who testify *concerning facts obtained or gathered by others*. The Act will require licensure of those who otherwise meet the definitions of an “Investigations Company” as defined by the Texas Legislature.

Individuals who testify as to their opinion or mental impressions of *facts gathered or provided by another* are not subject to registration or licensure under Article 4413(29bb). Additionally, an attorney who testifies as to his or her opinion or mental impressions of a law based on facts *provided by other attorneys* on direct or cross examination is not subject to our Act. Finally, as a general proposition, individuals who are licensed and regulated by a state or federal agency, and who are engaged in their respective professions and who are called to testify on matters within the scope of their licensed activities are not subject to Article 4413(29bb). (Emphasis added.)

This position is further reflected in an affidavit by Clifton Grumbles, who at that time was deputy director of the Texas Commission of Private Security, filed by an opposing counsel in a civil case in which this author participated.²⁸ In that affidavit, he stated: “The Commission has determined that individuals who testify as to their opinion or mental impressions of *facts gathered or provided by another* are not subject to registration or licensure under Chapter 1702. Clearly, this exempts an individual, who renders an opinion or mental impression based on evidence or facts collected by someone else.” (Emphasis added.)

This “position” by the former commission has serious consequences for attorneys and their expert witnesses because experts are required to rely on sound foundational data to reach their opinions. In many cases, such as a physician reviewing medical records, no conflict exists with the private investigator statute.

[W]hat did the commission mean by “within the scope of their licensed activities”? If the licensed activity does not include gathering information for use at trial, does the activity fall outside the scope of their professionally licensed activities, which would require licensure under the private investigations act?

But in other instances, there is serious conflict. Consider the following examples:

- A chemist hired to test a liquid to determine if it contained a chemical that caused a personal injury (if it was toxic) would be required to be licensed as a private investigator;
- An auto mechanic hired to inspect and test brakes to see if they were improperly installed or maintained thus causing an auto accident would have to be licensed as a private investigator;
- A physician who does an independent medical examination of a person to determine if that person was injured as a result of an accident would have to be a private investigator (no exemption exists for physicians);
- A professional photographer hired to take pictures of the scene of an accident for use as exhibits in court would have to be a licensed private investigator;
- An electrician hired to examine wiring to determine if it was improperly installed, thus creating a risk of shock causing personal injury, or caused a fire would have to be a licensed private investigator;
- A plumber hired to determine if plumbing work was improperly done, resulting in a leak that caused damage to property would have to be a licensed private investigator.
- A certified public accountant who

interviews a company’s accounting staff to determine how it was posting certain accounts so that the accountant could reconstruct the company’s accounting practices and testify as to those practices in court would have to be a licensed private investigator.

The linchpin of the former commission’s argument is that it is acceptable for an expert to testify regarding his or her opinion if the testimony is based upon facts gathered by others. Of course, this was the commission’s position under the old version of the statute, which contained the exemption. Its argument is in direct conflict with the holdings of *Daubert* and *E.I. Dupont De Nemours and Company, Inc.* and its progeny, which require that a sound methodology underlie an expert’s opinion.²⁹ This means experts must sometimes take photographs or measurements, conduct tests, or otherwise gather data.

The former commission’s position that “as a general proposition, individuals who are licensed and regulated by a state or federal agency, and who are engaged in their respective professions and who are called to testify on matters within the scope of their licensed activities” do not fall within the ambit of the act is disingenuous. First, not all experts are licensed and regulated by state or federal agencies. This includes auto mechanics, brake mechanics, chemists, biochemists and biologists, public health specialists, and photographers.

Second, what did the commission mean by “within the scope of their

licensed activities”? If the licensed activity does not include gathering information for use at trial, does the activity fall outside the scope of their professionally licensed activities, which would require licensure under the private investigations act? For example, physicians diagnose and treat illnesses and injuries, and information they gather is geared toward those goals. The Board of Medical Examiners strictly regulates them, and when performing these functions, physicians are acting within the scope of their licensed activities. However, the Board of Medical Examiners does not oversee whether physicians testify in court, and physicians do not diagnose or treat patients with an eye to providing evidence in court at some future date; they diagnose and treat with an eye to curing the illness or repairing an injury. Therefore, if a physician is hired to conduct an independent medical examination (IME) to determine whether a spinal injury was caused by an auto accident, and, in the process of conducting that IME, gathers data the physician uses when testifying before the court, the physician may have violated the act.

Finally, and perhaps most significantly, nothing in the act suggests that individuals who are licensed and regulated by a state or federal agency, who are engaged in their respective professions, and who are called to testify on matters within the scope of their licensed activities have run afoul of the code. Nowhere does this generalized language appear in the code. Further, the code contains a specific, inclusive list of exclusions. If a person performing an act that falls squarely within the definition of performing the function of a private investigator is not a member of that class of individuals specifically excluded from the ambit of the code, he or she is potentially in violation of the code. A good example of this type of exclusion is a licensed engineer. The code specifically exempts licensed engineers from its scope. However, the code does not exempt physicians.

Nor may attorneys be immune from the statute. The language contained in the commission’s letter is ominous. “[A]n attorney who testifies as to his or her opinion or mental impressions of a law

based on facts *provided by other attorneys* on direct or cross examination is not subject to our Act.” What, precisely, does that mean? If attorneys gather their own facts, do they violate the act? What if a tax attorney is hired to review financial records, interviews key witnesses, and prepares an expert report in a complex white-collar crime case? Does that attorney violate the statute? It is true the current code contains an exemption for attorneys, but that language was changed when the former act was re-codified into the Occupations Code in 1999. Prior to codification, the exemption for attorneys applied to “an attorney at law in performing his duties.” After codification, that provision was changed to read “an attorney while engaged in the practice of law.” There is a subtle difference in this language. Is it significant?

The code does not define “engaged in the practice of law.” Based upon the former commission’s public statements on its website, the question must be asked: Will the commission decide that, in order to be in compliance with the code, attorneys must hire private investigators to do things they might normally have done themselves, such as take pictures of an accident scene or of a vehicle involved in an accident? After all, does taking pictures equate to being “engaged in the practice of law”? The former commission could have quite reasonably argued that it does not. The commission could have likewise argued that an attorney who did so would be in violation of the code unless the attorney was also a licensed private investigator.

Who Is Exempt From The Code?

Licensed engineers are exempt from the code.³⁰ The commission, however, takes the position that if the engineer has retired and relinquished his or her engineering license, acts as an expert witness in a case, and gathers independent data during the course of the employment, he or she must be a licensed investigator. This can create potential problems for retired engineers working as expert witnesses, especially those who seek employment as accident reconstructionists. Also

exempt are landmen, full-time peace officers, persons employed full time obtaining information related to credit worthiness or debt collection, admitted insurers, insurance adjusters, insurance agents, insurance brokers, individuals who repossess property, locksmiths, cattle inspectors, common carriers, those who sell burglar alarms over the counter or by mail order, reserve peace officers performing their duties, persons employed as noncommissioned peace officers by a political subdivision of the state, medical alert services providers, persons engaged in the business of electronic monitoring of a person on probation, charitable non-profit organizations that maintain records on missing children, persons engaged in the business of psychological testing, campus peace officers, security departments of a private business, and government employees.³¹ While the list looks inclusive, many professions are not covered. No provision exempts physicians. Yet frequently, physicians are called upon to gather data or evidence independently for use in litigation in personal injury or criminal cases. Furthermore, the code makes no provisions for persons retired from these professions, such as engineers, who no longer hold licenses in their professions.

The Code, as Written, Poses Serious Problems

The code poses serious problems for just about any expert witness testimony. First, it exposes the expert and hiring attorney to the possibility of criminal prosecution. The code makes it a Class A misdemeanor for a person to act as a private investigator without a license.³² This would include an expert who was not exempted from the statute. In addition to motions to strike expert witnesses, this author is aware of a recent case in which two experts, an accident reconstructionist and a photogrammetrist, were charged with misdemeanors.³³ The charges were ultimately dropped, but this example illustrates the real consequences of running afoul of the statute’s provision and former commission’s willingness to attempt to enforce those provisions.

The code also makes it a Class A misdemeanor to knowingly hire an unli-

censed investigator,³⁴ which places an attorney squarely in the crosshairs. As we are all aware, attorneys are generally charged with knowledge of the law. In other words, “ignorance” of the law will not bar potential prosecution. This attorney is unaware, however, of any attempt to actually prosecute an attorney for hiring an unlicensed investigator.

Another risk is that a trial court will exclude an expert’s testimony or evidence if the expert does something within the scope of the code and does not possess a valid investigator’s license. The statute really has no relevance in the context of *Daubert* and its progeny. However, because the evidence is acquired in violation of the code, it may be subject to the exclusionary rule. This may certainly be the case in a criminal prosecution if the state uses an expert who does something to bring him within the scope of the code and does not possess a valid investigator’s license and thus violates the law.³⁵

In the civil context, it is unclear whether the exclusionary rule applies.³⁶ At least one appellate court has held that evidence illegally obtained in a civil lawsuit may be admissible, but admissibility must be tempered by the Rules of Evidence providing for the admission of all relevant evidence except as provided by statute.³⁷ The court noted that a party seeking exclusion of the evidence bears the burden of showing that the exclusion is required under state or federal law.³⁸ That particular case involved the illegal taping by a husband of a mother’s telephone conversations with her child, which he then sought to introduce into evidence at a custody hearing. The trial court excluded the tapes and the court of appeals affirmed that decision, finding that both state and federal wiretapping statutes prohibited disclosure of conversations obtained in violation of those statutes.³⁹ By analogy, it could be argued that because the Occupation Code defines acting as a private investigator to be the acceptance of employment to obtain or furnish information related to the cause or responsibility for a fire, libel, loss, accident, damage, and/or personal injury to a person or to property, or to secure evidence for use before a court, board,

officer, or investigating committee, that the legislature intended that evidence obtained in violation of this code be excluded. Although not expressly stated in the statute or legislative history, it is apparent from the context of the code and former act that the legislature was concerned with regulating the gathering of evidence through private investigators for use in legal proceedings. One obvious reason for such regulation would be to ensure reliable and ethical gathering of such evidence. Thus, it could be argued that using an unlicensed individual to gather evidence that falls within the scope of the definition of acting as a private investigator and to permit that evidence to be introduced at trial would frustrate the purpose of the code. Unfortunately, appellate courts offer little guidance as to the extent to which illegally obtained evidence must be excluded in a civil case.

Conclusion

The conflict over interpretation of the code can be easily resolved so that the board can realize its goal of ensuring licensure of accident reconstructionists, if that is indeed the legislature’s wish, and the Bar can retain an expert witness exemption so that future expert witnesses and attorneys do not inadvertently run afoul of the statute.

First, the definition of a private investigator can be amended to make clear that an accident reconstructionist hired as an expert witness in litigation falls within the scope of that definition. Both the board and the accident reconstructionists’ lobby can present evidence to the legislature so that it can make a reasonable determination and balance the competing interests. If the legislature rejects the board’s argument, then it can amend the code to make clear accident reconstructionists do not fall within the code’s scope.

Second, the expert witness exemption can be put back into the code to make it clear that the gathering of underlying data does not constitute performance of “any other service for which a license is required” under the code.

Finally, the exemption applying to

attorneys can be clarified so that it is clear that attorneys may gather facts and evidence for use in litigation. Alternatively, the new board may want to issue a policy statement setting forth which types of expert witnesses it would consider to fall within the scope of the code, and which would not. This would provide attorneys and their experts with the information they need so as not to run afoul of the code.

When considering hiring an expert witness who will be required to independently gather underlying data, or conduct tests that render data, prudent practitioners should first determine whether their expert witnesses fall within any of the specifically enumerated exceptions contained in the code. If the expert does fall within an exception (a licensed engineer), there will be no problem. However, should the proposed expert not fall into an exception, the hiring attorney should consider whether gathering independent data would constitute performing a service for

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which a license is required under the code. If the answer is yes, then the attorney should determine if the data needed to be gathered or the tests that need to be conducted can be done by a third party that either falls into an exception or is a licensed investigator. If the answer is no, then the practitioner should seriously consider another expert who meets the criteria of the code or be prepared to face the risks. The role the proposed expert will play in the litigation, the amount of independent investigation the expert must do, and whether he or she is regulated by another state or federal agency are all factors that should be weighed before making a decision.

NOTES

1. Tex.R.Evid., Rule 702; Fed.R.Evid., Rule 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. Dupont De Nemours and Company, Inc. v. C. R. Robinson*, 923 S.W.2d 549 (Tex. 1995)(adopting standard set forth in *Daubert*); *Merrell Dow Pharmaceuticals Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *Gammill v. Jack Williams Chevrolet, Inc.* 972 S.W.2d 713, 726 (Tex. 1998); and *General Motors Corp. v. Sanchez*, 997 S.W.2d 584 (Tex. 1999).
2. Tex. Occ. Code Ann. §1702.104 (Vernon's 2003) (formerly Tex. Rev. Civ. Stat. Ann. Article 4413(29bb), §1 (Vernon 1999, repealed)) (setting forth definition of acting as an investigator); Tex. Occ. Code Ann. §1702.388 (Vernon's 2003)(making it a Class A Misdemeanor for a person who is required to hold a license under act to perform services of an investigator); Tex.Occ.Code Ann. §1702.386 (Vernon's 2003) (making it a Class A Misdemeanor for a person to hire someone to perform the services of a private investigator knowing the individual or company is not licensed to perform such services).
3. Furthermore, Rule 702 of the Federal Rules of Civil Procedure now specifically require that an opinion be based upon sufficient facts or data, be the product of reliable principles and methods, and that the witness has applied the principles and methods of reliability to the facts of the case.
4. Tex. Occ. Code Ann. §1702.104 (1)(D)(Vernon's 2003).
5. Tex. Occ. Code Ann. §1702.104 (2)(Vernon's 2003).
6. Tex. Rev. Civ. Stat. Ann. Article 4413(29bb), §1 (Vernon 1999, repealed))(setting forth definition of acting as an investigator); Tex. Occ. Code Ann. §1702.388 (Vernon's 2003)(making it a Class A misdemeanor for a person who is required to hold a license under act to perform services of an investigator).

7. Tex. Occ. Code Ann. §1702.386 (Vernon's 2003) (making it a Class A misdemeanor for a person to hire someone to perform the services of a private investigator knowing the individual or company is not licensed to perform such services).
8. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. Dupont De Nemours and Company, Inc. v. C. R. Robinson*, 923 S.W.2d 549 (Tex. 1995)(adopting standard set forth in *Daubert*); *Merrell Dow Pharmaceuticals Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *Gammill v. Jack Williams Chevrolet, Inc.* 972 S.W.2d 713, 726 (Tex. 1998); and *General Motors Corp. v. Sanchez*, 997 S.W.2d 584 (Tex. 1999).
9. House Bill 2, 78th Legislature, Regular Session, effective Sept. 1,2003.
10. Those members are the Hon. George Craig, Chairman, and the Hon. Michael Samulin, Jacob M. Monty, Hon. Charlene Ritchey, and Hon. Linda J. Sadler.
11. Tex.Rev.Civ.Stat. Ann. Article 4413(29bb), §3 (Vernon 1999, repealed).
12. Tex.R.Evid. 702.
13. 923 S.W.2d 549 (1995)(adopting standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
14. 953 S.W.2d 706 (Tex. 1997).
15. 972 S.W.2d 713, 726 (Tex. 1998).
16. 997 S.W.2d 584 (Tex. 1999).
17. *Robinson*, 923 S.W.2d at 556.
18. *See Gammill*, 972 S.W.2d at 718 (Rule 702 permits a witness qualified as an expert by knowledge, skill, experience, training or education to testify); *Havner*, 953 S.W.2d at 714 (if foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base opinion thereon); *see also cf. Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)(it is basis of expert witness's opinion, and not his qualifications or bare opinion alone, that can settle question of law).
19. *Havner*, 953 S.W.2d 712.
20. *Id.* at 712 (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).
21. 987 S.W.2d 187, 193-194 (Tex. App. — Houston [14th Dist.], review denied).
22. *Id.* at 193-194.
23. Tex.Rev.Civ.Stat. Ann. Art. 3271a, §1 (Vernon Supp. 1999)(architecture); Tex.Rev.Civ.Stat. Ann. art. 249c, §5(a) (Vernon Supp. 1999)(architecture); Tex.Rev.Civ.Stat. Ann. art. 3271a, §1.2 (Vernon Supp. 1999)(engineering)(these have all been repealed and placed in the Occupations Code).
24. 919 S.W.2d 822, 827 (Tex. App. — Texarkana 1996), writ denied).
25. *Id.* at 194 (citing Tex. Rev. Civ. Stat. Ann. Art. 3271a, §20(h) (Vernon Supp. 1999)).
26. *Id.*
27. *Id.* (quoting *Tomberlain*, 919 S.W.2d at 827).
28. *See the file of Renella M. Roy v. Robert K. Speckman and The City of Houston*, Cause No.

- 712,146, in the County Civil Court of Law No. 4 of Harris County. The affidavit is attached to a motion to strike Plaintiff's expert witnesses filed by the defendant in that case.
29. Rule 702 of the Federal Rules of Civil Procedure now specifically require that an opinion be based upon sufficient facts or data, be the product of reliable principles and methods, and that the witness has applied the principles and methods of reliability to the facts of the case.
30. Tex. Occ. Code Ann. §1702.324(b)(7)(Vernon 2004).
31. Tex. Occ. Code Ann. §§1702.321 (government employees); 1702.322 (law enforcement personnel); 1702.323 (security department of private business); 1702.324 (certain occupations); 1702.325 (common carriers); 1702.326 (medical alert services); 1702.327 (nonprofit and civic organizations); 1702.328 (security systems sales and installations); 1702.329 (fire alarm and detections sales and installation); 1702.330 (security personnel of private institution of higher education).
32. Tex.Rev.Civ.Stat. Ann. Article 4413(29bb), §1 (Vernon 1999, repealed))(setting forth definition of acting as an investigator); Tex.Occ.Code Ann. §1702.388 (Vernon's 2003)(making it a Class A misdemeanor for a person who is required to hold a license under act to perform services of an investigator).
33. *See the file of Renella M. Roy v. Robert K. Speckman and The City of Houston*, Cause No. 712,146, in the County Civil Court of Law No. 4 of Harris County. In that case, commission investigators served as an expert witnesses for the defendants on their motion to strike.
34. Tex. Occ. Code Ann. §1702.386 (Vernon's 2003) (making it a Class A misdemeanor for a person to hire someone to perform the services of a private investigator knowing the individual or company is not licensed to perform such services).
35. Tex. Code Crim. Pro. Ann., Art. 38.23. The author would note, however, that the Department of Public Safety accredits forensic testing facilities. Tex. Gov. Code Ann. §411.0205 (Vernon Supp. 2004). Given the separate accreditation process, such service providers are likely exempt by implication from the scope of the Occupations Code.
36. *See Pine v. State*, 921 S.W.2d 866 (Tex. App. — Houston [14th Dist.] 1996, writ dismissed w.o.j.) (applicability of exclusionary rule in civil cases uncertain).
37. *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. — Houston [1st Dist.]), writ denied per curiam 923 S.W.2d 569 (1995)(emphasis added).
38. *Id.*
39. *Id.*

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