

**CHALLENGING EXPERTS IN INSURANCE CASES:  
A PRACTICAL PERSPECTIVE**

Presented by:

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The Honorable Scott Link  
55<sup>th</sup> Judicial District Court  
1019 Congress Plaza, 16<sup>th</sup> Floor  
Houston, Texas 77004



## BIOGRAPHICAL INFORMATION

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**Preparatory Education:** 1965 - Strake Jesuit High School  
1968-69 - University College Nairobi, Nairobi, EA (AEA)  
1970 - Antioch College, B.A. Political Science

**Law School:** 1974 - University of Michigan Law School - J.D.

**Area of Practice:** Personal Injury Litigation; Insurance Claims & Bad Faith Litigation

**Certifications:** Board Certified, Personal Injury Trial Law, Texas Board of Legal Specialization

**Professional Associations:** State Bar of Texas - admitted 1974;  
Insurance Law Section, Council Member, Position #1;  
State Bar Dist. 4A Grievance Committee, 1998-1999,  
1997-1998, 1989-1992, 1978-1980;  
American Board of Trial Advocates - Houston Chapter;  
Association of Trial Lawyers of America  
Secretary, Insurance Law Section 1999-2000; Secretary,  
Bad Faith Litigation Group, 1998-Present;  
Houston Bar Association  
Director, 2002-2003;  
Houston Lawyers Association  
Board of Directors; President 1979-1980;  
Houston Trial Lawyers Association  
President-Elect, 2000-2001; Board of Directors, 1994-  
1995; 1997-1998; Treasurer 1998-2000;  
Texas Trial Lawyers Association  
Board of Directors, 2000-2001

**Publications/Presentations:**

1989, Feb/Mar - South Texas College of Law, Seminar-Discovery & Civil Trial Practice Institute, speaker  
1989, Aug.; 1990, Sept. - Univ. of Houston Law Ctr., Seminar - Handling Insurance & Tort Claims, speaker  
1991 - South Texas College of Law, member, Planning Committee, 1992, Advanced Personal Injury Seminar  
1991, Aug. - State Bar of Texas, 7th Annual Advanced Personal Injury Law Course, speaker  
1994, Jan. - ATLA Winter Convention, Strategies for a Successful Practice: Maximizing Resources & Talents; Preparation: Your Witness & Their Witness, moderator  
1994, Mar. - Lorman Education Services, Texas Insurance Law: Bad Faith Claims;

- "Post-Litigation Duty of Good Faith", author & speaker
- 1995 - State Bar of Texas, Legal Assistants Division, Advanced Civil Trial Law Course for Legal Assistants, "Punitive Damages/Bad Faith", author & speaker
- 1995 - Lorman Education Services, Texas Insurance Law: Bad Faith Claims; "Duty of Good Faith and Fair Dealing - Is it a Continuing Duty?", author & speaker
- 1995 - ATLA Annual Convention, Fire Loss & Property Insurance Litigation Group, "Cross Examination of the Forensic Accountant", Seminar Paper (New York)
- 1996 - University of Houston Law Center, Advanced Personal Injury & Insurance Law, "Bad Faith Litigation Update", speaker (Houston/San Antonio)
- 1997, Sept. - Texas Insurance Law Symposium: From Nuts and Bolts to Tips and Tricks;  
"Litigation Strategies: Top Ten Tips and Tricks" (with Joseph F. Nistico, Jr.), co-author & speaker (Houston)
- 1998, Mar. - Professionalism Day 1998, group leader, South Texas College of Law of Texas A & M University (Houston)
- 1998, Apr. - Bad Faith Update: Is The Tort Still Alive?; Video cameo appearance, South Texas College of Law (Houston)
- 1998 - Everything You Need to Know About Insurance Law Symposium; "Bad Faith Update: The Common Law Duty of Good Faith is Alive and Well," author and speaker; Houston Bar Association (Houston)-
- 1998 - State Bar of Texas Legal Assistants Division Power Seminar - Keeping in Step as a Team; "Litigation Strategies," author and speaker (Corpus Christi)
- 1998, July - Texas Insurance Law Symposium, Planning Committee, moderator (Houston)
- 1998, Oct. - ATLA Trial Advocacy College: Essentials of Civil Litigation, Faculty, South Texas College of Law (Houston)
- 1999, Oct. - ATLA Trial Advocacy College: Essentials of Civil Litigation, Faculty, Suffolk University Law School (Boston)
- 1999, Oct. - University of Texas School of Law, 4th Annual Insurance Law Institute, Stower, Bad Faith Panel Member (Dallas)
- 1999, Nov. - Texas Insurance Law Symposium, Faculty, South Texas College of Law (Houston)
- 2000, Feb. - Stomar Educational Services, Personal Injury in Texas, Speaker, Bad Faith Litigation Update and Ethics (Houston)
- 2000, Mar. - Personal Injury Law Conference: Keys to Success, Planning Committee, South Texas College of Law (Houston)
- 2000, Nov. - Texas Insurance Law Symposium, Moderator; *Robinson/Daubert* Issues in Insurance Litigation: The Law and its Application, Speaker - Application (with Hon. Harvey Brown, author & speaker - Law) (Houston)
- 2002, Mar. - Automobile Injury Conference, author and speaker, Uninsured Motorists/Stowers Doctrine, South Texas College of Law
- 2002, July - ATLA Annual Convention, presenter, Proving Insurance Company Bad Faith: Ten Things I Have Learned Along the Way

**WARREN TAYLOR**  
ATTORNEY AT LAW

**PROFESSIONAL QUALIFICATIONS**

Courtroom Experience

Twenty one years of defense practice, with more than forty five verdicts in jury trials concerning a broad range of cases, including first party "bad faith" insurance claims, arson claims, products liability, medical malpractice, legal malpractice, commercial litigation and other personal injury cases.

Appellate Experience

First chair experience writing briefs and presenting oral arguments on more than thirty appeals, including numerous appeals that resulted in published opinions, and several frequently cited published opinions.

Certifications

Board Certified:	Civil Litigation, Texas Board of Legal Specialization	1992-present
Board Certified:	Personal Injury Trial, Texas Board of Legal Specialization	1992-present

**MEMBERSHIPS AND ADMISSIONS**

Admitted to

The Supreme Court of the United States of America  
The United States Fifth Circuit Court of Appeals  
The United States District Court for the Southern, Eastern and Western Districts of Texas  
The State Bar of Texas

Member

State Bar of Texas; Houston Bar Association; Texas Association of Defense Counsel; Defense Research Institute; Houston Medical-Legal Society; Texas Bar Foundation; Houston Bar Foundation; Sports Law Association; Litigator, Unauthorized Practice of Law Committee (1989-1996); Investigator, Unauthorized Practice of Law Committee (1989-1996); Texas Association of Defense Counsel

**EMPLOYMENT**

Taylor & Taylor, Founding Partner, May, 1995  
Floyd, Taylor & Riley, Founding Partner, July, 1986-May, 1995  
Butler & Binion, Associate attorney, May, 1981-July, 1986

**EDUCATION**

University of Michigan, J.D., May 1981; Licensed October, 1981  
University of Texas, B.A., Liberal Arts (Honors Program), May 1978

## ARTICLES AND PRESENTATIONS

Speaker: Texas Insurance Law Symposia: "Challenging Experts in Insurance Claims" — 2003

Texas Insurance Law Symposia: "Homeowner Coverage Issues" — 2002

Texas Insurance Law Symposia: "Witness Preparation" — 2000

Texas Insurance Law Symposia: "The Proper Defendants" — 1999

Texas Insurance Law Symposia: "How to Win Your Case In Voir Dire" — 1998

Wearing the Bull's Eye — 1999

Texas Automobile Insurance Law Seminar — 1998

Texas Insurance Law Seminar — From Nuts and Bolts to Tips and Tricks, 1997, 1998

Texas Insurance Law Bad Faith Claims Seminar, 1994 & 1995

Author: "Homeowner Coverage Issues (Or, How the Texas Supreme Court Accidentally Slew the Golden Goose, Opened Pandora's Box and Changed the Nature of Insurance in Texas)" — 2002

"Good Faith Witness Preparation in a Bad Faith Age" — November 2000

"Identifying the Proper Defendants" — November, 1999

"10 Cases Every Adjuster Should Know" — June, 1999

"Alternatives to Suit: Judicial Interpretation of the Appraisal Clause" — June, 1999

"When Is It Over? Statutes of Limitations on Insurance Claims" — June, 1999

"How to Win Your Case In Voir Dire - A Defense Perspective" — November 1998

"Defending an "Evil Empire"? Seven Steps to Courtroom Success in Defending Insurance Companies," The Texas Lawyer, September 1997

"Appellate Review of Jury Verdicts Finding a Breach of Duty of Good Faith and Fair Dealing" — 1995

"Deceptive Trade Practices Act and Insurance Code Update" — 1995

"The Third Party Extra-Contractual Cause of Action in Texas: Does One Exist?" — 1994

"Appellate Review of Jury Verdicts Finding a Breach of Duty of Good Faith and Fair Dealing" — 1994

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*Wolfson v. BIC Corp.*, \_\_ S.W.3d \_\_, 2002 WL 31721202  
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## FEDERAL COURT: APPLICABLE STANDARDS

Expert testimony is governed by Federal Rule of Evidence (FRE) 702, which requires the Court to determine if the opinion offered by an expert assists the jury. The Court must exclude the testimony of an expert whose opinion is not reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796-97 (1993). The underlying data of an expert's opinion should be independently evaluated to determine if the opinion itself is reliable. *In Re Paoli R..R.Yard P.C.B Litigation*, 35 Sup. 3<sup>rd</sup> 717, 747-48 (3<sup>rd</sup> Cir. 1994); *Richardson v. Richardson-Merrell, Inc.* 857 F.2d 823, 829 (D.C. Cir. 1988) (*Agent Orange*, 611 F. Supp. at 1245). There must be objective, independent validation of the expert's methodology. *Id.*

An expert witness may be qualified and highly credible, but his conclusions may be based on unreliable methodology or may be so against accepted scientific principles as to be rendered unreliable. *General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997). In fact, a proposed expert may have an advanced degree in a subject about which he intends to testify, have significant professional experience, and have even testified as an expert in that field before, but not be qualified to testify in a particular case. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999). The admissibility standard in FRE 702 is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*, 526 U.S. at 151, 119 S.Ct. at 1176.

The following questions are among those which determine whether an expert's opinion is reliable:

- Has the theory or opinion been subjected to peer review?

- Can the theory or opinion be tested?
- Are there standards controlling the technique's operation?
- Is the theory generally accepted in the relevant scientific community?

See *Daubert*, 509 U.S. at 592-94, 113 S. Ct. at 2796-98.

The Supreme Court has held that a large analytical gap between data and conclusions may in and of itself require exclusion of the testimony. The Court stated:

Respondent points to *Daubert's* language that the 'focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.' 509 U.S. at 595, 113 S. Ct. at 2797. He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

*General Electric Co. v. Joiner*, 118 S. Ct. at 519 (1997).

#### STATE COURT: APPLICABLE STANDARDS

A trial court should exclude the testimony of an expert witness who is not qualified. See Tex. R. Evid. 104(a), 702; *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). An expert should have a higher degree of knowledge, skill experience, training, or education about the subject of testimony than an ordinary person. Tex. R. Evid. 702; *Broders*, 924 S.W.2d at 153.

A court should also exclude the testimony of an expert whose testimony is not reliable. See *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711-12 (Tex. 1997); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). An expert witness may be qualified and highly credible, but his or her conclusions may be based on unreliable methodology.

Scientific evidence that is not grounded “in the methods and procedures of science” is no more than “subjective believe or unsupported speculation.” *Daubert*, 509 U.S. at 591, 113 S. Ct. at 2795. Unreliable evidence is of no assistance to the trier of fact and is, therefore, inadmissible under Texas Rule of Evidence 702. *Robinson*, 923 S.W.2d at 557. *Wolfson v. BIC Corp.*, \_\_\_ S.W.3d \_\_\_, 2002 WL 31721202 (Tex. App.-- Houston [1<sup>st</sup> Dist.] Dec. 5, 2002, n.p.h.)

The non-exclusive factors to be considered 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 non-judicial uses which have been made of the theory or technique.

*Robinson*, 923 S.W.2d at 557 (internal citations omitted).

A court should also exclude the opinion of an expert if the probative value of the opinion is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. CIV. EV. 403; *Robinson*, 923 S.W.2d at 556.

CAUSE NO. 96-36093

COLLEEN O'BRIEN	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
STATE FARM LLOYDS,	§	80 <sup>TH</sup> JUDICIAL DISTRICT
ET AL	§	

**DEFENDANTS' MOTION FOR GATEKEEPER HEARING**

1. State Farm Lloyds and State Farm Mutual Automobile Insurance Company ask the Court to exclude the testimony of Plaintiff's expert, Juan Herrera.

**A. INTRODUCTION**

2. Plaintiff, Colleen O'Brien sued Defendant, State Farm Lloyds, for breach of contract, bad faith, violations of Article 21.21 of the Insurance Code and violations of the Texas Deceptive Trade Practices Act.

Plaintiff identified Juan Herrera to testify to the following matters:

- knowledge regarding mechanical and electrical engineering,
- chemistry,
- fire science,
- Defendant's conduct,
- causation, and
- damages.

3. The Court should exclude the testimony of Juan Herrera because he is not qualified to testify regarding Defendant's conduct or any other insurance issue, nor regarding Plaintiff's damages, and because his testimony regarding causation of the fire is unreliable.

## ARGUMENT AND AUTHORITIES

4. A court should exclude the testimony of an expert witness who is not qualified. *See* Tex. R. Evid. 104(a), 702; *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). An expert should have a higher degree of knowledge, skill experience, training, or education about the subject of testimony than an ordinary person. Tex. R. Evid. 702; *Broders*, 924 S.W.2d at 153. Plaintiff's expert, Juan Herrera, is not qualified because he does not have the practical experience or training necessary to render an opinion regarding insurance claim handling or insurance investigation, nor regarding Plaintiff's damages. The Court should exclude his testimony regarding these matters.

5. A court should also exclude the testimony of an expert whose testimony is not reliable. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711-12 (Tex. 1997); *Robinson*, 923 S.W.2d at 557. An expert witness may be qualified and highly credible, but his or her conclusions may be based on unreliable methodology. Scientific evidence that is not grounded "in the methods and procedures of science" is no more than "subjective believe or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 2795 (1993). Unreliable evidence is of no assistance to the trier of fact and is, therefore, inadmissible under Texas Rule of Evidence 702. *Robinson*, 923 S.W.2d at 557.

6. The Court should exclude Juan Herrera's testimony because the testimony will not be reliable. Specifically, the Court should exclude the testimony because:

- Herrera's opinions were formulated based on testing which was completely dissimilar to the circumstances at O'Brien's home on the night of the fire. Therefore, the opinion is not consistent with generally accepted methods used for gathering relevant scientific evidence. *Robinson*, 923 S.W.2d at 557.

- A portion of Herrera's opinion is based on testing of a cord to an air filter which was present in the room of the fire at the time of the fire. Plaintiff's counsel has disposed of the air filter cord. Therefore, State Farm has been unable to test the same cord.

A court should also exclude the opinion of an expert if the probative value of the opinion is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. CIV. EV. 403; *Robinson*, 923 S.W.2d at 556. The Court should exclude the testimony of Herrera because any probative value it may have is outweighed by the substantial danger of unfair prejudice, confusion of the issues and misleading the jury. Specifically, Herrera testifies that if the forensic chemist hired by State Farm found gasoline in carpet samples from the room where the fire occurred (which he did), then those samples were contaminated with gasoline **after** the fire. There is no other evidence in this case indicating contamination of the samples of carpet taken from the site of the fire. Therefore, an offer of this testimony carries a serious threat of confusing the jury.

#### **PRAYER**

For these reasons, State Farm Lloyds asks the Court to conduct a hearing before a court reporter to exclude the testimony of Juan Herrera, Plaintiff's expert.

Respectfully submitted,

**TAYLOR & TAYLOR**

By: \_\_\_\_\_

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**NISTICO & CROUCH**

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ATTORNEYS FOR DEFENDANT  
STATE FARM LLOYDS and  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

/

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Gatekeeper Hearing has been forwarded to

Mr. Donald G. Wilhelm  
Scherr & Legate, P.C.  
440 Louisiana, Suite 1440  
Houston, Texas 77002

by certified mail, return receipt requested on this 20<sup>th</sup> day of January, 1999.

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**Warren Taylor**

CAUSE NO. 96-36093

COLLEEN O'BRIEN

VS.

STATE FARM LLOYDS,  
ET AL

§  
§  
§  
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

80<sup>TH</sup> JUDICIAL DISTRICT

**REQUEST FOR ORAL HEARING**

TO: Plaintiff, Colleen O'Brien, by her attorneys, Donald Wilhelm, Scherr & Legate, P.C., 440 Louisiana, Suite 1440, Houston, Texas 77002

Please take notice that Defendants State Farm Lloyds and State Farm Mutual Automobile Insurance Company request a Gatekeeper Hearing to be held before commencement of trial.

Respectfully submitted,

**TAYLOR & TAYLOR**

By: \_\_\_\_\_

Warren Taylor  
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Beth McCahill Taylor  
State Bar No. 13336787  
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**NISTICO & CROUCH**

Kathy Crouch  
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5847 San Felipe, Suite 3250  
Houston, Texas 77057  
(713) 781-2889 Telephone  
(713) 781-7222 Facsimile

ATTORNEYS FOR DEFENDANTS  
STATE FARM LLOYDS and STATE FARM  
MUTUAL AUTOMOBILE INSURANCE  
COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Request for Gatekeeper Hearing has been forwarded to

Mr. Donald G. Wilhelm  
Scherr & Legate, P.C.  
440 Louisiana, Suite 1440  
Houston, Texas 77002

by certified mail, return receipt requested on this 20<sup>th</sup> day of January, 1999.

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**Warren Taylor**