

Note

*275 CAN A DOMESTIC VIOLENCE ADVOCATE TESTIFY AS AN EXPERT WITNESS? FOLLOW THE ABC'S OF EXPERT TESTIMONY STANDARDS IN TEXAS COURTS:

Assist the Trier of Fact

Be Relevant and Reliable

Credentials Must Be Established

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*276 "An expert's a person who knows enough about what's going on to be really scared." [\[FN1\]](#)

I. Introduction

It has been shown that laypersons generally hold misconceptions related to domestic violence. [\[FN2\]](#) These misunderstandings, especially when held by jurors, can negate the seriousness of the violence as well as the victim's response of fear. Domestic violence advocates, on the other hand, understand the dynamics of domestic violence and this victim phenomenon. Because it is important that a jury understand the characteristics of domestic violence, prosecutors and defense attorneys may introduce domestic violence expert testimony in their cases. [\[FN3\]](#) Experts can be used in domestic violence cases in a variety of circumstances; the three main

reasons for using an expert are: (1) assisting the judge and jury in comprehending the relevance of abuse to the legal issues raised in the case, (2) assisting lawyers to ensure that the client's story of abuse and its implications are fully understood and presented, and (3) supplementing the testimony of the battered victim. [\[FN4\]](#) The domestic violence experts utilized by prosecutors and defense attorneys tend to be psychological and medical experts. [\[FN5\]](#) However, domestic violence advocates can similarly testify in domestic violence cases as experts.

Originally admitted in the context of battered women's self-defense cases, expert testimony about domestic violence has been applied in a variety of other legal contexts despite questions of its admissibility, [\[FN6\]](#) from *277 "criminal prosecutions of women charged with a crime in which violence may have played a role [to] criminal prosecutions of domestic violence perpetrators . . . [and] marital dissolution and child custody proceedings." [\[FN7\]](#) Although the use of domestic violence experts has increased over the years, the experts tend to conform to the traditional notion of what constitutes an expert--a highly educated, medical and/or psychological witness. Based on the flux in state and federal standards for admissibility of expert testimony, using these 'scientific' experts was arguably the only way to have their testimony admitted. Yet, both the Federal and Texas Rules of Evidence and Texas case precedent establish that nonscientific, victim advocate testimony can also be admitted as expert testimony. [\[FN8\]](#) Nevertheless, the benefits of using domestic violence advocates as experts have not been fully recognized.

Advocates play a critical role in domestic violence cases from the case's inception to the posttrial phases. Most "smart prosecutors appreciate that advocates can be indispensable to virtually every aspect of case handling." [\[FN9\]](#) Generally, advocates in a prosecution not only support the victim, but the prosecutor as well. As a consultant for the prosecutor, advocates can provide "comprehensive intakes [of the victim], which include the entire history of abuse, dynamics of the current relationship . . . the individual victim's reasons for staying with the abuser . . . any unsympathetic or conflicting information . . . and other relevant matters." [\[FN10\]](#) Yet, despite the advocates' knowledge of the victim, and of domestic violence generally, prosecutors and defense attorneys infrequently use advocates as experts in trials. [\[FN11\]](#)

In an effort to make the use of victim advocates as experts a viable option for domestic violence attorneys, this paper explores the rules of evidence as they relate to the admissibility of victim advocate expert *278 testimony on domestic violence. Part II of this paper briefly explores the history of expert testimony standards in Federal and Texas courts. Part III addresses the specifics of what courts require to admit expert testimony generally; and more particularly, it is focused on admissibility requirements for nonmedical, experience based expert testimony such as that given by a domestic violence victim advocate. Although the Rules of Evidence and Texas precedent clearly establish that such experts and their testimony can be admitted, there is still a reluctance to use victim advocates as experts. Consequently, Part IV surveys Texas case law to demonstrate that not only are such experts being used, but also that their testimony is being successfully admitted. Part V explores the positive and negative consequences of using domestic violence expert testimony because the use of expert testimony should not be assumed. Part VI addresses other considerations when using domestic violence victim advocates in an attempt to offer practitioners some useful approaches to the substance of the evidence rules as well as their procedural requirements. Finally, the conclusion offers general recommendations concerning expert testimony and how to use it

successfully in the courtroom.

II. A Brief History

A. Expert Testimony Standards in Federal Courts

The seminal *Frye v. United States* decision clarified the general common law test for admitting expert testimony in federal courts. [FN12] Noting the problems with unreliable and unrecognized 'expert' testimony, the court articulated a "general acceptance" test. [FN13] The admissibility of expert testimony hinged upon the following two main criteria: (1) the testimony must be based on special knowledge and (2) the "subject of the testimony must have gained general acceptance in the particular field in which it belongs." [FN14] Based on this standard, no new theory or science could be admitted. In *Frye*, this precluded testimony about a lie detector test and its workings. Certainly, in 1923, testimony about domestic violence and the battered person's syndrome would have been excluded, regardless of the characterization of the witness offered as an expert ('traditional' expert or advocate expert). [FN15]

*279 Following the promulgation of the Federal Rules of Evidence, the rules regarding admissibility of expert testimony conflicted with *Frye* and its common law admissibility standards. [FN16] Yet, over twenty-five years passed before the *Daubert v. Merrell Dow Pharmaceuticals* decision resolved the conflict. [FN17] In *Daubert*, the United States Supreme Court held that "under the Federal Rules no common law of evidence remains" and thus, the *Frye* test "should not be applied in federal trials." [FN18] Rather, [Federal Rule of Evidence 702](#) governs: "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." [FN19]

However, the *Daubert* Court noted that there are limits on the admissibility of expert testimony. [FN20] Based on this reasoning, the Court held that a federal trial judge has a "gatekeeping" role; he must screen expert testimony to ensure its relevancy and reliability. Clarifying these standards, the Court established these two primary barriers: (1) for scientific evidence to be reliable, an expert's testimony must consist of "scientific knowledge" that is derived from the scientific method and supported by appropriate validation, and (2) a standard of relevance requiring that the scientific evidence or testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." [FN21] The Court further identified the following four factors for judges to consider in determining the reliability and relevancy, and thus admissibility, of expert testimony under [Federal Rule of Evidence 702](#): (1) whether the theory or scientific technique has been or can be tested, (2) whether it has been subject to peer review or publication, (3) its known or potential rate of error, and (4) whether the principle was generally accepted in the relevant scientific community. [FN22]

Following *Daubert*, courts and the legal community were uncertain whether the "Daubert factors" applied only to expert evidence addressing the hard sciences or whether, and how, they affected nonscientific, specialized knowledge. [FN23] Although in dictum, the *Daubert* Court noted the *280 applicability of [Rule 702](#) and the *Daubert* factors test to nonscientific expert testimony, it did not clarify this application nor establish a corresponding standard of admissibility. [FN24] Yet under this standard, in particular the *Daubert* reliability factors, some types of expert testimony simply do not correspond; it is difficult to apply the *Daubert* factors to expert testimony based on behavioral sciences, soft-sciences, or professional experiences

such as domestic violence. Consequently, as the Court "derived its list of factors from a rather esoteric discussion of the nature of scientific knowledge and of reliability as a scientific concept," Daubert's factors "privileg[e] the methodology of the hard sciences." [FN25] The Supreme Court addressed these problems when it ruled on the admissibility of nonscientific expert testimony in *Kumho Tire v. Carmichael*. [FN26] *Kumho* held that Daubert's gatekeeping obligation, requiring an inquiry into both relevance and reliability, applied to all expert testimony, not only to 'scientific' expert testimony. [FN27] The *Kumho* Court determined that ultimately there is no clear bright line between determining what is scientific testimony and nonscientific expert testimony. The Court further noted that the Daubert factors apply to all expert testimony; "a trial judge determining the admissibility of . . . [expert] testimony may consider one or more of the specific Daubert factors." [FN28] Yet, using the Daubert factors to determine the reliability of nonscientific, specialized expert testimony, or expert testimony based on experience, remains difficult. Reshaping the manner in which courts determine the admissibility of expert testimony, *Kumho* prompted an amendment to [Rule 702](#) that became effective in December 2000. The amended [Rule 702](#) accounts for both the Daubert and *Kumho* holdings and provides that a witness can testify as an expert if, in addition to satisfying the requirements of the old [Rule 702](#), "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied *281 the principles and methods reliably to the facts of the case." [FN29] While factors two and three essentially codify the Daubert and *Kumho* expert testimony analysis, factor one further extends these standards. Although under all three factors of the new [Rule 702](#) reliability is paramount, factor one heightens the amount of data required to demonstrate the reliability of the expert's opinions and conclusions. [FN30] Nevertheless, amended [Rule 702](#), as well as the brief history of the expert testimony standards in federal courts, provide a basis for practitioners in determining what must be presented to a court to have expert testimony deemed admissible--evidence that the expert testimony is both relevant and reliable.

B. Expert Testimony Standards in Texas Courts

The Texas Rules of Evidence and corresponding case law standards for admitting expert testimony mirror the Federal Rules of Evidence and the standards established by the Supreme Court trilogy. [FN31] In *Kelly v. State*, the court established an expert testimony admissibility test consisting of reliability and relevancy determinations, paralleling the standard espoused in Daubert. [FN32] *Kelly* concluded that for expert testimony to be considered valid, (1) the underlying scientific theory must be valid, (2) the technique applying the theory must be valid, and (3) the technique must have been properly applied on the occasion in question. [FN33] In making this reliability determination, a court can consider numerous factors, including: acceptance of the underlying scientific theory and technique by the relevant scientific community, qualifications of the expert, existence of supporting literature, potential rate of error of the technique, availability of other experts to support the theory and technique, clarity with which the testimony can be explained, and experience and skill of the person who applied the technique on the occasion in question. [FN34] Following *Kelly*, these factors and standards were applied to expert testimony in civil cases in Texas. In *Nemours v. Robinson*, for example, the court listed several factors a civil trial court could consider under [Texas Rule 702](#) to determine admissibility of expert testimony. [FN35] These factors are virtually identical to those listed in *Kelly*. [FN36] Furthermore, in *Hartman v.*

*282 State, [\[FN37\]](#) the court declared that although Kelly involved novel scientific evidence, its established standard applied to all scientific evidence, whether it was novel or not. Yet, problems regarding applicability of the Kelly/Robinson factors to nonscientific expert testimony emerged similar to those experienced in federal courts. Consequently, the Texas Supreme Court in *Nenno v. Texas* held that Kelly applied to nonscientific expert testimony. [\[FN38\]](#) Reiterating *Kumho's* holding, the *Nenno* court concluded that in making an admissibility determination of expert testimony, a court must inquire into the relevance and reliability of the testimony: "[Rule 702's](#) fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule"--not just scientific expert testimony. [\[FN39\]](#) Furthermore, to reinforce *Kumho's* flexibility holding as pertaining to the *Daubert/Kelly* reliability factors, the *Nenno* court observed that these factors "do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise." [\[FN40\]](#) Thus, aside from the hard sciences, the *Daubert/Kelly* factors of reliability apply "with less rigor." [\[FN41\]](#) In an attempt to transfer and reformulate the analysis to soft-science expert testimony, the *Nenno* Court noted that the appropriate questions are: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." [\[FN42\]](#) Yet, this merely reiterates the relevancy and reliability standards already determined by much precedent. Thus, *Nenno* failed to provide courts with specific guidance on what factors to use to make these relevancy and reliability determinations. Following *Nenno*, the Supreme Court of Texas in *Gammill v. Jack Williams Chevrolet* recognized that when expert testimony is based on a witness' individual skill, experience, or training, the established analysis for expert testimony still applies. [\[FN43\]](#) Furthermore, the *Daubert/Kelly* factors used to determine reliability likewise govern, "even if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its *283 admissibility." [\[FN44\]](#) However, the *Gammill* Court notes that it is impossible to set out specific criteria for evaluating the reliability of expert witnesses. [\[FN45\]](#) Rather, the court has the duty to ensure that "the opinion comports with applicable professional standards outside the courtroom and that it 'will have a reliable basis in the knowledge and experience of [the] discipline.'" [\[FN46\]](#) *Gammill*, like its predecessors, fails to provide specific factors similar to those established in *Daubert* and *Kelly* for courts to consider in making reliability and thus, admissibility decisions. What remains clear, however, is that expert testimony, regardless of its type, must be reliable and relevant in order for it to be admissible. Ultimately, practitioners still face the challenge of applying the vague reliability and relevancy standards in domestic violence cases.

C. Expert Testimony Standards as Applied to Domestic Violence Expert Testimony

Although both the federal and Texas rules liberally approach expert testimony by generally presuming its admissibility, precedent indicates that when presented with nonscientific expert testimony, courts often encounter difficulty in making their admissibility determinations. For example, when presented with a domestic violence expert, because domestic violence is a soft-science of specialized knowledge, courts are unsure how to apply the *Daubert/Kelly* factors. Thus, it is not surprising that there remains a challenge for attorneys in admitting domestic violence expert testimony; no court has articulated what standards apply to nonscientific expert

testimony. Many commentators argue that from a literal interpretation of current expert testimony jurisprudence, the number and effectiveness of challenges to the admissibility of domestic violence expert testimony may increase as a result of the inability to align domestic violence testimony with the Daubert/Kelly factors. [\[FN47\]](#) Yet Kumho and Nenno reassure that these factors are flexible, especially as applied to specialized soft-science knowledge such as that related to domestic violence. Consequently, by using a different approach to these factors, practitioners can increase the likelihood that their domestic violence expert testimony, including advocate expert testimony, will be admissible.

Furthermore, more advocate expert testimony will be arguably admissible post- Kumho.

[\[FN48\]](#) Domestic violence experts who conform to the *284 traditional notion of expert will still be treated as scientific experts, despite the soft-science nature of domestic violence. Thus, it will be more difficult for the court to stray from the Daubert factors. Advocates, on the other hand, base their knowledge and expert qualifications primarily on their experiences. When faced with such advocate expert testimony, although the court must still perform a relevancy and reliability inquiry, it is easier to recognize that the Daubert/Kelly factors do not fit.

Therefore, the court should follow the Kumho/Nenno precedent and allow more flexibility for the party offering the expert to demonstrate the reliability and relevancy of the advocate's testimony without strictly conforming to the factors. [\[FN49\]](#)

III. What is Required for Expert Testimony Admissibility?

While the federal and Texas precedent cited for historical purposes are significant for the standards developed for nonscientific expert testimony admissibility, these cases do not refer to the other requirements of [Rule 702](#). Therefore, before discussing relevancy or reliability of expert testimony by domestic violence victim advocates, it is important to note that expert testimony must also satisfy two other requirements: the testimony must assist the trier of fact, and the expert must be qualified.

A. The Expert Testimony Must Assist the Trier of Fact

Under both [Federal Rule of Evidence 702](#) and [Texas Rule of Evidence 702](#), expert testimony must "assist the trier of fact." [\[FN50\]](#) These Rules depart from the common law requirement that the expert testimony be necessary for the jury. Rather, under the Rules of Evidence, expert testimony assists the jury when "the expert's knowledge and experience . . . are beyond that of the average juror." [\[FN51\]](#) Thus, "if the expert's evidence will assist the finder of fact in any way in determining the factual issues before it, the evidence is admissible." [\[FN52\]](#) Courts do have some discretion to exclude expert testimony that they believe the jury is competent to understand on its own, but many courts recognize that commonly held beliefs are often in error. [\[FN53\]](#) Indeed, legal and feminist commentators note that "in spite of, or because of, increased public awareness of domestic violence, jurors come to a trial with assumptions and preconceptions about crimes of domestic violence, perpetrators, and victims" that often demonstrate their misunderstanding of *285 domestic violence. [\[FN54\]](#)

By capitalizing on these jury misconceptions, attorneys can demonstrate that the expert testimony would assist the jury. Thus, the usefulness of the expert evidence can be established either through voir dire or through studies demonstrating that common views concerning domestic violence are often incorrect. Where permitted, "the jury [can] be questioned to elicit responses which reflect jurors' misconceptions and assumptions about domestic violence and battered women." [\[FN55\]](#) By focusing the questions on stereotypical beliefs about domestic

violence, practitioners can show the need for expert testimony to clarify the dynamics of domestic violence for the jury. In addition, the helpfulness of the expert evidence can be confirmed with research literature. By citing studies that conclude that most people are misinformed about domestic violence, the usefulness and necessity of expert testimony can be established. [\[FN56\]](#)

This helpfulness requirement often overlaps with another requirement for expert testimony admissibility--relevance. Relevancy must be demonstrated for all evidence proffered under Rule 401. However, the "assisting the trier of fact" requirement demands a more stringent inquiry than mere relevance, because it requires the expert testimony to have a valid connection to the pertinent issues of the case. In order for expert testimony to actually help the jury understand the evidence and factual issues involved, the testimony must be related to the case.

B. The Expert Testifying Must Be Qualified

Qualifications represent another prerequisite to expert testimony admissibility. For expert witnesses, the Federal and Texas Rules of Evidence require that a witness offered as an expert be qualified on the basis of "knowledge, skill, experience, training, or education." [\[FN57\]](#) The exact amounts of these elements are not quantified by the statute or by precedent. [\[FN58\]](#) Any one of these factors alone, or a combination of them may be used to qualify a witness as an expert. For example, in a recent case, *Wyatt v. State*, the court reiterated that special knowledge which qualifies a witness to give an expert opinion may be derived from specialized *286 education or training, practical experience, a study of technical works, or a varying combination of these things. [\[FN59\]](#) In *Wyatt*, the defendant appealed his murder conviction claiming error regarding the expert testimony of a human services aid with specialized knowledge regarding sexual offenders and sexual deviation. [\[FN60\]](#) The court overruled the defendant's claim based on the expert's nineteen years of training in the field of sexual offenders and extensive training received and conducted. [\[FN61\]](#)

Thus, [Rule 702](#) permits a wide range of witnesses to be qualified as experts; "within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." [\[FN62\]](#) Unlike psychologists or doctors testifying about domestic violence, domestic violence victim advocates arguably have less, if any, publications or status rank in their profession. They are also unlikely to know if their testimony would be accepted in a 'scientific' community, and such experts are commonly unfamiliar with the breadth of literature on the subject. Rather, many victim advocates are knowledgeable about domestic violence through personal experience or experience dealing directly with victims of domestic violence. [\[FN63\]](#) However, experience alone may be enough to qualify many witnesses as experts. [\[FN64\]](#) In certain fields, such as domestic violence, experience is the predominant basis for reliable testimony, and courts have recognized this fact. [\[FN65\]](#) In *287 *Kumho*, the Court noted that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." [\[FN66\]](#) However, courts will not "tak[e] the expert's word" that their experience qualifies them. [\[FN67\]](#) Rather, for expert testimony based on experience to be admissible, the witness must explain how her experience leads to her conclusions, why that experience is a sufficient basis for the opinion, and how that experience is reliable as applied to the facts. [\[FN68\]](#) These explanations, however, overlap with the reliability and relevancy questions and will be used by the court in making its overall

admissibility determination.

Prosecutors or defenders using expert testimony in domestic violence cases must look beyond the traditional notion of who constitutes an expert. [\[FN69\]](#) A potential expert "need not be a scientist or a professional to offer expert testimony. The notion that an expert must be a highly educated, sophisticated 'authority' is wrong." [\[FN70\]](#) Rather, case law demonstrates that to qualify as a witness, many factors can be looked at so long as it is demonstrated that the expert possesses special skills and knowledge that will assist the jury. For example, a witness does not need to have a license to be qualified to give expert testimony; [\[FN71\]](#) a witness's training, education, or experience in jurisdictions other than Texas may suffice to qualify him as an expert in Texas courts; [\[FN72\]](#) a college degree is not required for a witness to be qualified as an expert; [\[FN73\]](#) and formal education is not even required for expert qualification. [\[FN74\]](#) Ultimately, what is important is that the expert demonstrates to the court that her knowledge will assist the jury in drawing inferences regarding fact issues more effectively or reliably than they could unaided. [\[FN75\]](#)

A recent case reiterates these principles. In *Hardin v. State*, the court approved the qualifications of a county community supervision employee to testify as an expert based on her twenty years' experience investigating and supervising sex offenders, and her extensive and continuous training. [\[FN76\]](#) Although the expert's opinions lacked peer review, the court noted that this *288 factor would go to the weight of that evidence and not to its admissibility. [\[FN77\]](#) On the other hand, some witness' experiences may be too limited or too brief to qualify the witness as an expert. For example, in *Indigo Oil v. Wiser Oil*, the court concluded that the trial court properly refused to qualify a witness based on experience because his oil operations experiences were limited to three months. [\[FN78\]](#)

Many other Texas cases have followed the qualification reasoning of *Hardin* and have concluded that years of experience in a field or practice area that is the subject matter at trial can qualify a witness as an expert based on his knowledge, skill, and experience. [\[FN79\]](#) Thus, many testimonies concerning nonscientific opinions by nonscientific witnesses have been admitted into evidence as expert testimony. These nonscientific, nonmedical, nontraditional experts range from foster care caseworkers [\[FN80\]](#) to police [\[FN81\]](#) to technicians [\[FN82\]](#) to rape counselors [\[FN83\]](#) to experts on child abuse. [\[FN84\]](#) Thus, the use of a domestic violence victim advocate or other nonmedical domestic violence advocate could and should certainly fall within the range of accepted experts.

Because of the lack of quantitative guidelines concerning what is required for a nonscientific expert to be qualified, it is better for counsel using these experts to be overprepared. A thorough and complete resume of the potential domestic violence advocate expert can be quite useful as a starting point for practitioners. Yet practitioners should not stop there. Minor details can also be used to give the court a laundry list of qualifications. Ultimately, the court must be satisfied that the advocate witness is highly skilled and knowledgeable about domestic violence.

Procedurally, there are some other factors practitioners need to keep in mind in order for a witness to be qualified as an expert. For example, the party offering the expert bears the burden to prove that the witness is qualified. [\[FN85\]](#) Moreover, once a party objects to the expert evidence, the proponent bears the burden of demonstrating its admissibility. [\[FN86\]](#) Finally, a trial court's acceptance of a witness' qualifications as an expert or of the *289 testimony as a whole are reviewable for an abuse of discretion. [\[FN87\]](#)

C. The Expert Testimony Must Be Relevant

Federal and Texas courts have both consistently held that the trial court has the gatekeeping obligation to ensure the expert testimony is relevant. [\[FN88\]](#) Essentially, the testimony must have a valid "connection to the pertinent inquiry" of the case and it must be "properly . . . applied to the facts in issue." [\[FN89\]](#) In federal courts, the standard developed for this inquiry is a "fit test;" the expert testimony must fit the issue in the case, and be sufficiently tied to the facts of the case so that it will aid the jury in resolving a factual dispute. [\[FN90\]](#) This standard expands and requires more than just bare relevance; "evidence must speak 'clearly and directly to an issue in dispute in the case' to satisfy this element." [\[FN91\]](#) Texas courts have likewise emphasized the need for expert evidence to be relevant, but they have not adopted the heightened burden of the fit test. [\[FN92\]](#) Rather, in *Nemours v. Robinson*, the court "looked solely to the evidence's relevance" under a probative standard; [\[FN93\]](#) "relevance is shown by proof that some logical connection exists between the proffered evidence and the proposition to be proved." [\[FN94\]](#) Although this seems to parallel the federal standard, *Robinson* "[does] not explicitly adopt the fit language," nor does it require specific testimony for a specific issue in the case. [\[FN95\]](#) However, evidence that is not related to the issues of the case is inadmissible as it does not satisfy either [Rule 702](#)'s requirement that the expert testimony assist the factfinder, or [Rule 402](#)'s notion that relevant evidence is generally admissible. [\[FN96\]](#)

*290 D. The Expert Testimony Must Be Reliable

In order to be admissible, expert testimony must also be reliable. However, expert opinions based on experience and observations do not necessarily fit or correspond with the established Daubert/Kelly factors used to determine reliability and admissibility. [\[FN97\]](#) So, how is the court to determine reliability of domestic violence advocate expert testimony? Texas Judge Harvey Brown argues that there are three reliability hurdles that must be overcome in order for expert testimony of any type to be deemed admissible: methodological reliability, connective reliability, and foundational reliability. [\[FN98\]](#) This division demonstrates what courts are looking for when deciding if an expert's testimony constitutes genuine knowledge in the expert's field and is therefore trustworthy and reliable.

1. Methodological reliability refers to the expert's reasoning for the proposed expert testimony. In federal courts, this standard is based on the Daubert factors which *Kumho* assured were flexible. In Texas, this standard is flexibly based on the Kelly/*Robinson* factors, which parallel the Daubert factors. Even though it may be difficult to determine how expert evidence based on skill and experience fits these factors, the court still has the gatekeeping role in ensuring expert testimony is reliable. The Texas *Nemours* Court held that with social science evidence, the Daubert factors apply less rigorously. [\[FN99\]](#) Through precedent, other factors have developed that can be used to determine whether the methodology is reliable. These factors include: the relationship of expert's technique to established methods, the availability of other experts to test and evaluate the technique, the expert's qualifications, and whether the expert provides actual data relied upon or merely purports to summarize it. [\[FN100\]](#)

2. Connective reliability ensures there is a valid connection between the expert testimony and the case. This questions the expert's ability to draw reliable conclusions from his methodology. Both federal and Texas precedent indicate that there cannot be too great of an analytical gap between the data and expert opinion. [\[FN101\]](#)

*291 3. Foundational reliability refers to the reliability of the data and facts actually relied upon by the expert. [\[FN102\]](#)

According to Judge Brown, not all three indicators have to be satisfied in order for testimony to be admitted as reliable. Indeed, the determination of reliability differs as much as and depends on the various areas of expert testimony offered. Ultimately, the expert must explain her reasoning process and explain how she reaches her conclusion. [\[FN103\]](#) Since domestic violence expert testimony is specialized knowledge primarily based on experience, an expert is not likely to have a methodology for the court to test its reliability. Rather, the experience itself qualifies as the basis for the expert's opinion. Thus, the expert's experience plays a significant role in the court's determination not only of qualifications, but also of reliability. In the Texas case, *United States Currency v. State*, the court used a more objective test than the Daubert factors to determine that the expert testimony was not relevant, by focusing its reliability determination on the expert's experiences and qualifications. [\[FN104\]](#) In contrast, in *Watkins v. Telsmith*, the court concluded that it would determine the reliability of the expert by a comparison test; if a question of the expert's testimony existed, the expert's foundation of experience could be tested by comparing it with other experts or literature on the subject. [\[FN105\]](#) Despite the differing approaches to the reliability inquiry, a victim advocate testifying as an expert on domestic violence would satisfy either test. [\[FN106\]](#) Yet, the Daubert and Kelly/Robinson factors should not, and probably will not, be completely ignored. If modified, they can provide a helpful start for prosecutors and defense attorneys who use advocate expert testimony concerning domestic violence. Demonstrating that other experts, whether advocates or medical experts, share the same views concerning domestic violence can virtually satisfy all of the Daubert standards. That others share similar views (1) enables the court to test the "potential rate of error," [\[FN107\]](#) (2) demonstrates for the court that the principles espoused are "generally accepted in the [subject] community," [\[FN108\]](#) (3) addresses the issue of peer review, and (4) indicates that the theory has been tested by others through their concurrences. [\[FN109\]](#)

*292 IV. Recent Texas Case Examples

In 1998, in *Fielder v. State*, the court reversed the voluntary manslaughter conviction of the defendant/appellant--a women who had killed her abusive husband. [\[FN110\]](#) The Court of Criminal Appeals found that the lower court erred in excluding testimony of an expert on battered woman's syndrome. The proffered expert was a marriage and family violence counselor. The lower court held that her testimony was irrelevant and would not assist the trier of fact because the expert never examined the appellant nor did the testimony establish that the appellant was a battered woman. In reversing the conviction, the appellate court held that the expert's testimony was relevant to rebut the prosecutor's inference that the defendant's prior conduct was inconsistent with her claim of fearing her husband. Furthermore, the Court noted that such domestic violence expert testimony would be of assistance to the trier of fact; "by her testimony, [the expert] established the average lay person has no basis for understanding the conduct of a woman who endures an abusive relationship." [\[FN111\]](#) Thus, not only was domestic violence expert testimony determined to be helpful to the jury, but because the testimony related to an issue at hand in the case, the court also held it was relevant. [\[FN112\]](#) Similarly, in *Scugoza v. State*, the court interpreted [Rule 702](#) to admit expert testimony of a program services director at a battered women's shelter. [\[FN113\]](#) In this assault case, the court held that the expert's testimony regarding emotional and behavioral patterns typical of spousal abuse was relevant to assist the jury in understanding evidence. Therefore, the court concluded the expert testimony was admissible. [\[FN114\]](#) Furthermore, in a child sexual assault case,

Hernandez v. State, the court held that the testimony of an expert witness concerning opinions on characteristics and dynamics of sexually abused children was both relevant and reliable, and thus, admissible. [\[FN115\]](#) The court based this determination on a number of factors, but particularly on the expert witness's qualifications. The expert was the Executive Director of the Advocacy Center for Children whose numerous qualifications included: three years of experience as the Executive Director of the Advocacy Center; eighteen years as a case worker and supervisor at Child Protective Services, a career that focused on the abuse and neglect of children primarily in the area of sexual abuse of children; experience in conducting sexual abuse investigations; and general training on sexual *293 abuse at various conferences. These factors enabled the expert's qualifications and the relevancy of her testimony to be demonstrated. However, when questioning the reliability of her proffered testimony, the court noted that she had not conducted any studies nor published on the subject. Going through the Kelly/Robinson factors, the expert revealed that she believed her data and opinions "were recognized by the general community . . . [that she] did not know the potential rate of error of her opinion, and [that she] believed her opinion was reliable, as it was based on her 'experience and observation and training.'" [\[FN116\]](#) Ultimately, the Texas Court of Appeals held that the expert demonstrated her qualifications adequately, and "because of her extensive experience" her testimony was reliable and admissible. [\[FN117\]](#)

Finally, cases where domestic violence expert testimony was not permitted provide clear examples to practitioners about what not to do or what must be done to get expert testimony admitted. For example, in Garcia v. State, the defendant challenged his assault conviction based on the testimony of a police officer as an expert in domestic violence. [\[FN118\]](#) The court held that the lower court harmlessly erred in admitting the testimony of Officer Weems. Although the Officer testified that he had responded to approximately ten domestic violence situations per month, it was not demonstrated that he was familiar with "battered wife syndrome." Rather, the court noted that "the only apparent attempt to prove the required expertise was the evidence that Officer Weems 'had heard' of the syndrome." [\[FN119\]](#) Although not permitted in Garcia, even a police officer can testify as an expert about domestic violence if it is explicitly established that he possesses special knowledge about the subject based on his training and experience.

Similarly, in Fowler v. State, the court held that testimony by a family violence counselor was inadmissible due to its lack of relevancy and reliability. [\[FN120\]](#) Although this case is significant for what went wrong, it is also important to note that the court did not question the expert's qualifications. The expert witness in Fowler was a family violence counselor whose experiences consisted of a "two thousand hour internship at the Family Abuse Center in Waco, and one year of private practice. She also indicated that she had attended several workshops and seminars." [\[FN121\]](#) After these qualifications were established, the expert then began her testimony regarding family violence. Based on the State's presentation of *294 the expert witness, the court concluded that "apart from establishing her qualifications and experience, not a single Kelly/Robinson factor was met." [\[FN122\]](#) Consequently, the lower court "should have required that [the expert] explain her theory, her technique, and how she applied that technique under the Kelly reliability test." [\[FN123\]](#) The errors in Fowler are clear--one must demonstrate to the court that the domestic violence testimony and theories underlying the expert's testimony and conclusions are relevant and reliable. This is the challenge facing practitioners. By following the modifications of the Kelly/Robinson factors, [\[FN124\]](#) courts may be more apt to admit domestic violence advocate expert testimony.

V. Implications of Using Domestic Violence Expert Testimony

Using domestic violence expert testimony affects every aspect of a case. A Department of Justice report suggests that such expert testimony assists the jury in understanding the evidence and helps dispel common myths and misunderstandings about domestic violence. [\[FN125\]](#)

Unless provided with accurate and credible testimony about domestic violence by experts, many jurors rely on their own set of mistaken beliefs about domestic violence that have been inculcated by society. Gender, race, and culture all affect the way society views domestic violence. For example, men and women may view domestic violence differently, and culture and race may block a juror's understanding of a battered person. [\[FN126\]](#) Thus, the expert must provide the jury with a complete understanding of domestic violence, taking into account individual victim or offender characteristics including race, culture, and gender.

There is controversy, however, regarding whether the theory and term "battered women's syndrome" should be used, or whether experts should focus their testimony on a more general depiction of domestic violence. [\[FN127\]](#) Furthermore, the following factors may contribute to a particular disposition of domestic violence cases: (1) whether the expert testimony accurately presents the dynamics of battering relationships, (2) the degree of the attorney's understanding of domestic violence and his skill in using expert witnesses, (3) the ability of the attorney to link the expert testimony to the specific facts and issues involved in the case, and (4) the quality of the expert witness. [\[FN128\]](#) Thus, the particular expert and how she is used are critical issues. An attorney's knowledge of domestic violence, in general, and the specifics of the case can also greatly affect the outcome of a case. Without such knowledge, prosecutors and defense attorneys may fall subject to the same domestic violence misconceptions as do some people. [\[FN129\]](#) Aside from an attorney's own general research and learning about domestic violence, she can also gain valuable information from the expert prior to offering her as an expert witness in a particular case. Thus, regardless of whether an expert witness testifies in a case, it is tremendously helpful for an attorney to consult with an expert about issues of domestic violence.

Using a domestic violence advocate as an expert provides many benefits. First, the Department of Justice report cites a lack of "access to expert witnesses" due to increased efforts in the use of experts to present evidence of battering and domestic violence. [\[FN130\]](#) However, in 1996, when the report was published, primarily only traditional experts (professional, degreed, and published) were being used in domestic violence cases. Now that it has been established that nonprofessional, nonscientific experts may be qualified and used as experts in domestic violence cases, some of the typical problems regarding expert resource availability should be diminished. Domestic violence victim advocates require less compensation and in many cases, do not charge at all. Second, the resource pool is greatly expanded when one considers that they may use either a professional or victim advocate expert. Third, if the primary use of expert testimony is to provide the jury with an understanding of domestic violence, the use of an advocate expert may actually provide the jury with a clearer depiction of domestic violence. The victim advocate's clarity and lack of scientific or technical jargon would cause less confusion for the jury. She will explain the characteristics and dynamics of domestic violence in language jurors can understand without being condescending. Along the same lines, it decreases the work of an attorney who will not have to repeatedly ask a scientific expert to explain his testimony in lay terms.

However, one of the most significant critiques of the use of expert testimony concerning

domestic violence is the reference to the "battered *296 women's syndrome" (BWS). [\[FN131\]](#) BWS describes and portrays domestic violence as a cycle of violence with learned helplessness. Although testimony of BWS assisted in improving judge and juror recognition of domestic violence experiences, it nevertheless perpetuates the stereotypical portrayal of battered women. If the goal of using expert testimony is to help the jury dispel of the myths of domestic violence, the use of BWS may be contradictory. [\[FN132\]](#) For example, BWS may be ambiguous as it "does not incorporate the breadth of available knowledge concerning battering and its effects" [\[FN133\]](#)

Furthermore, BWS does not account for all battered individuals; its specific checklist of battered women characteristics excluded many battered persons who do not possess specific characteristics. Thus, BWS may be too narrow. Professor Moore, for example, argues that "even more troubling than battered woman syndrome's general characterization of women as victim is the application of the battered women syndrome to African American women." [\[FN134\]](#) African American women must overcome not only the stereotypes about women, and domestic violence victims, but also those about African Americans. However, these two independent stereotypes do not correspond. African American women are perceived as "angry, masculine, domineering, strong, and sexually permissive-- characteristics which do not denote 'victim.' As a result, judges and jurors are less likely to believe African American women are 'victims.'" [\[FN135\]](#) Even Dr. Walker, the developer of the BWS theory, recognizes that "expert testimony on the battered woman syndrome has been unable to overcome the bias of sexism and racism." [\[FN136\]](#)

As an alternative to BWS, many experts and domestic violence advocates suggest that expert testimony should pertain to battering and its effects. [\[FN137\]](#) Because BWS refers generally to the psychological characteristics of domestic violence victims, often scientific and medical knowledge are necessary. However, by using domestic violence victim advocate expert testimony, there is little need for the psychological and *297 medical conclusions of BWS. Furthermore, due to their vast and varied experiences, victim advocates also present a more realistic portrayal of domestic violence, as they are more likely to account for individual experiences. [\[FN138\]](#) Finally, domestic violence advocate organizations provide valuable resources concerning domestic violence and cultural issues that may assist practitioners in determining if and how to use an expert. [\[FN139\]](#)

VI. Other Considerations--A Practical Approach

Before an expert can testify, the trial judge must conduct an investigation of the admissibility of the proffered expert's testimony. This inquiry must occur regardless of whether the opposing party objects. In both civil and criminal trials, the inquiry usually occurs pretrial or before the witness testifies. The burden of proving the requirements of [Rule 702](#) rest with the party attempting to admit the expert and her testimony. [\[FN140\]](#) Regardless of whether the practitioner is sure that their evidence will demonstrate to the court that the expert and her testimony should be admissible, it is essential to provide the court with the most complete and thorough presentation. Not only will this ensure the expert is permitted to testify, but in case the judge refuses to allow counsel's expert testimony, on appeal, the court can look to the complete record and if it finds error in the trial court's decision, it can reverse rather than remand.

Counsel trying to use expert testimony should not limit themselves to using experts in only certain types of domestic cases. Precedent establishes that both the prosecution and defense in

a variety of cases, both civil and criminal, can use domestic violence experts. For criminal cases, such as murder, a Texas statute provides that when a defendant pleads self-defense, she may offer relevant expert testimony regarding the defendant's state of mind "including those relevant facts and circumstances relating to family *298 violence." [\[FN141\]](#) The use of experts is also gaining recognition in other criminal contexts such as duress, child abuse cases, kidnapping, and drug possession. There has also been an increase in prosecutorial use of domestic violence experts.

In the civil context, expert testimony on battering and domestic violence is typically offered in divorce or child custody cases. Even if there is no precedent on point regarding expert testimony for a particular case, practitioners should not hesitate to use an expert if it is warranted. Whether the proffered expert is a medical or advocate expert, as long as it is established that the expert and her testimony are admissible, the court will likely approve of such testimony in any type of domestic violence case. The presumption under the Rules is that expert testimony is admissible; exclusion of such testimony is the exception. [\[FN142\]](#) Forms are available to practitioners that provide sample questions to ask the domestic violence expert that will ensure the admissibility of her testimony. [\[FN143\]](#) However, these guides are usually limited to samples for experts of the traditional type--those with high levels of education, status, credentials, extensive research and literature published, and often medical or technical experts. However, a different approach must be used when attempting to admit expert testimony from a victim advocate or other type of domestic violence advocate, including a social worker, former victim, police officer, shelter director, clinic manager, etc. Below are some sample procedures and questions that can be used to demonstrate that the advocate expert and her testimony should be admitted. Of course, modification will be necessary depending on the chosen expert and on the facts of the case, but the basic framework should provide a helpful resource.

First, it must be shown to the court that the proffered expert's testimony will help the jury in understanding the evidence and making their decisions. Citing to jury misconceptions about domestic violence would satisfy this requirement. [\[FN144\]](#)

Second, the expert must be qualified. Some sample questions that can be asked of the expert to demonstrate her qualifications include: [\[FN145\]](#)

*299 1. Occupation

a. What do you do? Describe your job responsibilities?

b. How long have you been doing [insert job]?

2. Work background (if relevant)

a. What did you do prior to your current job? Describe.

b. For how long?

c. How many victims did you [counsel, assist, provide shelter for, go to court with, etc]? Be specific.

3. Experience (modified according to the occupation of the advocate expert)

a. What types of domestic violence services do you provide?

b. In providing [insert service], what types of domestic violence situations have you encountered? Explain them. (Enabling the expert to provide concrete examples to demonstrate the breadth and range of her experiences is helpful as the specifics of the expert's experiences represent 'instances of verification.').

c. How many domestic violence situations have you been involved in? Explain.

d. How have your experiences led to your conclusions about domestic violence and [any

specific issue at hand]?

e. How and why are your experiences a sufficient basis for your opinions and conclusions?

4. Training (if relevant)

a. Have you ever conducted or attended a workshop, conference, or training on domestic violence? Explain.

b. Have you attended training on domestic violence? When, and what type?

5. Knowledge about subject.

a. What knowledge do you have about domestic violence [and the specific issues involved in the case]?

b. So, [the issue in the case] is within the scope of your expertise? (Note: Although this is not required by the Rules of Evidence, specialization can emphasize the expert's qualifications).

c. Where did you learn this?

d. What do these things mean? Have the expert explain some basic concepts about domestic violence (abuse, fear, typical responses, characteristics, etc.).

e. What are your conclusions and opinions based on? (This answer will usually be experience, but the practitioner can reiterate the fact that the expert's numerous experiences *300 comprise the data used in making the expert's opinions and conclusions and therefore, her experience is a sufficient basis for the opinion).

6. Education (Add this only if it will bolster the advocate expert's qualifications)

a. What is the subject of your degree?

b. Did you specialize in any particular aspect of [subject]?

Any other factors or issues that would demonstrate the expert's expertise should also be addressed and offered to the court. In addition to questions concerning qualifications, other sample forms contain expanded lists of questions that pertain to all domestic violence expert testimony. [\[FN146\]](#)

Third, after the expert is qualified, the next barrier a practitioner must overcome is demonstrating the relevancy of the expert testimony to the issues and questions of the case. This requisite overlaps with the first two hurdles that should be demonstrated: that the expert is qualified to testify as an expert in battering and its effects, and that this information will assist the jury. Thus, during these initial showings, relevancy must also be demonstrated. Although it might be repetitive to refer to the same elements or evidence when demonstrating relevancy, this redundancy will only highlight the expert's experiences and qualifications.

Finally, in order for the expert testimony to be admissible, it must be reliable. Arguably, this is the hardest barrier that must be overcome when attempting to admit any expert testimony, especially when the proffered expert is an advocate. As a starting point, practitioners can rely on what precedent has already established. Essentially, counsel using an advocate expert can manipulate the Daubert/Kelly factors. [\[FN147\]](#) Modifications of these factors are helpful for advocate expert testimony especially for determining the reliability of testimony based on experience. [\[FN148\]](#) Some sample questions demonstrate a reformulation of the factors as applied to domestic violence advocate experts. Testimony based on experience can be used to show compliance with all the Daubert/Kelly factors. The Daubert/Kelly factors include: (1) whether the theory or scientific technique can be tested, (2) whether it has been subject to peer review or publications, (3) the known or potential rate of error, and (4) whether the principle is generally accepted in the relevant scientific community. [\[FN149\]](#) All these factors can be established for advocate domestic violence expert testimony by asking questions similar to *301 the examples given here.

1. Do you know of others who share your beliefs and opinions about domestic violence and [specific issue(s) in the case]?
2. Are you familiar with any literature on domestic violence and [on the specific issue(s) in the case] (even if the expert is not familiar, firsthand, with the existing literature, counsel can still introduce it to demonstrate compliance with the Daubert/Kelly factors).
3. Does the general community of domestic violence advocates accept your opinions and the basis, [likely the expert's experience] for them? (Research and other literature or publications can be offered to the court by counsel.)

In addition, counsel should show the court literature that supports the expert's opinions and conclusions. That way, the court can see that other 'experts' agree with the proffered expert. Counsel should also provide the court with the knowledge of other experts to test and evaluate the offered expert's theories and opinions, thereby allowing the court to gauge the potential rate of error of the expert's opinion.

By using a modified version of the existing factors, counsel can demonstrate that the expert's experiences satisfy all three prongs of the admissibility test of expert testimony (qualifications, assisting the jury, and relevance and reliability). Additionally, practitioners who know or sense the judge is specifically looking for answers demonstrating that the Daubert/Kelly factors have been addressed can tailor their questions and offerings of evidence to the court. Thus, after the expert testifies, it may be necessary for the practitioner to reiterate concisely how the expert's qualifications, and/or methodology satisfy the factors.

Once these obstacles have been overcome, the expert testimony will likely be accepted.

Procedurally, the jury will usually return if the testimony is admissible, and the practitioner can then begin her direct examination of the expert regarding substantive issues of domestic violence, particularly, those issues involved in the case.

VII. Conclusion

Domestic violence advocate expert testimony can provide prosecutors and defense attorneys with a valuable tool in their cases. These experts should not be regarded as inferior to the traditional expert. Rather, when advocate testimony is admissible, these experts can provide the jury with valuable information that they can comprehend. Indeed, [Rule 702](#) is *302 challenging and practitioners must satisfy its requirements without the assistance of clear standards and guidelines. However, it seems unlikely these courts will promulgate any standards. Therefore, practitioners must be willing to navigate through [Rule 702](#) and provide the precedent and standards as support when they use advocate expert testimony in the future.

[\[FN1\]](#). J.D. Candidate, The University of Texas School of Law, 2003; B.A., Wellesley College, 2000. Many thanks to Professor Sarah Buel for her guidance and knowledge on this important topic. I would also like to thank my family and Richard Villa for their continued support in all my endeavors.

[\[FN1\]](#). P.J. Plauger, Great Quotations, available at http://www.cyber-nation.com/victory/quotations/authors/quotes_plauger_pj.html (last visited Dec. 20, 2001) (on file with the Texas Journal of Women and the Law).

[\[FN2\]](#). C.P. Ewing and M. Aubrey, Battered Women and Public Opinion: Some Realities About the Myths. 2(3) *Journal of Family Violence* 257-264 (1987).

[FN3]. See Paula Mangum, Note, Reconceptualizing Battered Woman Syndrome Evidence, 19 B.C. Third World L. J. 592 (1999).

[FN4]. See Clare Dalton & Elizabeth M. Schneider, Battered Women and the Law 210-211 (2001).

[FN5]. This fact comes from Sarah Buel's Domestic Violence and the Law class at The University of Texas School of Law (Fall 2001).

[FN6]. Dalton & Schneider, *supra* note 4, at 210-11. Courts have continuously "wrestled with the question of [domestic violence expert testimony] admissibility." *Id.* However, most jurisdictions have dealt with these admissibility issues by case law and statutes. In Texas, for example, in all prosecutions for murder, Texas statutes explicitly permit expert testimony on domestic violence; admissible evidence includes all "relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased and relevant expert testimony regarding the condition of [her] mind ... [including] relevant facts and circumstances relating to family violence that are the basis of experts' opinions." *Id.* at 747-48.

[FN7]. See Mary Ann Dutton, [Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome](#), 21 *Hofstra L. Rev.* 1191, 1193 (1993).

[FN8]. See [Fed. R. Evid. 702](#); [Tex. R. Evid. 702](#); see also discussion *infra* Part II. Similarly, Texas case precedent will be presented. See discussion *infra* Part IV.

[FN9]. Sarah Buel, Family Violence: The Critical Role of Advocates in Family Violence Cases for Both Prosecutors and Victims, 28 *Texas Prosecutor* 187 (1998).

[FN10]. *Id.*

[FN11]. This fact is derived from Sarah Buel's Domestic Violence and the Law class at The University of Texas School of Law (Fall 2001), and the need for this paper. However, some attorneys do use domestic violence advocate testimony. Sarah Buel cites to Austin and Laredo attorneys as examples. Note from Sarah Buel to author (Dec. 13, 2001).

[FN12]. [293 F. 1013 \(C.A.D.C. 1923\)](#).

[FN13]. *Id.*

[FN14]. *Id.*

[FN15]. It could be argued that Frye's general acceptance test, although no longer recognized as the governing standard for admissibility of expert testimony, would not exclude domestic violence expert testimony in today's courtrooms. Testimony about domestic violence is specialized knowledge and the battered person's syndrome has gained general acceptance as a theory of domestic violence thus satisfying Frye's admissibility standards.

[FN16]. Compare [Fed. R. Evid. 702](#) with Frye's general acceptance test, [293 F. 1013 \(C.A.D.C. 1923\)](#).

[FN17]. [509 U.S. 579 \(1993\)](#).

[FN18]. [Id. at 589](#).

[FN19]. [Id.](#); [Fed. R. Evid. 702](#).

[FN20]. [Daubert, 509 U.S. 579](#).

[FN21]. [Id. at 588](#) (quoting and construing [Fed R. Evid. 702](#)).

[FN22]. [Id. at 593-94](#).

[FN23]. See Michelle Michelson, Recent Development: The [Admissibility of Expert Testimony on Battering and Its Effects After Kumho Tire, 79 Wash U. L. Q. 367 \(2001\)](#). In this paper, I refer to domestic violence expert testimony as nonscientific testimony. Although social sciences such as domestic violence inevitably involve some similar processes as the hard sciences, because of the Daubert factors, originally used to make admissibility determinations of scientific expert testimony, and their inapplicability to domestic violence expert testimony, it is easier to refer to domestic violence expert testimony as nonscientific. Furthermore, the focus of this paper discusses the use of domestic violence advocate experts, whose conclusions and expertise are based on experience rather than on science. Finally, the Court in [In re D.S., 19 S.W.3d 525 \(2000\)](#), declared that "the difference between scientific and nonscientific expert testimony is that the former is based on the application of scientific principles which can be readily tested by the Daubert/Robinson factors on reliability of expert testimony, while the latter is based on skill or on experience based on observation." [Id.](#)

[FN24]. [Daubert, 509 U.S. at 590](#).

[FN25]. Michelson, *supra* note 23, at 381.

[FN26]. [526 U.S. 137 \(1999\)](#).

[FN27]. [Id.](#)

[FN28]. [Id.](#)

[FN29]. [Fed. R. Evid. 702 \(2000\)](#).

[FN30]. [Id.](#)

[FN31]. Compare [Tex. R. Evid. 702](#) with [Fed. R. Evid. 702](#). The only difference is Texas has yet to adopt the 2000 amendments to the [Federal Rules of Evidence 702](#). See also discussion

infra.

[FN32]. [824 S.W.2d 568 \(1992\)](#).

[FN33]. [Id. at 573](#).

[FN34]. [Id.](#)

[FN35]. [923 S.W.2d 549 \(1995\)](#).

[FN36]. Compare the [Kelly factors, 824 S.W.2d 568 \(1992\)](#) with the [Robinson factors, 923 S.W.2d 549 \(1995\)](#).

[FN37]. [946 S.W.2d 60, 62-63 \(1997\)](#).

[FN38]. [Nenno, 970 S.W.2d 549 \(1998\)](#).

[FN39]. [Gammill v. Jack Williams Chevrolet, 972 S.W.2d 713, 726 \(1998\)](#) (construing [Nenno, 970 S.W.2d 549 \(1998\)](#)).

[FN40]. [Nenno, 970 S.W.2d at 561](#).

[FN41]. [Id.](#)

[FN42]. [Id.](#)

[FN43]. [Gammill, 972 S.W.2d 713](#).

[FN44]. [Id. at 724](#).

[FN45]. [Nissan Motor Co. v. Armstrong, 32 S.W.3d 701, 708 \(2000\)](#) (construing [Gammill, 972 S.W.2d 713](#)).

[FN46]. [Gammill, 972 S.W. 2d at 725-26](#).

[FN47]. See Michelson, *supra* note 23.

[FN48]. See discussion *infra* Part IV.

[FN49]. See discussion *infra* Parts III, IV. Domestic violence case examples illustrating the flexibility of the courts concerning the Daubert/Kelly factors will be provided in Part IV.

[FN50]. [Fed. R. Evid. 702](#); [Tex. R. Evid. 702](#).

[FN51]. Judge Harvey Brown, [Eight Gates for Expert Testimony, 36 Hous. L. Rev. 743, 752 \(1999\)](#).

[FN52]. 4 Weinstein's Federal Evidence § 702.02 (2001).

[FN53]. See, e.g., [United States v. Hall, 93 F.3d 1337 \(1996\)](#).

[FN54]. Mangum, supra note 3, at 615.

[FN55]. Id. at 616.

[FN56]. Id. at 617. Studies are available from the Family Violence Prevention Fund at <http://www.fvvpf.org> (last visited Dec. 19, 2001) (on file with the Texas Journal of Women and the Law). See also U.S. Commission on Civil Rights, *The Federal Response to Domestic Violence* 77 (1982).

[FN57]. See [Fed. R. Evid. 702](#); [Tex. R. Evid. 702](#).

[FN58]. See [Fed. R. Evid. 702](#); see also [Gainsco County Mut. Ins. Co v. Martinez, 27 S.W.3d 97 \(2000\)](#); [American West Airlines v. Tope, 935 S.W. 2d 908, 918 \(2000\)](#); [Western Atlas Intern., Inc. v. Wilson, 930 S.W.2d 124 \(1996\)](#).

[FN59]. [Wyatt, 23 S.W.3d 18, 20 \(2000\)](#).

[FN60]. Id. at 19.

[FN61]. Id. at 20.

[FN62]. [Fed. R. Evid. 702](#), Advisory Committee Notes, 1972 Proposed Rules.

[FN63]. Personal experience, however, is not required to qualify an expert. An expert may testify based upon his or her education even in the absence of practical experience. See Brown, supra note 51, at 760 n.122-23.

[FN64]. See [Schneider v. Lynaugh, 835 F.2d 570, 576 \(5th Cir. 1988\)](#) (academic training does not rank higher than demonstrated practical experience); [United States v. Johnson, 575 F.2d 1347, 1361 \(5th Cir. 1978\)](#) (witness qualified as expert based on experience of smoking Columbian marijuana over one thousand times); [Hardin v. State, 20 S.W.3d 84 \(2000\)](#) (witness's 20 years experience investigating sex offenders and her training qualified her as expert); [Ventroy v. State, 917 S.W.2d 419 \(1996\)](#) (qualification based on special knowledge may be satisfied when the knowledge is acquired by virtue of witness's experiences); [Negrini v. State, 853 S.W.2d 128 \(1993\)](#) (qualification based on specialized knowledge may be derived from study of technical works, specialized education, practical experiences, or a combination of these factors); [Emerson v. State, 846 S.W.2d 531 \(1993\)](#) (specialized knowledge for expert qualification may be derived from specialized education, practical experience, or both).

[FN65]. See [United States v. Jones, 107 F.3d 1147 \(6th Cir. 1997\)](#) (no abuse of discretion by admitting testimony of a handwriting analyst who had years of practical experience and

training and who explained his methodology); [Tassin v. Sears Roebuck, 946 F. Supp. 1241, 1248 \(M.D. La. 1996\)](#) (testimony of design engineer admissible if testimony is "based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches").

[FN66]. [Kumho, 526 U.S. at 138.](#)

[FN67]. [Daubert, 43 F.3d at 1319.](#)

[FN68]. See [Fed. R. Evid. 702](#), Advisory Committee Notes, 2000 Amendments.

[FN69]. See discussion *infra* Part V.

[FN70]. [Brown, supra note 51, at 759 n.105-106.](#)

[FN71]. [State v. Northborough Center, Inc., 987 S.W. 2d 187 \(1999\); Southland Lloyd's Ins. Co. v. Tomberlain, 919 S.W.2d 822 \(1996\).](#)

[FN72]. [Southland Lloyd's Ins. Co. v. Tomberlain, 919 S.W.2d 822 \(1996\).](#)

[FN73]. [Glasscock v. Income Property Services Inc., 888 S.W.2d 176 \(1994\).](#)

[FN74]. [Petrolia Ins. Co. v. Everett, 719 S.W.2d 639 \(1986\).](#)

[FN75]. See [Brown, supra note 51](#); see also 4 Weinstein's Federal Evidence §702.04 (2001)

[FN76]. [20 S.W.3d 84 \(2000\).](#)

[FN77]. [Id. at 92.](#)

[FN78]. [Indigo Oil v. Wisor Oil, No. 05-96-00984-CV, 1998 WL 839591, at * 13-14 \(Dec. 7, 1998\).](#)

[FN79]. See [In re D.S., 19 S.W.3d 525 \(2000\); Burleson v. State, 802 S.W.2d 429 \(1991\); Austin v. State, 794 S.W.2d 408 \(1990\); Rio Grande Land & Cattle Co. v. Light, 749 S.W.2d 206 \(1988\).](#)

[FN80]. See [Johnson v. State, 970 S.W.2d 716 \(1998\).](#)

[FN81]. See [Austin, 794 S.W.2d 408.](#)

[FN82]. See [Burleson, 802 S.W.2d 429.](#)

[FN83]. See [Key v. State, 765 S.W.2d 848 \(1989\).](#)

[FN84]. See [Decker v. State, 894 S.W.2d 475 \(1995\)](#).

[FN85]. [Broders v. Heise, 924 S.W.2d 148 \(1996\)](#); see also [Gammill, 972 S.W.2d 713 \(1998\)](#); [Nemours, 923 S.W.2d 549 \(1995\)](#).

[FN86]. [Nemours, 923 S.W.2d at 557](#).

[FN87]. See [General Electric v. Joiner, 522 U.S. 136, 138-39 \(1997\)](#); [Gammill, 972 S.W.2d at 719](#).

[FN88]. [Daubert, 509 U.S. 579](#); [Nemours, 923 S.W.2d at 554](#). The Texas and [Federal Rule of Evidence 401](#) defines relevant evidence as "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." [Fed. R. Evid. 401](#); [Tex. R. Evid. 401](#).

[FN89]. [Daubert, 509 U.S. at 592](#).

[FN90]. *Id.*

[FN91]. *Brown*, *supra* note 51, at 774 n. 222-23.

[FN92]. *Id.* at 773-79.

[FN93]. [923 S.W.2d 549 \(1995\)](#).

[FN94]. *Brown*, *supra* note 51, at 778.

[FN95]. [Robinson, 923 S.W.2d 549 \(1995\)](#); see also [Austin v. Kerr- McGee, 25 S.W.3d 280 \(2000\)](#)(to be relevant, expert testimony must be tied to the facts of the case); [United States v. Marler, 614 F.2d 47, 50 \(5th Cir. 1980\)](#) (knowledge or training related to general area, not to specific question before factfinder). But see [Broders v. Heise, 924 S.W.2d 148 \(1996\)](#)('special knowledge' as to the very matter on which he proposes to give an opinion). See also 4 Weinstein's Federal Evidence §702.03 (2001)(qualifications in a general field relating to the subject matter of the issue in question is required rather than expertise in specialized areas that are directly pertinent to the issues in question).

[FN96]. See [Fed. R. Evid. 702, 402](#); [Tex. R. Evid. 702, 402](#).

[FN97]. See J.C. Penney [Life Ins. Co. v. Baker, 33 S.W.3d 417 \(2000\)](#) (expert testimony based on experience and observations in the medical field were not the type of testimony that could be easily evaluated under the Robinson factors for determining reliability).

[FN98]. *Brown*, *supra* note 51, at 748.

[FN99]. [Nenno, 970 S.W.2d 549 \(1998\)](#).

[\[FN100\]](#). See *Brown*, *supra* note 51, at 779-805.

[\[FN101\]](#). *Id.* at 805-11.

[\[FN102\]](#). *Id.* at 811-20.

[\[FN103\]](#). *Id.* at 829-39.

[\[FN104\]](#). *Id.*

[\[FN105\]](#). [Watkins](#), 121 F.3d 984 (5th Cir. 1997).

[\[FN106\]](#). *Id.*

[\[FN107\]](#). [Daubert](#), 509 U.S. 579. See also [Kelly v. State](#), 824 S.W.2d 568 (1992); [Nemours](#), 923 S.W.2d 549 (1995).

[\[FN108\]](#). [Daubert](#), 509 U.S. 579 (1993).

[\[FN109\]](#). *Id.*

[\[FN110\]](#). [Fielder](#), 756 S.W.2d 309 (1988).

[\[FN111\]](#). [Id.](#) at 320-21.

[\[FN112\]](#). *Id.*

[\[FN113\]](#). [Scugoza](#), 949 S.W.2d 360 (1997).

[\[FN114\]](#). *Id.*

[\[FN115\]](#). [Hernandez](#), 53 S.W.3d 742 (2001).

[\[FN116\]](#). [Id.](#) at 744.

[\[FN117\]](#). *Id.*

[\[FN118\]](#). *Garcia v. State*, No. 01-99-01068-CV, 2000 Tex. App. LEXIS 3774 (June 8, 2000) (not designated for publication).

[\[FN119\]](#). *Id.* at *5.

[\[FN120\]](#). [Fowler](#), 958 S.W.2d 853 (1998).

[\[FN121\]](#). [Id.](#) at 860.

[\[FN122\]](#). [Id. at 864.](#)

[\[FN123\]](#). [Id. at 863.](#)

[\[FN124\]](#). See discussion *supra* Part III and *infra* Part VI.

[\[FN125\]](#). In 1996, the Department of Justice issued a report in response to the Violence Against Women Act, assessing the effects that evidence of battered woman syndrome may have in criminal trials. Mary Ann Dutton, U.S. Dep't. of Justice, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women* (1996). [hereinafter DOJ Report].

[\[FN126\]](#). See Alison Leonard, Paper, *Use Of Expert Testimony In Domestic Violence Cases: What Is The Standard For Admissibility?*, The University of Texas School of Law (received from Sarah Buel, Professor, The University of Texas School of Law).

[\[FN127\]](#). See Mangum, *supra* note 3, at 605-12; Dutton, *supra* note 7, at 1194; Pamela Posch, [The Negative Effects of Expert Testimony on the Battered Women's Syndrome](#), *6 Am. U.J. Gender Soc. Pol'y & L.* 485 (1998).

[\[FN128\]](#). Magnum, *supra* note 3, at 605-612.

[\[FN129\]](#). *Id.*

[\[FN130\]](#). See DOJ Report, *supra* note 125, at 6.

[\[FN131\]](#). See Mangum, *supra* note 3, at 605-12; Dutton, *supra* note 7, at 1194; Posch, *supra* note 127; see also Violence Against Women Online Resources, *Critique of the "Battered Woman Syndrome" Model*, available at <http://www.vaw.umn.edu/Vawnet/bws.htm> (last visited Nov. 16, 2001) (on file with the Texas Journal of Women and the Law).

[\[FN132\]](#). This should not be construed as an argument that BWS should never be used. In contrast, in some cases, BWS is applicable and extremely helpful.

[\[FN133\]](#). See DOJ Report, *supra* note 125, at 3.

[\[FN134\]](#). Shelby A.D. Moore, [Battered Women Syndrome: Selling the Shadow to Support the Substance](#), *38 How. L. J.* 297, 302 (1995).

[\[FN135\]](#). [Id. at 302-03.](#)

[\[FN136\]](#). [Id. at 344.](#)

[\[FN137\]](#). See Mangum, *supra* note 3, at 605-12; Dutton, *supra* note 7, at 1194; Posch, *supra* note 127.

[\[FN138\]](#). In the author's opinion, victim advocates are more likely to have assisted women in various domestic violence experiences. Furthermore, to be qualified as an expert, the witness advocate must have many years of experiences. Arguably, due to this fact, the advocate's experiences will be varied and diverse. Therefore, in establishing her opinions, the victim advocate will likely account for the experiences of culturally and socially diverse women.

[\[FN139\]](#). The Family Violence Prevention Fund's Judicial Education Project has developed a reference guide to assist judges to become more culturally competent in handling domestic violence cases. Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook can also assist domestic violence advocates and practitioners in understanding cultural and domestic violence issues. Innovative New Resource Material Help Judges Improve Their Response to Domestic Violence, at <http://endabuse.org/newsdesk/releases/php3?Search=Article&ID=31> (last visited Dec. 18, 2001) (on file with the Texas Journal of Women and the Law).

[\[FN140\]](#). See [Broders v. Heise, 924 S.W.2d 148 \(1996\)](#); see also [Gammill, 972 S.W.2d 713; Nemours, 923 S.W.2d 549](#).

[\[FN141\]](#). Tex. R. Crim. Pro. §38.36.

[\[FN142\]](#). See 4 Weinstein's Federal Evidence § 702.02 (2001).

[\[FN143\]](#). See, e.g., Pace University School of Law, Women's Justice Center, Sample Direct of a Battered Woman Syndrome Expert, at <http://www.pace.edu/lawschool/bwjc/expertquestions.html> (last visited Nov. 16, 2001) (on file with the Texas Journal of Women and the Law); see also Richard Kraft and Alana Bowman, Introducing Expert Testimony on Domestic Violence and Common Experiences of Battered Women: Practice and Procedure, XIV Investigation & Prosecution of Domestic Violence (2000), available from Conference Manual, National Training Center on Domestic and Sexual Violence, June 18-20, 2001.

[\[FN144\]](#). See discussion *supra* Part IIIA.

[\[FN145\]](#). Some of these questions have been reprinted from various articles. See Pace University School of Law, Women's Justice Center, Sample Direct of a Battered Woman Syndrome Expert at <http://www.pace.edu/lawschool/bwjc/expertquestions.html> (last visited Nov. 16, 2001) (on file with the Texas Journal of Women and the Law); see also Kraft and Bowman, *supra* note 143.

[\[FN146\]](#). The questions I provide are specifically addressed to and for domestic violence victim advocate experts. Many sample forms, in addition to providing qualification questions, also offer questions concerning general domestic violence issues (myths, statistics, effects), and specific facts of the case. See Kraft and Bowman, *supra* note 143.

[\[FN147\]](#). See discussion *supra* Part III.D.

[\[FN148\]](#). Brown, supra note 51, at 834-36.

[\[FN149\]](#). [Daubert, 509 U.S. 579](#).

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