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I. INTRODUCTION

Almost every civil case involves experts to some degree. The party with the burden of proof in a large percentage of cases must have expert testimony to carry its burden. That being said, it makes complete sense that the rules regarding the admission of expert testimony have evolved substantially over the past several decades.

In Texas, the admission and exclusion of expert evidence was substantially refined by the Texas Supreme Court's decision in *E.I. du Pont de Nemours & Co. v. Robinson.*[1] Since *Robinson*, Texas courts have generally held that an expert's testimony can be excluded on the basis that: 1) the expert's opinion does not assist the trier of fact;[2] 2) the expert is not qualified to render the specific opinion offered;[3] 3) the expert bases his or her opinion on unreliable facts;[4] 4) the expert's methodology is unreliable;[5] 5) the expert's opinion is not relevant;[6] or 6) the probative value of the expert's opinion is substantially outweighed by its prejudicial effect.[7] This article does not address

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1. 923 S.W.2d 549, 556 (Tex. 1995).

2. *See* TEX. R. EVID. 702; K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 620 (Tex. 1999); *see also In re* G.M.P., 909 S.W.2d 198, 206 (Tex. App.—Houston [14th Dist.] 1995, no writ) (holding that the officer's expert testimony concerning whether the witness was telling the truth or not, would not assist the jury but would instead abdicate the jury's responsibility to determine the truth).

3. *See* TEX. R. EVID. 702; Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996); Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 719 (Tex. 1998); Roberts v. Williamson, 111 S.W.3d 113, 121 (Tex. 2003); *see also* Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 470 (Tex. 2005) (citing Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999)) (holding that mere qualifications alone can not settle an issue as a matter of law).

4. *See* TEX. R. EVID. 703, 705(c); *see* Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711–13 (Tex. 1997); Onwuteaka v. Gill, 908 S.W.2d 276, 283 (Tex. App.—Houston [1st Dist.] 1995, no writ); Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 154 (Tex. App.—Texarkana 1997, writ denied); Tex. Indus., Inc. v. Vaughan, 919 S.W.2d 798, 802 (Tex. App.—Houston [14th Dist.] 1996, writ denied); United Way of San Antonio, Inc. v. Helping Hands Lifeline Found., Inc., 949 S.W.2d 707, 711–12 (Tex. App.—San Antonio 1997, writ denied).

5. *See* TEX. R. EVID. 702; E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995); *see also Gammill*, 972 S.W.2d at 726–27 (finding that neither the Federal Rules of Evidence nor *Daubert* requires a district court to admit expert testimony that is connected to existing data only by the *ipse dixit* of the expert); *Merrell Dow Pharm., Inc.*, 953 S.W.2d at 713 (finding that if the expert's scientific testimony is not reliable, it is not evidence).

6. *See* TEX. R. EVID. 401, 402; *E.I. du Pont de Nemours & Co.*, 923 S.W.2d at 556; *Gammill*, 972 S.W.2d at 720.

7. TEX. R. EVID. 403; *E.I. du Pont de Nemours & Co.*, 923 S.W.2d at 557; N. Dallas Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 96 (Tex. App.—Dallas 1995, writ denied); State v. Malone Serv. Co., 829 S.W.2d 763, 767 (Tex. 1992); Tex. Workers' Comp. Ins. Fund v. Lopez, 21 S.W.3d 358, 363–64 (Tex. App.—San Antonio 2000, pet. denied); *see also* Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 192 (Tex. App.—Texarkana

these grounds for an objection to expert evidence. There are many well-written and informative articles that address these various grounds and how to phrase them in a convincing manner.

Rather, this article focuses on the appellate issues that arise due to the admission or exclusion of expert testimony: preserving error regarding the admission or exclusion of expert testimony, the various standards of review that are used in connection with expert issues, and the correct disposition of the case after appellate review.[8]

II. PRESERVING ERROR

As shown above, a party can object to an opposing party's expert on multiple grounds. The first step for any appeal is determining whether an error in the admission or exclusion of expert evidence has been preserved.

A. General Preservation of Error Rules

Texas courts have set out general guidelines for preserving error both in rules and in caselaw. Most appellate courts first cite to the Texas Rule of Appellate Procedure 33.1, which provides:

> (a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:
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> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
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> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
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> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
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> (2) the trial court:
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> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
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> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the

1998, pet. denied) (holding that the expert witness's testimony must have some probative value to be admissible).

8. The scope of this article is limited to Texas state precedent and does not cover federal precedent.

refusal.[9]

Though less cited, Texas Rule of Evidence 103 also provides a general rule for preserving error:

> (a) Effect on Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.
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> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.
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> (b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.
>
> (c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.[10]

Following these rules, to preserve error a party must make a valid, timely, and specific request, motion, or objection and obtain a ruling.[11] The objection must be timely, i.e., it must be brought within the time permitted by the rules and decisions.[12] Further, in order to be timely, a complaint must be raised at a time when the trial court has the power

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9. TEX. R. APP. P. 33.1.

10. TEX. R. EVID. 103.

11. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a)(1); Osterberg v. Peca, 12 S.W.3d 31, 55 (Tex. 2000).

12. *See* TEX. R. APP. P. 33.1(a)(1); Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991); Vaughan v. Walther, 875 S.W.2d 690, 690–91 (Tex. 1994).

and opportunity to correct the error alleged.[13] An objection is timely if made "as soon as the ground of objection becomes apparent."[14] A party cannot make an objection for the first time on appeal—the objection at trial must be consistent with the complaint on appeal.[15] The basic reason for the requirement that a party object at trial is that the trial court must be afforded an opportunity to correct the error or rule on the issue.[16]

Generally, a court of appeals will deem error in the admission of evidence harmless "if the objecting party subsequently permits the same or similar evidence to be introduced without objection."[17] In order to preserve error, a party must object to each offer of the inadmissible evidence.[18] However, a party may preserve error by asserting a "running objection" without having to object to each individual offer.[19] A running objection preserves error if it clearly identifies the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, and if properly done, courts will recognize a running objection for more than one witness.[20]

A party complaining on appeal must show that the trial court ruled on his objection or motion. The Texas Rules of Appellate Procedure now provide that the trial court must either expressly or implicitly rule on the objection, or if the court refuses to rule, the complaining party must object to the court's failure to rule.[21] When a ruling is implied by the court's actions, no express ruling is necessary.[22]

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13. Richards v. Tex. A&M Univ. Sys., 131 S.W.3d 550, 555 (Tex. App.—Waco 2004, pet. denied); Wal-Mart Stores, Inc. v. McKenzie, 997 S.W.2d 278, 280 (Tex. 1999).

14. *Richards*, 131 S.W.3d at 550 (quoting Kerr-McGee Corp. v. Helton, 134 S.W.3d 204, 208 (Tex. App.—Amarillo 2002, pet. granted), *rev'd*, 133 S.W.3d 245 (Tex. 2004).

15. *See In re* C.O.S., 988 S.W.2d 760, 765 (Tex. 1999).

16. *See In re* Shaw, 966 S.W.2d 174, 182 (Tex. App.—El Paso 1998, no pet.).

17. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004) (quoting Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984)).

18. Scaggs v. State, 18 S.W.3d 277, 291 (Tex. App.—Austin 2000, pet ref'd.); *see* TEX. R. APP. P. 33.1.

19. *Ramirez*, 159 S.W.3d at 907.

20. *Id.*

21. *See* TEX. R. APP. P. 33.1; Guyot v. Guyot, 3 S.W.3d 243, 246 (Tex. App.—Fort Worth 1999, no pet.).

22. Hardman v. Dault, 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet.); *see* TEX. R. APP. P. 33.1; Clement v. City of Plano, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.) (finding non-movant's special exceptions were implicitly overruled by trial court granting summary judgment), *overruled in part by* Telthorster v. Tennell, 92 S.W.3d 457, 464 (Tex. 2002); Colom. Rio Grande Reg'l Hosp. v. Stover, 17 S.W.3d 387, 395–96 (Tex. App.—Corpus Christi 2000, no pet.) (finding trial court implicitly overruled non-movant's objections to movant's summary judgment evidence by granting summary judgment); Dagley v. Haag Eng'g Co., 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston [14th

The determination of whether a court "impliedly" rules on an objection or motion is an unnecessary inquiry; a party can guarantee that his complaint is preserved for appellate review by obtaining a ruling or by objecting to the court's refusal to rule.[23] That is the safest course.

To complain about the exclusion of evidence, the offering party must make an offer of proof.[24] A party must make its offer of proof after it officially offers the evidence into record and secures an adverse ruling.[25] As one court stated:

> To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility. . . . The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent. If counsel does make such an offer, he must describe the actual content of the testimony and not merely comment on the reasons for it.[26]

The party complaining on appeal must also make a sufficient record such that the court of appeals can determine that error occurred and that a complaint to the error was preserved.[27] Without a motion, response, order, or a statement of facts containing an oral objection and ruling, an appellate court must presume that the trial court's ruling was correct and was supported by the omitted portions of the record.[28] This will require that a party repeat on the record statements made off the record in a bench conference.

Moreover, the complaining party must be able to show harmful error to the court of appeals. Texas Rule of Appellate Procedure 44.1 provides that an error does not require a reversal unless it "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals."[29] Preserving error is not the object—the

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Dist.] 2000, no pet.) (finding trial court implicitly overruled non-movant's objection to adequate time for discovery by granting summary judgment).

23. *See* TEX. R. APP. P. 33.1; Frazier v. Yu, 987 S.W.2d 607, 609–10 (Tex. App.—Fort Worth 1999, pet. denied).

24. Perez v. Lopez, 74 S.W.3d 60, 66 (Tex. App.—El Paso 2002, no pet.).

25. *Id.*

26. *In re* N.R.C., 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (citations omitted).

27. *See* TEX. R. APP. P. 33.1, 44.1; Petitt v. Laware, 715 S.W.2d 688, 690 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

28. *See* Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990).

29. TEX. R. APP. P. 44.1; *accord* McCraw v. Maris, 828 S.W.2d 756, 758 (Tex. 1992) (finding that a complaining party is only required to show that the exclusion of evidence

object is to preserve reversible error. In order to preserve reversible error, the party must make a record of every instance that supports the fact that the trial court's error "probably caused the rendition of an improper judgment."[30] Making this showing may include instances where opposing counsel hammered the error home to the jury via statements made in voir dire, opening statements, evidence admission, and closing statements. Moreover, harmful error may be shown by making an offer of proof and showing the court of appeals that the trial court left out crucial evidence or argument.[31] Accordingly, making a record of the error and its impact on the trial is of utmost importance to preserve reversible error.

B. Preserving Complaints About Expert Disclosure

Once a party serves a request for disclosure pursuant to Texas Rule of Civil Procedure 194, the opponent must disclose certain information about its retained and non-retained experts.[32] Rule 195 states: "A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule."[33] Texas Rule of Civil Procedure 195 controls the timing of the disclosures if the court has not entered a

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most likely resulted in an improper judgment).

30. TEX. R. APP. P. 44.1.

31. Ganesan v. Vallabhaneni, 96 S.W.3d 345, 351–52 (Tex. App.—Austin 2002, pet. denied).

32. *See* TEX. R. CIV. P. 194.

33. *Id.* at 195.1. Texas Rule of Civil Procedure 194.2(f) permits a party to request disclosure of:

> (1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party: (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and (B) the expert's current resume and bibliography.

Id. at 194.2(f). Under this provision, there is a difference in the designation of retained and non-retained experts. For non-retained experts, a party is only required to disclose: (1) the expert's name, address, and telephone number; (2) the subject matter of his testimony; and (3) the general substance of the expert's mental impressions and opinions or documents reflecting a brief summary of the basis for them. *See* Barr v. AAA Tex., L.L.C., 167 S.W.3d 32, 36 (Tex. App.—Waco 2005, no pet.).

scheduling order.[34] A trial court has the authority to enter a scheduling order that controls the disclosure of experts.[35] Unless the court orders to the contrary, the party seeking affirmative relief must designate ninety days before the end of the discovery period, and all other parties must designate sixty days before the end of the discovery period.[36]

The discovery rules are intended to provide adequate information about an expert's opinions to allow the opposing party the necessary information to prepare to cross-examine the expert and to rebut this testimony with its own experts.[37] Generally, experts are not required to prepare reports. However, "[i]f the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition."[38] When required, an expert's report shall include the discoverable factual observations, tests, supporting data, calculations, photographs, and opinions of the expert.[39] The report must provide the expert's opinions and the underlying basis for them.[40] An expert has the right to refine calculations and perfect reports through the time of trial.[41] An expert must retain his or her work product, and a party must produce that material to the requesting party.[42] If a party or its expert destroys the expert's work product, a trial court may exclude the expert's testimony as a sanction.[43]

There is often a complaint about a party's failure to properly designate an expert or to the timeliness of the designation.[44] Of course, failure to raise an objection about the designation of an expert will

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34. TEX. R. CIV. P. 195.2.

35. *See id.*; State Farm Fire & Cas. Co. v. Price, 845 S.W.2d 427, 434 (Tex. App.—Amarillo 1992, writ dism'd by agr.).

36. *See* TEX. R. CIV. P. 195.2.

37. Exxon Corp. v. W. Tex. Gathering Co., 868 S.W.2d 299, 304 (Tex. 1993).

38. TEX. R. CIV. P. 195.5.

39. *See id.*

40. *See* Mauzey v. Sutliff, 125 S.W.3d 71, 84 (Tex. App.—Austin 2003, pet. denied) (finding that trial courts should ensure that expert reports fully disclose the substance of and basis for the expert's mental impressions).

41. Tovar v. Arambula, No. 04-02-00640-CV, 2003 Tex. App. LEXIS 8217, at *7 (Tex. App.—San Antonio Sept. 24, 2003, no pet.) (citing *Exxon Corp.*, 868 S.W.2d at 304).

42. *See* Vela v. Wagner & Brown, Ltd., No. 04-04-00745-CV, 2006 Tex. App. LEXIS 5277, at *5–6 (Tex. App.—San Antonio June 21, 2006, no pet.).

43. *Id.*

44. *See, e.g.*, Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 585 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (discussing a complaint about a late supplemental report).

result in waiver of that complaint on appeal.[45]

Rule 193.5(b) governs supplemental disclosures: "An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response."[46] It is presumed that a response made within 30 days of trial is not reasonably prompt.[47] However, there is no presumption that a supplement served 30 days or more before trial is reasonably prompt.[48]

"A party who fails to timely make, amend, or supplement a discovery response" may not offer the testimony of a non-party witness who was not timely identified, unless the court finds that (1) there was good cause for the failure, or (2) the failure will not unfairly surprise or prejudice the other parties.[49] The burden is on the party supplementing discovery.[50] For example, in one case, the defendants did not designate their expert when they retained him and waited until 30 days before trial.[51] The court of appeals affirmed the trial court's decision to exclude the expert because the defendants did not supplement their discovery responses "reasonably promptly."[52]

In other cases, where the objecting party knew of the expert before trial, the court of appeals found that there was no harm in a late designation.[53] Moreover, in one recent case, the court of appeals held that the trial court did not abuse its discretion in allowing the testimony of an expert where the expert was disclosed reasonably promptly after the case had been remanded from an interlocutory appeal.[54] Further, if the failure to disclose expert opinions is due to the opponent's own failure to supplement discovery, a trial court can find

45. *See, e.g.*, *In re* Tomkins, No. 06-04-00067-CV, 2005 Tex. App. LEXIS 5317, *17–18 (Tex. App.—Texarkana July 8, 2005, no pet.) (mem. op.); Shackelford v. Shackelford, No. 11-03-00119-CV, 2004 Tex. App. LEXIS 8727, at *6 (Tex. App.—Eastland Sept. 30, 2004, no pet.) (mem. op.).

46. TEX. R. CIV. P. 193.5; *see also* TEX. R. CIV. P. 195.6 (stating that a party must supplement any deposition testimony, or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them).

47. TEX. R. CIV. P. 193.5.

48. *See* Snider v. Stanley, 44 S.W.3d 713, 716 (Tex. App.—Beaumont 2001, pet. denied).

49. *See* TEX. R. CIV. P. 193.6(a).

50. TEX. R. CIV. P. 193.6(b).

51. *Snider*, 44 S.W.3d at 716.

52. *Id.*

53. Gutierrez v. Gutierrez, 86 S.W.3d 729, 735 (Tex. App.—El Paso 2002, no pet.); Elliott v. Elliott, 21 S.W.3d 913, 921 (Tex. App.—Fort Worth 2000, pet. denied); Rutledge v. Staner, 9 S.W.3d 469, 472 (Tex. App.—Tyler 1999, pet. denied).

54. Wigfall v. Tex. Dep't of Criminal Justice, 137 S.W.3d 268, 273–74 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

good cause and allow the testimony.[55]

When a party has such an objection, he should file a motion to strike the expert and schedule a hearing on the motion before trial or within the requirements of a scheduling order.[56] However, often a party may not know that an expert has been inadequately disclosed until after the expert testifies at trial; for example, when the expert testifies to opinions outside of his or her report and deposition. When this occurs, a party should immediately object to the testimony and show harm in not being able to prepare for cross-examination.[57] Furthermore, the objecting party should make a record to support the objection—evidence that the expert was not properly disclosed.[58] This may include a copy of the properly served request for disclosure, a response thereto, deposition testimony, a report, and/or oral testimony by the attorney regarding any of the above. An attorney should make sure that a trial court and court of appeals can review all relevant expert discovery in determining whether an expert was adequately disclosed—this can be difficult under current practice because parties do not file discovery products.

If properly challenged, an expert should not be allowed to give an opinion at trial that was not provided in response to discovery unless there is good cause to permit it or the opinion would not unfairly surprise or prejudice the other parties.[59] The trial court should

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55. Pugh v. Conn's Appliance, Inc., No. 09-02-514-CV, 2004 Tex. App. LEXIS 2443, at *12 (Tex. App.—Beaumont Mar. 18, 2004, pet. denied) (mem. op.).

56. *See* Sunbridge Healthcare Corp. v. Penny, 160 S.W.3d 230, 241–42 (Tex. App.—Texarkana 2005, no pet. hist.) (holding that the party waived complaint regarding expert disclosure by waiting until trial to object to inadequate disclosure where party knew of the inadequacy before trial).

57. *See* Shackleford v. Shackleford, No. 11-03-00119-CV, 2004 Tex. App. LEXIS 8727, at *6 (Tex. App.—Eastland Sept. 30, 2004, no pet.) (mem. op.) (finding that a complaint about undesignated witness waived where no objection made at trial).

58. *See* Facundo v. Solis, No. 03-05-00059-CV, 2006 Tex. App. LEXIS 318, at *6–7 (Tex. App.—Austin Jan. 12, 2006, no pet.) (mem. op.) (finding that the trial court did not err in admitting expert testimony where the record did not show that requests for disclosure were sent, that party asked for the expert's deposition, or that there was no report); Mora v. Chacon, No. 13-05-182-CV, 2005 Tex. App. LEXIS 8433, at *2–3 (Tex. App.—Corpus Christi Oct. 13, 2005, pet. denied) (mem. op.).

59. TEX. R. CIV. P. 193.6(a); Barr v. AAA Tex., L.L.C., 167 S.W.3d 32, 37 (Tex. App.—Waco 2005, no pet.) (holding the trial court did not err in excluding non-retained expert who was not properly designated by responses to requests for disclosure); Dennis v. Haden, 867 S.W.2d 48, 51–52 (Tex. App.—Texarkana 1993, writ denied) (finding that because party did not produce expert's report as required by pretrial order, expert should have been excluded.); Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 271 (Tex. App.—Austin 2002, pet. denied); Haley v. GPM Gas Corp., 80 S.W.3d 114, 120–21 (Tex. App.—Amarillo 2002, no pet.); Mares v. Ford Motor Co., 53 S.W.3d 416, 419 (Tex. App.—San Antonio 2001, no pet.); Matagorda County Hosp. Dist. v. Burwell, 94 S.W.3d 75, 81 (Tex.

properly limit the expert's testimony to the opinions disclosed unless one of the exceptions applies.[60] However, if a trial court excludes an expert, the party opposing such exclusion may seek a continuance:

> Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b) [Rule 193.6], the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.[61]

A trial court's ruling on such a motion will be reviewed under an abuse of discretion standard.[62]

C. Preserving Complaints About Expert Testimony

1. Must Preserve Error

Like other evidence issues, a party must preserve error in the admission or exclusion of expert testimony. The Texas Supreme Court has held that if a party wants to complain on appeal about the admission of expert testimony, it has an obligation to object to the evidence before trial or when the evidence is offered.[63] The Court noted that, absent such a timely objection, the offering party would not be given the opportunity to cure any defect which might exist, and the objecting party would be allowed an appeal by ambush:

> To preserve a complaint that scientific evidence is unreliable

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App.—Corpus Christi 2002), *rev'd on other grounds*, 189 S.W.3d 738 (Tex. 2006); Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied) (holding that failure to provide all information requested for disclosure constitutes failure to respond and triggers automatic exclusion of testimony); Cooper v. Fleming, No. 05-04-01726-CV, 2006 Tex. App. LEXIS 68, at *1 (Tex. App.—Dallas Jan. 5, 2006, no pet.) (mem. op.) (finding that the party must show good cause for late designation, and conclusory allegation of an "accident" is not sufficient without any underlying facts); State v. Capitol Feed & Milling Co., No. 03-02-00749-CV, 2003 Tex. App. LEXIS 8029, at *14–15 (Tex. App.—Austin Sept. 11, 2003, no pet.) (mem. op.).

60. TEX. R. CIV. P. 193.6(a).

61. *Id.* at 193.6(c); *accord* Tri-Flo Int'l Inc. v. Jackson, No. 13-01-472-CV, 2002 Tex. App. LEXIS 7630, at *7 (Tex. App.—Corpus Christi Oct. 24, 2002, no pet.) (finding the trial court correctly delayed trial to allow full discovery of late supplementation of expert opinions).

62. Snider v. Stanley, 44 S.W.3d 713, 716 (Tex. App.—Beaumont 2001, pet. denied) (holding the trial court's ruling denying motion for continuance, where it was made after the jury was impaneled, was not an abuse of discretion); *Capitol Feed & Milling Co., Inc.*, 2003 Tex. App. LEXIS 8029, at *5.

63. Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

> and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush.
>
> Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party because that party relied on the fact that the evidence was admitted.[64]

Absent a proper complaint, error in the admission of expert testimony is waived.[65]

2. *Procedure for Preserving Error Before Trial*

Challenges to experts should be made as early in the litigation process as possible.[66] Texas Rule of Evidence 104 states: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."[67] Therefore, "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the [appropriate] standards."[68] A party should file a motion to challenge its opponent's expert and set a pre-trial hearing on that motion. After the expert or his opinion has been challenged, the party offering the expert's testimony has the burden to prove that the witness is qualified or has reliable methodologies.[69] A motion to exclude an expert is similar to a no-evidence motion for summary judgment in that the burden is initially on the non-movant to contradict the allegations in the motion.[70] However, unlike a no-evidence motion, the evidence may not be viewed in the light most favorable to the non-movant.[71]

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64. *Id.* (citations omitted).

65. *See, e.g.*, Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); Melendez v. Exxon Corp., 998 S.W.2d 266, 282–83 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 665 (Tex. App.—Houston [1st Dist.] 1998, no pet.); Weidner v. Sanchez, 14 S.W.3d 353, 366 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Askew v. Askew, No. 2-04-109-CV, 2005 Tex. App. LEXIS 8329, at *17 (Tex. App.—Fort Worth Oct. 6, 2005, no pet.) (mem. op.).

66. *See Mar. Overseas Corp.*, 971 S.W.2d at 412.

67. TEX. R. EVID. 104(a).

68. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).

69. *See* Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996); Frias v. Atl. Richfield Co., 104 S.W.3d 925, 927 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

70. *E.I. du Pont de Nemours & Co.*, 923 S.W.2d at 557.

71. *See* Harris County Appraisal Dist. v. Kempwood Plaza Ltd., 186 S.W.3d 155, 157–58 (Tex. App.—Houston [1st Dist.] 2006, no pet. hist.).

A ruling on a pre-trial hearing is sufficient to preserve error in the admission or exclusion of expert testimony.[72] However, if a party solely relies on a pretrial motion to preserve error, it should take great caution to foresee all objectionable bases and to assert them. Otherwise, the party will not be able to allege a ground of objection that was not expressly raised in the pre-trial motion and that was not raised at trial.[73] Further, just filing a pre-trial motion will not be enough to preserve error—the party should set the motion for hearing and obtain a ruling from the trial court.[74] One court has stated: "An adverse ruling also appears to be required."[75] Relating back to Texas Rule of Appellate Procedure 33.1, this requirement is intended to make the record show that expert objections are brought to the trial court's attention.[76] However, if the record clearly shows that a party raised objections to the trial court, there is no reason that an implied or implicit ruling could not be inferred by the trial court's action in admitting or excluding the expert evidence.[77]

Notwithstanding the ability to preserve error solely pre-trial, a careful party will urge its objections both before trial and re-urge them when the evidence and any similar evidence is offered at trial and obtain a ruling.[78] Like all testimony, an expert's testimony can

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72. KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. v. Davis, 175 S.W.3d 379, 389–90 (Tex. App.—Houston [1st Dist.] 2005, no pet. hist.); DaimlerChrysler Corp. v. Hillhouse, 161 S.W.3d 541, 554 n.5 (Tex. App.—San Antonio 2004, pet. granted), *rev'd due to settlement*, 2006 Tex. LEXIS 25 (Tex. Jan. 13, 2006); Marvelli v. Alston, 100 S.W.3d 460, 470 n.3 (Tex. App.—Fort Worth 2003, pet. denied); Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194, 205–06 (Tex. App.—Texarkana 2000, pet denied); Doyle Wilson Homebuilder, Inc. v. Pickens, 996 S.W.2d 387, 393 (Tex. App.—Austin 1999, pet. dism'd by agr.).

73. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 143–44 (Tex. 2004) (holding that party waived objection to qualification where pre-trial motion only addressed reliability); Cass v. Stephens, 156 S.W.3d 38, 63 (Tex. App.—El Paso 2004, pet. filed).

74. *E.g.*, *In re* S.A.P., 169 S.W.3d 685, 691 (Tex. App.—Waco 2005, no pet.) (holding that party waived error despite filing pre-trial motion where it failed to set motion for hearing); Pilgrim's Pride Corp. v. Smoak, 134 S.W.3d 880, 890 n.1 (Tex. App.—Texarkana 2004, pet. denied) (stating that party must have ruling on expert motion in record to preserve error, but not addressing the implied or implicit ruling concept).

75. *Pilgrim's Pride Corp.*, 134 S.W.3d at 890 n.1.

76. *See* NIP v. Checkpoint Sys. Inc., 154 S.W.3d 767, 771 n.1 (Tex. App.—Houston [14th Dist.] 2004, no pet. hist.) (stating that complaints set forth in expert report or attached as exhibit to motion to strike were waived where the record did not show that the party specifically presented them to the trial court).

77. *See* TEX. R. APP. P. 33.1.

78. *See, e.g.*, *Cass*, 156 S.W.3d at 63 (stating that objection to expert evidence is waived if the same evidence is offered without objection elsewhere in trial); GTE Mobilnet of S. Tex. Ltd. P'ship. v. Pascouet, 61 S.W.3d 599, 613 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (stating that error is not preserved where there was no objection at trial nor a ruling on objection before trial); Royce Homes, L.P. v. Neel, No. 10-03-00127-CV,

differ at trial from what was said before trial. A party should re-urge objections at trial, obtain a running objection, and make sure that all grounds for objection are raised and are on the record.

3. Scheduling Orders that Address the Timing of Objecting to Experts

The timing requirement for objecting to experts is more structured when a trial court sets a pre-trial deadline to file expert challenges. Usually, when a trial court does so, the order states that any objections not timely filed will be waived. Texas Rule of Civil Procedure 166 provides a trial court great discretion in setting deadlines in pre-trial orders.[79] The purpose of Rule 166 is to simplify and shorten the trial.[80] "When a trial court's pretrial scheduling order changes the deadlines set forth in a procedural rule, the trial court's order prevails."[81] Rule 166 provides that a trial court can set due dates for the disclosure of experts, but it does not expressly mention setting deadlines to file objections to expert evidence.[82] It does state that a trial court can set deadlines for "[s]uch other matters as may aid in the disposition of the action," and the scheduling order "shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice."[83] Moreover, trial courts can enter serious, suit-ending sanctions for the failure to comply with a scheduling order.[84]

However, there is no case directly on point as to whether a party will waive expert objections if it does not do so in conformity with a pre-trial order. In *Daniels v. Yancey*, the court addressed an argument that a party waived his expert objections by not filing them within the time required by the pre-trial order.[85] After the court entered the pre-trial order, the trial date was moved by agreement. The defendant filed an expert challenge, which the trial court granted, after the

2005 Tex. App. LEXIS 1514, at *2–3 (Tex. App.—Waco Feb. 23, 2005, pet. denied) (mem. op.) (stating that court terminated hearing without a ruling while in middle of pre-trial hearing); Soliz v. Cofer, No. 03-01-00246-CV, 2002 Tex. App. LEXIS 3069, at *24 (Tex. App.—Austin May 2, 2002, pet. denied) (not designated for publication) (stating that error was not preserved where there was no objection at trial and no ruling on objection before trial).

79. *See* TEX. R. CIV. P. 166.

80. *See* Provident Life & Accident Ins. Co. v. Hazlitt, 147 Tex. 426, 429, 216 S.W.2d 805, 807 (1949).

81. Lindley v. Johnson, 936 S.W.2d 53, 55 (Tex. App.—Tyler 1996, writ denied).

82. *See* TEX. R. CIV. P. 166(i).

83. TEX. R. CIV. P. 166(p).

84. *See, e.g.*, Koslow's v. Mackie, 796 S.W.2d 700, 703–05 (Tex. 1990) (affirming trial court's striking of pleadings due to failure to comply with Rule 166).

85. 175 S.W.3d 889, 893 (Tex. App.—Texarkana 2005, no pet. hist.).

deadline that was in the original scheduling order. On appeal, the plaintiff argued that the challenge was waived. The court of appeals affirmed the trial court's dismissal of the expert and held that the challenge was timely: "[the] motion could not have violated the deadlines set by the agreed scheduling order because it was filed after those deadlines ceased to exist."[86] However, due to the facts in *Daniels*, it does not directly hold that a party can wait until trial to challenge an expert where a pre-trial order sets an earlier deadline.

There are strong arguments for both sides of this issue. First, a trial court is a gatekeeper and has a duty to keep out unreliable evidence. The court would be undermining its own duty by admitting unreliable evidence against a party's objection due to a scheduling order requirement. Moreover, a party may not know or have a reasonable ground to object to testimony until trial—under that circumstance it would seem very unjust to require a pre-trial objection before the grounds for the objection become apparent. On the other hand, for reliability challenges that are known before trial, there is no real reason that a party should not be able to set a hearing on those objections before trial. Such a practice tends to make a trial more efficient. In fact, one commentator has weighed both practices and has determined that most courts should require reliability objections to be raised at least thirty days before trial.[87] Until this issue is decided, a party should file challenges to experts in conformity with any requirements contained in a pre-trial order and re-urge them at trial. However, even if the party fails to file a motion to exclude an expert before trial, a party should still attempt to raise the objection at trial. If the court sustains the objection, a court of appeals will find that the court implicitly modified the scheduling order to allow the objection.[88]

4. Motion in Limine Versus Motion to Exclude Expert Testimony

A party can seek to exclude expert evidence before trial via a motion to strike/exclude an expert or by filing a motion in limine.[89] However, these two motions are substantively different and affect preservation of error differently. In Texas state court, a party will not

86. *Id.*

87. *See* Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS. L. REV. 1133, 1142–44 (1999).

88. *See, e.g.*, Trevino v. Trevino, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.) (finding the trial court implicitly modified scheduling order by granting summary judgment that was filed after a dispositive motion deadline).

89. *See* Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194, 203–04 (Tex. App.—Texarkana 2000, pet. denied).

preserve error regarding the admission of expert testimony when the only objection to that testimony is raised in a motion in limine.[90] A motion in limine is a motion that a party presents to a court before trial that seeks rulings on evidentiary issues that are anticipated to arise in the trial.[91] In *Fort Worth Hotel Ltd. Partnership v. Enserch Corp.*, the court stated that a motion in limine neither admits nor excludes evidence:

> The trial court's ruling on a motion in limine is not a ruling that excludes or admits evidence; it is merely a tentative ruling that prohibits a party from asking a certain question or offering certain evidence in front of the jury without first approaching the bench for a ruling.[92]

The motion in limine does not preserve error as to any issue raised therein.[93]

If a court denies an issue in a motion in limine, it has refused to require a party to approach the bench before offering evidence. If the party offers the evidence at trial, the party complaining of the evidence must timely object to the offer of the evidence or else error in its admission is waived.[94] If the court grants an issue in the motion in limine, the court has ruled that the offering party must approach the bench for a ruling on the admissibility of the evidence before offering it in front of the jury.[95] In order to preserve error in its exclusion, the party offering the evidence must: 1) approach the bench and ask for a ruling, 2) formally offer the evidence (in either an informal offer of proof or a formal bill of exception), and 3) obtain a ruling on the offer.[96] For example, in *Owens v. Perez*, a party waived any error in the exclusion of expert testimony after a trial court had granted a

90. *See* Mendoza v. Daughters of Charity Health Servs. of Austin, No. 03-00-00216-CV, 2001 Tex. App. LEXIS 7135, at *22–23 (Tex. App.—Austin Oct. 25, 2001, pet. denied) (not designated for publication) (objection in motion in limine, by itself, was not sufficient to preserve error).

91. Weidner v. Sanchez, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

92. 977 S.W.2d 746, 757 (Tex. App.—Fort Worth 1998, no pet.); *accord* Chavis v. Dir., 924 S.W.2d 439, 446 (Tex. App.—Beaumont 1996, no writ) (finding that a court's ruling on a motion in limine merely precludes reference to certain issues, but does not preserve the evidence for appeal).

93. *Huckaby*, 20 S.W.3d at 203.

94. *See* Sims v. State, 816 S.W.2d 502, 504 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

95. Fort Worth Hotel Ltd. P'ship, 977 S.W.2d at 757.

96. *See* Johnson v. Garza, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied); *see also* Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 662–63 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (finding that a party must tender the evidence and suffer an adverse ruling in order for the evidence to be preserved for review).

motion in limine on the evidence by failing to approach the bench during trial and offering the evidence, securing an adverse ruling, and then making an offer of proof.[97]

There is a difference between a pretrial motion to exclude expert evidence and a motion in limine. In *Huckaby v. A.G. Perry & Son, Inc.*, the court held that a ruling on a pretrial motion to exclude expert evidence was not a motion in limine and did preserve error:

> We recognize that motions in limine do not preserve error; however, a distinction is drawn between a motion in limine and a pretrial ruling on admissibility. The Huckabys filed a motion in limine on other matters, but specifically filed another motion that was entitled "Plaintiffs' Objections, and Motion, to Exclude Evidence." All pretrial motions are not motions in limine. For example, in criminal cases, we have motions to suppress. The other motion in the present case specified a request to exclude inadmissible prior and subsequent accidents on the basis of their lack of similarity. The relief requested in the title of the motion did not indicate that this was a motion in limine. There was nothing in the motion to make it a motion in limine unless a pretrial motion to exclude evidence is deemed as a matter of law to be a motion in limine. The trial court has authority to make a pretrial ruling on the admissibility of evidence.[98]

The court in *Brookshire Bros., Inc. v. Smith* took this analysis a step further and held that a motion in limine to exclude an expert was sufficient to preserve error because it sought to bar the expert from testifying.[99] The court of appeals looked beyond the name of the motion and solely looked to the relief requested in the motion.[100]

Accordingly, a party should be very careful to examine the relief requested in its motion and the trial court's order. If the motion requests the relief that the expert be excluded and not solely that the opposing party be ordered to approach the bench before offering the expert evidence, the motion should be sufficient to be a pre-trial motion to strike that will preserve error regardless of its title.[101] However, even if the motion is sufficient to be a motion to strike or

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97. 158 S.W.3d 96, 107–08 (Tex. App.—Corpus Christi 2005, no pet. hist.); *see also* Acadian Geophysical Servs. v. Cameron, 119 S.W.3d 290, 299–300 (Tex. App.—Waco 2003, no pet.) (finding that after the court's ruling on the motion in limine, the party made no attempt to offer the evidence at trial; therefore, it failed to satisfy a necessary prerequisite for appellate review).

98. 20 S.W.3d at 203–04 (citations omitted).

99. 176 S.W.3d 30, 35 & n.3 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

100. *Id.*

101. *See id.*

exclude the expert, the movant may not preserve error if the trial court treats it like a motion in limine and does not directly sustain or overrule the objection.[102]

5. Preserving Error at Trial

Once trial begins, an important issue is when does a party have the duty to object to expert testimony such that a failure to do so will waive a complaint about that testimony on appeal. A party has to object at some point at trial—a party waives its complaint regarding expert testimony by permitting the admission of expert testimony without objection and by solely attempting to discredit it by cross-examination and counter-expert testimony.[103] A clear objection at the beginning of the expert's testimony preserves error.[104] For example, in *Guadalupe-Blanco River Authority v. Kraft*, the Court held that an objection made when an expert witness begins his testimony is timely.[105] Further, an objection in the middle of the expert's testimony, before the objectionable matter is offered, will be sufficient to preserve error.[106]

Before, or during, an expert's testimony, an opposing party can seek to voir dire an opponent's expert on the expert's underlying facts or data that allegedly supports his or her opinions:

> Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request . . . in a civil case may . . . be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.[107]

However, in civil cases the trial court has discretion as to whether to

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102. *See id.*

103. *See* Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590–91 (Tex. 1999).

104. *See* Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002).

105. *Id.* The Court stated:

> To preserve a complaint that an expert's testimony is unreliable, a party must object to the testimony before trial or when it is offered. When Gholson began his testimony, the Authority objected: "I'm going to make an objection based upon the failure of this witness's methodology to meet the reliability standards as articulated by the Supreme Court in *Gammill versus Jack William[s] Chevrolet* as applying to all expert testimony." After voir dire, the trial court overruled the objection. The objection was timely, its basis was clear, and the Authority obtained a ruling.

Id.

106. *See In re* Estate of Robinson, 140 S.W.3d 782, 789 (Tex. App.—Corpus Christi 2004, pet. denied).

107. TEX. R. EVID. 705(b).

allow a voir dire examination.[108] One court has taken a rather narrow reading of this voir dire right and has held that it does not include an expert's qualifications, only the underlying facts and data.[109] However, trial courts are usually given great deference in the presentation, order, and timing of evidence, and absent an error that caused an improper judgment, a trial court will likely not reversibly err in allowing or disallowing any particular questions in a voir dire examination.[110] Further, there is no obligation on a party opposing expert testimony to question the expert on voir dire; the party can wait until cross-examination to elicit information.[111]

Depending upon the facts of the case, an objection at some later point in the testimony may still preserver error. For example, in *Kerr-McGee Corp.*, the Supreme Court held that a motion to strike an expert may be timely where it is made after cross-examination:

> As we explained in *Maritime Overseas v. Ellis,* requiring a reliability objection during trial prevents trial or appeal by ambush: "Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush." To hold otherwise, we reasoned, is "simply unfair" because the offering party "relied on the fact that the evidence was admitted." In this case, Helton was not subjected to "trial or appeal by ambush." Kerr-McGee objected to the testimony immediately after cross-examination, when the basis for the objection became apparent, and Helton had the opportunity to respond to the objection when Riley was recalled. Accordingly, we conclude that Kerr-McGee's motion to strike after cross-examination was sufficient to preserve its no-evidence complaint on appeal.[112]

Furthermore, the Court similarly held in *General Motors Corp. v. Iracheta*, that an objection at the end of cross-examination was sufficient to preserve error:

> Iracheta argues that General Motors waived any complaint regarding the reliability of Sanchez's testimony by waiting until the end of cross-examination to object. But the utterly conflicting nature of Sanchez's testimony was not fully apparent

108. *In re* Estate of Trawick, 170 S.W.3d 871, 875 (Tex. App.—Texarkana 2005, no pet. hist.).

109. *Id.*

110. *See, e.g.*, Green v. Gemini Exploration Co., No. 03-02-00334-CV, 2003 Tex. App. LEXIS 3703, at *7–8 (Tex. App.—Austin May 1, 2003, pet. denied) (mem. op.).

111. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 252 (Tex. 2004).

112. *Id.* (quoting 971 S.W.2d 402, 409 (Tex. 1998)) (citations omitted).

> until cross-examination. Indeed, the conflict in his testimony regarding his and Stilson's respective expertise did not occur until redirect. The unreliability of expert opinions may be apparent as early as the discovery process but also may not emerge until trial, during or after the expert's testimony, or even later. An objection must be timely, but it need not anticipate a deficiency before it is apparent. Here we cannot say that General Motors' objection following cross-examination came too late.[113]

Accordingly, the Court held that a party's expert objection can be timely if raised after cross-examination if that is when the grounds for the objection are reasonably apparent.[114] Moreover, in *Iracheta*, the Court seemed to hold that a party must only object after the grounds become "fully apparent."[115] However, a cautious attorney should still raise an objection to an expert before the end of cross-examination because the court has not held that where the grounds for an objection are reasonably apparent or fully apparent before the end of cross-examination, a party can wait until after cross-examination to raise an objection for the first time.

In the courts of appeals, parties have waived error by failing to properly object to the proffered expert testimony.[116] For example, in *In re Estate of Trawick*, the court held that waiting until after an expert is excused and the opponent has rested to move to strike the expert's testimony is too late and will result in waiver of the objections.[117] Moreover, a party should raise all relevant grounds for objection at trial, otherwise, the party will waive the opportunity to raise those grounds on appeal.[118] "To allow appellate review of the expert's reliability without a proper objection at trial would deny [the] expert the opportunity to provide reliable evidence and usurp the trial

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113. Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 471 (Tex. 2005).

114. *Id.*

115. *Id.*

116. *See* Energen Res. MAQ, Inc. v. Dalbosco, 23 S.W.3d 551, 557 (Tex. App.—Houston [1st Dist.] 2000, no pet.); N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 130 (Tex. App.—Beaumont 2001, pet. denied) (holding that the objection to expert's computer animation was waived where party failed to object to his testimony); Weidner v. Sanchez, 14 S.W.3d 353, 366 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

117. 170 S.W.3d 871, 875–76 (Tex. App.—Texarkana 2005, no pet. hist.).

118. *See, e.g.*, R.R. St. & Co. v. Pilgrim Enter., Inc., 81 S.W.3d 276, 306 (Tex. App.—Houston [1st Dist.] 2001), *rev'd in part*, 166 S.W.3d 232 (Tex. 2005) (finding the objection must be consistent); Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 404 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.m.) (finding that an objection to qualifications does not preserve error for objection to reliability).

court's discretion as gatekeeper under *Havner*."[119]

However, there are no magic words that need to be said to preserve any particular objection. For example, in *Hall v. Hubco, Inc.*, a party preserved a complaint about the reliability of an expert's opinion where the attorney referred to the way that the expert had reached his opinion and the underlying facts without expressly using the term "reliability."[120] Furthermore, in *Gross v. Burt*, the court of appeals concluded that a party could object by simply referring to and incorporating another party's objections raised in a pre-trial motion.[121] In *SeaRiver Maritime, Inc. v. Pike*, a party preserved error on expert objections by incorporating its pre-trial motion to exclude the expert.[122] A prudent party, however, will expressly state all objections in addition to incorporating prior motions. A cautious lawyer will object on all relevant grounds to an expert's testimony, request running objections, and obtain rulings from the court. One court has held that a party waives error where it did not ask for a running objection and failed to repeat the objection every time the objectionable testimony was offered at trial.[123]

A party should not go overboard on voir dire or cross-examination and thereby introduce the evidence that it is seeking to exclude. One court has held that a party waived a challenge to expert testimony, even where it had obtained a pre-trial ruling on its objections, where the party introduced the expert's qualifications and opinions during cross-examination:

> In the present case, Gill called Dr. McNish to testify in her case in chief. Through counsel, Gill introduced the very expert testimony on the topic of accident reconstruction that she now seeks to have stricken. Although Dr. McNish was originally hired as Slovak's expert, he was called on direct examination by Gill, as Slovak's counsel pointed out at trial: "We've got a crazy situation here because [Gill's] counsel's [sic] called my witness as an adverse witness, okay. So he's called my witness-he subpoenaed him from San Antonio and asked him to come

119. VIV Elec. Co. v. STR Constructors, Inc., No. 14-98-00551-CV, 2000 Tex. App. LEXIS 4327, at *49 (Tex. App.—Houston [14th Dist.] June 29, 2000, no pet.) (not designated for publication).

120. No. 14-05-00073-CV, 2006 Tex. App. LEXIS 1037, at *13–14 (Tex. App.—Houston [14th Dist.] Feb. 9, 2006, no pet. hist.).

121. 149 S.W.3d 213, 237 n.18 (Tex. App.—Fort Worth 2004, pet. denied).

122. No. 13-05-0033-CV, 2006 Tex. App. LEXIS 4905, at *3–4 (Tex. App.—Corpus Christi June 18, 2006, pet filed).

123. *See* Schindler Elevator Corp., 78 S.W.3d at 404 (finding that because attorney did not obtain a running objection to preserve error, he must object on that basis each time allegedly inadmissible evidence was offered).

> down here, okay. This is not as if I'm on direct examination . . . ." Although Gill properly preserved her *Robinson* objection at the pre-trial hearing, she then waived this objection by directly examining the witness herself.[124]

If the court sustains an objection and refuses to allow an expert to testify, the party who offered the testimony must ensure that the record reflects the substance of the testimony.[125] This can be done by an offer of proof or through a formal bill of exceptions. The offer must be specific enough to enable the reviewing court to determine the admissibility of the disputed evidence.[126] To show harm, the party must show that the testimony is admissible, controlling on a material issue, and is not cumulative.[127] As one court has held, the substance of the expert's testimony was not apparent from the context of the evidence; therefore, the court has no means to assess the harm, if any, arising from excluding that testimony.[128] Indeed, the offer must be specific, and simply offering an entire deposition transcript may not be sufficient to preserve error.[129]

III. OBJECTION TO EXPERT NOT REQUIRED IN SOME INSTANCES

Historically, when evidence is admitted without objection, a party

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124. *See* Gill v. Slovak, No. 13-02-582-CV, 2005 Tex. App. LEXIS 8876, at *4–5 (Tex. App.—Corpus Christi Oct. 27, 2005, pet. denied) (mem. op.) Note, however, that the court of appeals held that the party did not waive a no-evidence challenge by introducing the evidence. *Id.* at *7.

125. *See* Ulogo v. Villanueva, 177 S.W.3d 496, 502 (Tex. App.—Houston [1st Dist.] 2005, no pet. hist.); Fletcher Aviation, Inc. v. Booher, No. 14-04-00712-CV, 2005 Tex. App. LEXIS 4048, at *2 (Tex. App.—Houston [14th Dist.] May 26, 2005, no pet. hist.) (mem. op.) (finding the party waived exclusion of expert evidence where the record did not indicate what the excluded evidence would have been); De La Garza v. Beckett, No. 13-00-785-CV, 2002 Tex. App. LEXIS 6159, at *8–9 (Tex. App.—Corpus Christi Aug. 22, 2002, no pet.) (not designated for publication).

126. In re N.R.C., 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet denied).

127. Belt v. Comm'n for Lawyer Discipline, 970 S.W.2d 571, 574 (Tex. App.—Dallas 1997, no pet.); Mentis v. Barnard, 870 S.W.2d 14, 16 (Tex. 1994) (finding that the error in the exclusion of evidence requires reversal if the evidence is controlling on a material issue and not cumulative).

128. Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 659–60 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

129. *See e.g.*, Carreon v. Nat'l Standard Ins. Co., No. 01-85-0233-CV, 1986 Tex. App. LEXIS 8134, at *4–5 (Tex. App.—Houston [1st Dist.] July 31, 1986, writ ref'd n.r.e.) (not designated for publication) (party waived error by offering entire deposition transcript where only a few isolated issues were relevant to offer). *But see* Hooper v. Chittaluru, No. 14-05-0058-CV, 2006 Tex. App. LEXIS 5532, at *2–3 (Tex. App.—Houston [14th Dist.] June 29, 2006, no pet. hist.) (party did preserve error by offering entire deposition transcript where 90% of it was relevant to offer).

cannot complain on appeal regarding the admission thereof.[130] This principal is equally true for expert testimony.[131] However, since *Maritime Overseas*, the Texas Supreme Court has held that sometimes expert evidence can be no evidence and that an appellate court may disregard it even absent an objection at trial.[132] In *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, the only evidence regarding gross negligence was as follows:

> Q: When viewed objectively from Coastal's point of view at the time of the September '93 incident, in your opinion, did Coastal's failure to stop using probes that could have [sensor failure] problems, did that involve a high degree of risk, considering the probability and magnitude of the potential harm to others?
>
> A: Yes, it did, very high.
>
> Q: In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?
>
> A: Yes, again and again.
>
> Q: And in your opinion, did Coastal nevertheless proceed with conscious indifference to the rights, safety, or welfare of others?
>
> A: That's the only conclusion I can draw.[133]

The Supreme Court held that even absent an objection to the evidence, a party may challenge the legal sufficiency of an expert's testimony when it is restricted to the face of the record:

> [W]hen a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record [(]for example, when expert testimony is speculative or conclusory on its face[)] then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.[134]

The Court made a "distinction between no evidence challenges to the reliability of expert testimony in which [the court] evaluate[s] the

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130. *See, e.g.*, TEX. R. EVID. 103; TEX. R. APP. P. 33.1.

131. *See* Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 590–91 (Tex. 1999); Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

132. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004).

133. *Id.* at 231.

134. *Id.* at 233.

underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face."[135] Accordingly, when a party wants to assert a challenge to the "reliability of expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert," a party must preserve error by objecting to the evidence at the time it is offered; whereas, a party can preserve error regarding "conclusory or speculative testimony that is non-probative on its face" by raising a sufficiency of the evidence challenge, which is often done after trial.[136]

Most recently, in *General Motors Corp. v. Iracheta,* the Texas Supreme Court once again reviewed the sufficiency of a plaintiff's experts' testimony where there was no objection to the admission of the evidence, and it held that the expert's testimony was conclusory and speculative and constituted no evidence to support the jury finding of proximate cause.[137] In reaching this conclusion, the Court went through a detailed description of the expert's evidence. Whether expert testimony in a case is sufficient to warrant an objection or is so conclusory that a complaint can be made on appeal is a very case specific inquiry. Citing *Coastal*, some courts have reviewed expert testimony and held that the testimony was so conclusory that it was no evidence and reversed the finding notwithstanding a failure to object to the testimony.[138] Under the facts of the case, other courts have held that expert testimony was not so conclusory as to be no evidence.[139]

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135. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 910 (Tex. 2004) (citing *Coastal Transp. Co.*, 136 S.W.3d at 233).

136. *Id.*

137. 161 S.W.3d 462, 472 (Tex. 2005).

138. *See, e.g.*, El Dorado Motors, Inc. v. Koch, 168 S.W.3d 360, 366 (Tex. App.—Dallas 2005, no pet.) (holding that the expert's affidavit on lost profits was conclusory where no underlying basis for conclusions as to damages); Reinicke v. Aeroground, Inc., 167 S.W.3d 385, 391 (Tex. App.— Houston [14th Dist.] 2005, pet. denied) (finding that the expert's testimony at trial was conclusory because it was not linked to facts—no evidence of any methodology); Price v. Divita, No. 01-05-00799-CV, 2006 Tex. App. LEXIS 6929, at *14–15 (Tex. App.—Houston [1st Dist.] August 3, 2006, no pet. hist.); Taylor v. FFE Transp. Servs., No. 14-03-01430-CV, 2005 Tex. App. LEXIS 2389, at *8–9 (Tex. App.—Houston [14th Dist.] March 31, 2005, no pet.) (mem. op.) (finding that the expert's conclusory affidavit in a summary judgment proceeding was no-evidence); Texas Dept. of Trans. v. Martinez, No. 04-04-00867-CV, 2006 Tex. App. LEXIS 4420, at *24–26 (Tex. App.—San Antonio March 22, 2006, pet. filed); W. Atlas Int'l, Inc. v. Randolph, No. 13-02-00244-CV, 2005 Tex. App. LEXIS 2199, at *7–10 (Tex. App.—Corpus Christi March 24, 2005, no pet. hist.) (mem. op.) (finding that the expert's testimony at trial was no-evidence because it was conclusory in that it was based solely on assumptions and actual evidence).

139. *See, e.g.*, Gabriel v. Lovewell, 164 S.W.3d 835, 846 (Tex. App.—Texarkana 2005, no pet. hist.); United Servs. Auto Ass'n v. Croft, 175 S.W.3d 457, 466–67 (Tex. App.—Dallas 2005, no pet. hist.); Welch v. McLean, 191 S.W. 3d 147, 159 (Tex. App.—Fort Worth

However, to urge that an expert's testimony is no-evidence on appeal, a party must preserve a legal or factual sufficiency challenge. In a bench trial, a party can raise a legal or factual sufficiency challenge for the first time after trial.[140] However, in the context of a jury trial, a party must preserve a legal sufficiency challenge (1) in a motion for directed verdict; (2) by objecting to a submission in the charge; (3) in a motion to disregard the jury's answer; and (4) in a motion for judgment notwithstanding the evidence.[141] Further, a party must preserve a factual sufficiency challenge by alleging it in a motion for new trial.[142] If neither of these challenges are preserved, then the party will not be able to challenge the evidentiary support for a finding—including expert evidence.[143]

IV. STANDARDS OF REVIEW

A court of appeals' review of a trial court's decision concerning some aspect of the admission or exclusion of expert evidence is influenced, in part, by the appropriate standard of review. A standard of review is the lens in which the court of appeals views the trial court's decision.[144]

A. Whether Expert Testimony Is Necessary

A trial court's decision as to whether an expert is necessary in order to provide certain evidence is reviewed by a de novo standard.[145] Accordingly, a court of appeals can review the claims and evidence in determining whether an expert was necessary for a party to meet its burden of proof on its claim or defense without according the trial court's decision any deference.

2005, no pet. hist.); Dupont Employees Recreation Ass'n v. A.V.A. Servs., No. 01-04-00053-CV, 2005 Tex. App. LEXIS 3597, at *14–17 (Tex. App.—Houston [1st Dist.] May 12, 2005, no pet. hist.) (mem. op.); Durham Transp. Co. v. Beettner, No. 10-05-00212-CV, 2006 Tex. App. LEXIS 6203, at *16 n.5 (Tex. App.—Waco July 19, 2006, no pet. hist.); Pettit v. Dowell, No. 10-01-00420-CV, 2005 Tex. App. LEXIS 6355, at *8 (Tex. App.—Waco Aug. 10, 2005, no pet. hist.) (mem. op.).

140. TEX. R. APP. P. 33.1(d).

141. *See* Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822–23 (Tex. 1985).

142. TEX. R. CIV. P. 324 (b); Cecil v. Smith, 804 S.W.2d 509, 510 (Tex. 1991).

143. *See, e.g.*, City of Dallas v. Redbird Dev. Corp., 143 S.W.3d 375, 385 (Tex. App.—Dallas 2004, no pet. hist.).

144. Kennedy v. Kennedy, No. 03-04-00299-CV, 2005 Tex. App. LEXIS 5951, at *11 (Tex. App.—Austin July 28, 2005, pet. denied) (mem. op.).

145. FFE Transp. Servs., Inc. v. Fulgham, 154 S.W.3d 84, 90 (Tex. 2004).

B. Expert Disclosure—Discovery Rulings

A court of appeals will review a trial court's decision in the area of discovery, e.g., expert disclosures, by an abuse of discretion standard.[146] "A trial court abuses its discretion when its ruling is arbitrary, unreasonable or without reference to any guiding rules or legal principles."[147] Under this standard, a trial court's decision on whether an expert has been properly disclosed and whether his or her testimony should be excluded or limited as a sanction is given great deference.[148]

C. Admission or Exclusion of Expert Testimony

Appellate courts have generally held that the standard of review over the admission or exclusion of expert witnesses is an abuse of discretion standard.[149] This is consistent with the large number of holdings that a trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard of review.[150] Additionally, the abuse of discretion standard applies to both qualifications and methodologies.[151]

D. Sufficiency Review Involving Expert Testimony

Many commentators and authors have written extensively on the legal and factual sufficiency standards of review. Many call this a "Spectrum" of review: no-evidence challenges, factual insufficiency challenges, against the greater weight challenges, and as a matter of

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146. Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 855 (Tex. App.—Fort Worth 2001, pet. denied); Gregorian v. Ewell, No. 2-03-010-CV, 2004 Tex. App. LEXIS 1936, at *3 (Tex. App.—Fort Worth Feb. 26, 2004, pet. denied) (mem. op.).

147. K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam); *accord* Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998).

148. *See generally* Aluminum Co. of Am. v. Bullock, 870 S.W.2d 2, 3 (Tex. 1994) (holding that the trial court has discretion to determine whether good cause exists for a party who fails to disclose the substance of an expert's testimony.).

149. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 285 (Tex. App.—Texarkana 2000, no pet.); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995); Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002); *In re* D.S., 19 S.W.3d 525, 528 (Tex. App.—Fort Worth 2000, no pet.); Martinez v. City of San Antonio, 40 S.W.3d 587, 592 (Tex. App.—San Antonio 2001, no pet.); Nissan Motor Co. v. Armstrong, 32 S.W.3d 701, 708 (Tex. App.—Houston [14th Dist.] 2000, pet. filed); Norstrud v. Trinity Universal Ins. Co., 97 S.W.3d 749, 755 (Tex. App.—Fort Worth 2003, no pet.).

150. Ford Motor Co. v. Aguiniga, 9 S.W.3d 252, 262 (Tex. App.—San Antonio 1999, pet. denied).

151. Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996) (qualifications); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997) (methodologies).

law challenges.[152] Depending upon who has the burden of proof, these challenges will be different. It is outside the scope of this paper to give a detailed description of these challenges in the context of the appropriate evidentiary standard.

1. Legal Sufficiency Review

When a party challenges the negative finding on an issue that he had the burden of proof on at trial, the party raises a "matter of law" challenge. Under this challenge, the appellant must show that "reasonable minds can draw only one conclusion from the evidence."[153] If there is any evidence of probative force to raise a fact issue on the question, the court of appeals should deny the challenge.[154] A court of appeals should first review the record to see if there is any evidence to support the finding.[155] If there is none, then the court reviews the record to see if the issue was proven as a matter of law.[156]

When a party challenges the positive finding on an issue that his opponent has the burden of proof on at trial, the party raises a legal insufficiency or no-evidence issue. No-evidence points must, and may only, be sustained "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact."[157] When the evidence is so weak as to do no more than create a surmise or suspicion of its existence, the evidence is no more than a scintilla and is legally insufficient.[158] Any party that argues a no-evidence issue in a case must review in detail the Texas Supreme Court's opinion in *City of Keller v. Wilson,* where the Court revisited, in depth, the scope of review for a no-evidence challenge.[159]

To preserve a legal sufficiency review issue, a party may do so (1) in a motion for directed verdict; (2) by objecting to a submission in the charge; (3) in a motion to disregard the jury's answer; or (4) in a

152. *See* 6 MCDONALD & CARLSON, TEX. CIV. PRAC. § 44:3 (2d ed. 1998).
153. *See* Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978).
154. *Id.*
155. *See* Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 940 (Tex. 1991).
156. *Id.*
157. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003).
158. *See* Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998).
159. 168 S.W.3d 802, 810–13 (Tex. 2005).

motion for judgment notwithstanding the evidence.[160] The point may also be preserved in a motion for new trial, but if sustained, the appellant will only be entitled to a new trial.[161] Both the Texas Supreme Court and the intermediary courts of appeals have jurisdiction to review legal sufficiency issues.[162]

2. "As A Matter Of Law" Challenges

In the context of expert evidence, the issue that is usually raised is whether a court of appeals must reverse a negative fact finding where there is solely expert evidence that is uncontradicted and that supports a positive answer. For example, a jury finds that a party is not entitled to any attorney's fees where the only evidence on the issue of attorney's fees was from the plaintiff's expert. Is the party entitled to his fees?

Generally, a fact finder has the right to disregard even uncontradicted testimony from disinterested witnesses—even expert witnesses.[163] As the Supreme Court said in *McGalliard*:

> [T]he judgments and inferences of experts or skilled witnesses, even when uncontroverted, are not conclusive on the jury or trier of fact, unless the subject is one for experts or skilled witnesses alone, where the jury or court cannot properly be assumed to have or be able to form correct opinions of their own based upon evidence as a whole and aided by their own experience and knowledge of the subject of inquiry. The uncontradicted testimony of an interested witness cannot be considered as doing more than raising an issue of fact unless that testimony is clear, direct, and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony. The trier of fact has several alternatives available when presented with conflicting evidence. It may believe one witness and disbelieve others. It may resolve inconsistencies in the testimony of any witness. It may accept lay testimony over

160. *See* Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985).
161. *See* Horrocks v. Tex. Dept. of Transp., 852 S.W.2d 498, 499 (Tex. 1993).
162. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. §§ 22.001(a), 22.225(b).
163. *See* PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd., 146 S.W.3d 79, 100 (Tex. 2004); MCI Telecomms. Corp. v. Tex. Utils. Elec. Co., 995 S.W.2d 647, 653–54 (Tex. 1999) (holding evidence allowed jurors to disbelieve defendant's experts' testimony even though plaintiff's expert's testimony was shown to be in error); Callejo v. Brazos Elec. Power Coop., Inc., 755 S.W.2d 73, 75 (Tex. 1988); McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986) (opinions and judgments of expert witnesses are not conclusive on the trier of fact).

that of experts.[164]

Moreover, opinion testimony of expert witnesses, even though uncontradicted by an opposing expert, is held not binding upon the trier of fact if more than one possible conclusion may be drawn from the facts.[165]

However, there are occasions where some courts have held that expert testimony is sufficient to meet the "as a matter of law" standard. These cases have normally revolved around attorney's fees issues where a defendant does not present conflicting evidence and does not cross-examine the plaintiff's expert.[166]

3. "No-Evidence" Challenges

A court of appeals reviewing a no-evidence challenge to a claim or defense must consider whether expert testimony is more than a scintilla of evidence. When a court reviews expert testimony in the context of a no-evidence review, the court must review the same *Robinson* factors analysis as in the admission or exclusion of the expert's testimony.[167] If the expert's testimony is based on unreliable facts or uses unreliable methodologies, "the expert's scientific testimony is unreliable and, legally, no evidence."[168]

Historically, when reviewing a no-evidence challenge, a court of appeals should:

> "[V]iew the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary." In determining whether an expert's testimony constitutes some evidence, however, "an expert's bare opinion will not suffice" and "the substance of the testimony must be considered." Further, "[t]he underlying data should be *independently* evaluated in determining if the opinion itself is reliable." "The proponent of the evidence bears the burden of demonstrating that the expert's opinion is reliable." If the expert's testimony is not reliable, it is not evidence.[169]

Regarding the scope of review, the Texas Supreme Court stated

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164. *McGalliard*, 722 S.W.2d at 697 (citation omitted).

165. *Id.*; Gregory v. Tex. Employers Ins. Ass'n, 530 S.W.2d 105, 107 (Tex. 1975).

166. *See, e.g.*, Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990) (holding that uncontroverted testimony regarding attorney's fees may be taken as true as a matter of law where opposing party had means and opportunity of disproving same, but failed to do so).

167. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997).

168. *Id.*

169. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (emphasis added) (citations omitted).

that a reviewing court must look at all the evidence to review the competency of the expert evidence:

> [The exception to the general rule that contrary evidence is ignored] frequently applies to expert testimony. When expert testimony is required, lay evidence supporting liability is legally insufficient. In such cases, a no-evidence review cannot disregard contrary evidence showing the witness was unqualified to give an opinion. And if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded.
>
> After we adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well. Thus, an appellate court conducting a no-evidence review cannot consider only an expert's bare opinion, but must also consider contrary evidence showing it has no scientific basis. Similarly, review of an expert's damage estimates cannot disregard the expert's admission on cross-examination that none can be verified.
>
> Thus, evidence that might be "some evidence" when considered in isolation is nevertheless rendered "no evidence" when contrary evidence shows it to be incompetent. Again, such evidence cannot be disregarded; it must be an exception either to the exclusive standard of review or to the definition of contrary evidence.[170]

Therefore, if after a review of all the evidence the court of appeals determines that the sole basis of an expert's opinion is contradicted by all of the evidence, the expert's opinions are no evidence and should be disregarded in a no-evidence review.[171]

A recent example of the detailed analysis regarding the review of the sufficiency of an expert's testimony is in *General Motors Corp. v. Iracheta* where the Texas Supreme Court reviewed the sufficiency of a plaintiff's experts' testimony and held that it constituted no evidence to support the jury's finding of proximate cause:

> Iracheta attempts to borrow from each of her experts pieces of opinion that seem to match, tie them together in an ill-fitting theory, discard the unwanted opinions, disregard the fact that the experts fundamentally contradicted themselves and each other, and then argue that this is some evidence to support the

170. City of Keller v. Wilson, 168 S.W.3d 802, 812–13 (Tex. 2005).

171. *See, e.g.*, Gen. Motors Corp. v. Harper, 61 S.W.3d 118, 130 (Tex. App.—Eastland 2001, pet. denied).

> verdict. Inconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support. We therefore conclude that there is no evidence that the siphoning defect in the Toronado caused the second fire in which Edgar died. Accordingly, Iracheta is not entitled to recover against General Motors.[172]

Though not quoted in this article, the Court goes through a long, detailed analysis of the evidence and testimony. Accordingly, whether expert testimony is some evidence or no-evidence does not depend upon the amount of testimony but on the content of that testimony.

4. Review of Reliability of Expert Testimony in Context of Legal Sufficiency Review

The review of the reliability of an expert in the context of a legal sufficiency challenge may not follow a normal legal sufficiency standard of review analysis. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, the Supreme Court first discussed how a court of appeals should view expert testimony in the context of a sufficiency of the evidence challenge in a post-*Robinson* era case:

> It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence.[173]

This different standard of review was also hinted at by Justice Hecht and Justice Phillips where they argued in a dissent that a party should be able to argue on appeal that expert testimony amounts to no-evidence even absent an objection to the testimony.[174]

Soon after *Havner*, the Texarkana Court of Appeals discussed the apparent difficultly in reviewing expert evidence "in the light most favorable to the judgment" in the context of the *Robinson* factors and found that the review was more akin to a de novo standard.[175]

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172. 161 S.W.3d 462, 472 (Tex. 2005).
173. 953 S.W.2d 706, 712 (Tex. 1997).
174. *See* Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 421–23 (Tex. 1998) (Hecht, J., dissenting).
175. Minn. Mining & Mfg. v. Atterbury, 978 S.W.2d 183, 192 (Tex. App.—Texarkana

Similarly, the San Antonio Court of Appeals stated: "[t]he question of the admissibility of expert testimony goes hand in hand with this court's analysis under a legal sufficiency challenge."[176] Moreover, that court held that it reviewed de novo expert testimony under a no-evidence review: "[w]here the trial court has admitted the expert testimony and the appellant challenges, on appeal, the expert testimony as constituting 'no evidence,' we consider whether the expert testimony is reliable under a *de novo* standard of review."[177]

If the courts of appeals review expert testimony de novo under a legal sufficiency review, a party will have the ability to argue anew the *Robinson* factors to the courts of appeals, who will not give any deference to the trial court's determination.[178] Recent Texas Supreme Court cases would indicate that the Court is undertaking a review of expert's qualifications and methodologies via a no-evidence review that could be considered de novo.[179] In other words, courts of appeals will review by looking at the *Robinson* factors, the underlying facts, and the expert opinions without giving deference to the trial court's express or implied determinations thereon.

5. Factual Sufficiency Review

When a party challenges a positive finding on an issue that the opponent has the burden of proof on at trial, the party asserts a factual insufficiency challenge. This review requires that the appellant establish that the evidence, considering all the evidence, is so contrary

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1998, pet. denied). The court stated:

> Under *Robinson* and *Havner*, a defendant has two bites at the *Daubert* apple. He can and should object to the proffer of the evidence at trial. If the trial court excludes the evidence, then the reviewing court views the trial court's decision by the lenient abuse of discretion standard. However, if the trial court overrules the defendant's objection and admits the evidence, then the defendant may seek review of the trial court's decision in a sufficiency of the evidence point of error to an appellate court. Further, under the sufficiency of the evidence standard, the appellate court looks to the plaintiff's evidence in an almost de novo standard because the "in the light most favorable to the judgment" standard appears to be all but eviscerated.

Id.

176. *See* State Farm Lloyds v. Mireles, 63 S.W.3d 491, 493 (Tex. App.—San Antonio 2001, no pet.).

177. Mo. Pac. R.R. Co. v. Navarro, 90 S.W.3d 747, 750 (Tex. App.—San Antonio 2002, no pet.); *accord* Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107, 113 (Tex. App.—San Antonio 2004, pet. denied) (holding where the trial court has admitted expert testimony challenged on appeal as constituting "no evidence," the appeals court considers the expert's testimony under a de novo standard of review).

178. *Goodyear Tire & Rubber Co.*, 143 S.W.3d at 113.

179. *See, e.g.*, Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 464–72 (Tex. 2005).

to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.[180] When a party challenges the negative finding on an issue that it had the burden of proof on at trial, the party asserts a great weight and preponderance of the evidence challenge on appeal.[181] This review requires that the appellant show that, considering all the evidence, the failure of the jury or court to find in favor of the issue is against the great weight and preponderance of the evidence.[182] The court of appeals should only reverse when the great weight and preponderance of the evidence supports an affirmative answer.

Under either standard, the court should not substitute the fact finders' opinion regarding the credibility of the witnesses and the weight to be given to their testimony merely because it may have reached a different conclusion.[183] To preserve a factual sufficiency of the evidence challenge in a jury trial, a party must file a motion for a new trial that alleges a factual sufficiency challenge.[184] However, when challenging the amount of damages as excessive, a factual sufficiency challenge can be preserved by a motion for remittitur.[185] In a non-jury trial, it is not necessary to preserve a factual sufficiency challenge.[186] Only the intermediary courts of appeals have jurisdiction to consider factual sufficiency issues.[187]

6. *Factual Sufficiency Review of Expert Testimony*

Many courts that have reviewed expert testimony under a factual sufficiency review have not reversed under that standard.[188] That is

180. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).
181. *See* Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996).
182. *See id.* at 772.
183. M.D. Anderson Hosp. & Tumor Inst. v. Felter, 837 S.W.2d 245, 247 (Tex. App.—Houston [1st Dist.] 1992, no writ).
184. TEX. R. CIV. P. 324 (b); Cecil v. Smith, 804 S.W.2d 509, 510 (Tex. 1991).
185. *See* Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777–78 (Tex. 1989).
186. *See* TEX. R. APP. P. 33.1(d); O'Farrill Avila v. Gonzalez, 974 S.W.2d 237, 249 & n.5 (Tex. App.—San Antonio 1998, pet denied).
187. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.225.
188. *See, e.g.*, Morrell v. Finke, 184 S.W.3d 257, 272, 291 (Tex. App.—Fort Worth 2005, pet. filed); Norstrud v. Trinity Universal Ins. Co., 97 S.W.3d 749, 755 (Tex. App.—Fort Worth 2004, no pet.); Welch v. McLean, 191 S.W.3d 147, 159–61 (Tex. App.—Fort Worth 2005, no pet.); *see also* Crawford v. Hope, 898 S.W.2d 937, 942–43 (Tex. App.—Amarillo 1995, writ denied) (noting "battle of experts" existed in suit; weight of evidence was for jury and failure to find proximate cause not manifestly unjust or clearly erroneous); Cruz *ex rel.* Cruz v. Paso Del Norte Health Found., 44 S.W.3d 622, 647 (Tex. App.—El Paso 2001, pet. denied) (holding refusal to find defendant negligent not against overwhelming weight of evidence where opinions of experts for both parties conflicted); Magee v. Ulery, 993 S.W.2d 332, 336 (Tex. App.—Houston [14th Dist.] 1999, no pet.)

expected. If the expert's testimony is unreliable, it is no-evidence and is subject to a legal sufficiency challenge. In that case, the court never reaches a factual sufficiency review.[189] Otherwise, if a court finds that the expert's testimony is reliable enough to be some evidence, the court is very reluctant to overturn the jury's finding based on that evidence. As one court stated:

> In deciding a factual insufficiency issue, we determine whether the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. We are required to consider all of the evidence in the case in making this determination.
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>
> Like many medical malpractice suits, this case comes down to a "battle of the experts." In a battle of competing expert testimony, it is the sole prerogative of the jury to determine the weight and credibility of the witnesses, the obligation of the respective advocates to persuade them, and "our obligation to see that the process was fair and carried out according to the rules." We cannot substitute our judgment for that of the jury simply because we may disagree with its findings. As fact finder, the jury is authorized to disbelieve expert witnesses.
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> After examining all of the expert testimony and other medical evidence, both for and against the jury's verdict in this case, we cannot say that the evidence supporting the jury's finding that Delores was suffering from pulmonary emboli on April 24, 1996 is so weak, or the evidence to the contrary is so overwhelming, that the jury's verdict should be set aside and a new trial ordered.[190]

This is more true where a party fails to preserve error as to particular challenges to expert testimony.[191]

However, it is possible that an expert's testimony may be sufficient to meet a legal sufficiency review, yet a court of appeals may reverse on a factual sufficiency issue. Moreover, there are cases where

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(holding failure to find defendant negligent not against overwhelming weight of evidence where jury could have believed defense expert that diagnosis was erroneous but not negligent).

189. Wyndham Int'l Co. v. Ace Am. Ins. Co., 186 S.W.3d 682, 685–86 (Tex. App.—Dallas 2006 no pet. hist.).

190. *Welch*, 191 S.W.3d at 159–61 (citations omitted).

191. *See, e.g.*, *Norstrud*, 97 S.W.3d at 755 (holding that without objection, the proper weight to give expert testimony is up to the jury to decide).

expert testimony is not required, and if an expert's testimony is disregarded under a legal sufficiency review, there may still be non-expert evidence in the record to meet a legal sufficiency review.[192] In those cases, after disregarding the expert's testimony, the court of appeals could sustain a factual sufficiency issue where a legal sufficiency issue is not appropriate.

V. DISPOSITION BY COURT OF APPEALS

After a court of appeals analyzes expert evidence, it must determine how to dispose of the case. Appellate review of expert evidence is relevant to two different areas: 1) admissibility of the evidence versus 2) the sufficiency of the evidence to support a finding. If the trial court errs in admitting expert evidence, an appellant should show three elements to obtain a reversal: 1) the trial court erred in admitting the evidence; 2) there was no other similar evidence admitted; and 3) the error probably caused the rendition of an improper judgment.[193] To show error in excluding proper evidence, an appellant should show: 1) the trial court erred in excluding the evidence, 2) the evidence was excluded, 3) the evidence was controlling on a material fact and was not cumulative, and 4) the error probably caused the rendition of an improper judgment.[194] If these standards are met, a party is entitled to a reversal and a remand for a new trial.[195]

If a court strikes an expert's testimony, and in so doing, finds that there is factually insufficient evidence to support a jury finding, then the court of appeals should reverse and remand the case for a new trial.[196] If an appellate court finds that an expert's testimony should be struck, that the testimony was the only evidence to support a required element, and that the party raised a legal sufficiency complaint regarding that element, then a court of appeals should reverse and render in favor of the party defending against the claim.[197]

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192. *See* Munoz v. Orr, 200 F.3d 291, 300–02 (5th Cir. 2000).

193. TEX. R. APP. P. 44.1(a)(1); *see* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 144 (Tex. 2004).

194. *See* TEX. R. APP. P. 44.1(a)(1); Tex. Dept. of Transp. v. Able, 35 S.W.3d 608, 617 (Tex. 2000).

195. *See* Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 275 (Tex. 1995); *see, e.g.*, Duer Wagner & Co. v. City of Sweetwater, 112 S.W.3d 628, 631 (Tex. App.—Eastland 2003, no pet.) (finding an improper exclusion of expert evidence required remand for new trial).

196. *See* Sage St. Assocs. v. Northdale Constr. Co., 937 S.W.2d 425, 428 (Tex. 1996).

197. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711–13 (Tex. 1997). This approach is contrasted against the federal system, where the court of appeals has discretion to reverse and render on behalf of the challenging party, reverse and remand for

However, the Texas Rules of Appellate Procedure do allow appellate courts to remand in the interest of justice. Rule 43.3 provides: "When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when: . . . (b) the interests of justice require a remand for another trial."[198] Additionally, Rule 60.3 provides: "When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate."[199] However, courts have not been inclined to grant a new trial in the interest of justice due to the inadequacy of expert testimony.[200]

For example, in *Kerr-McGee*, the Supreme Court specifically addressed and denied a party's request for a remand and new trial where the Court determined that the expert testimony was not sufficient:

> "The most compelling case for [a remand in the interest of justice] is where we overrule existing precedents on which the losing party relied at trial." Accordingly, we have remanded in the interest of justice when precedent has been overruled or the applicable law has otherwise changed between the time of trial and the disposition of the appeal.
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> Helton also summarily asserts that a remand in the interest of justice is appropriate because Helton relied on the trial court's admission of Riley's testimony and exhibits. However, Kerr-McGee's [repeatedly objected to the evidence and] placed Helton on notice that Kerr-McGee was preserving error for an appeal challenging the legal sufficiency of Riley's testimony and exhibits. Furthermore, Helton had an opportunity to bolster Riley's testimony and exhibits on redirect and upon recalling him. Helton's conclusory assertion of reliance is clearly insufficient to justify a remand in the interest of justice.
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> The United States Supreme Court recently observed: "It is implausible to suggest, post-*Daubert,* that parties will initially

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a new trial, or reverse and remand to the district court to determine whether the case should be rendered or a new trial granted. *See* Weisgram v. Marley Co., 528 U.S. 440, 453–56 (2000).

198. TEX. R. APP. P. 43.3.

199. TEX. R. APP. P. 60.3.

200. *See generally* Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 257–60 (Tex. 2004) (finding that the case should not be remanded where a party had sufficient time and opportunity to bring forth competent expert testimony to support an essential element of the case, but failed to do so).

> present less than their best expert evidence in the expectation of a second chance should their first try fail." .... We agree with that observation. The exacting standards for expert testimony set forth by the United States Supreme Court ... and by this Court ... are well-known to Texas litigators.
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> ....
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> Both liability and damages were vigorously contested by the parties in the trial court. A remand allowing Helton to redo or supplement Riley's damages testimony would, without sufficient justification, provide Helton "an opportunity for another 'bite at the apple.'" Moreover, a remand would force Kerr-McGee, who presented four expert witnesses at the week-long trial, to bear the time and expense of additional proceedings when it was Helton that failed to bring forth competent evidence to support an essential element of the pleaded cause of action despite ample opportunity to do so.
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> We decline, under the circumstances of this case, to exercise our discretion to remand in the interest of justice. Accordingly, pursuant to Texas Rule of Appellate Procedure 60.2(c), we render judgment that Helton take nothing.[201]

Accordingly, after a party has had years to prepare for trial and has been put on notice that expert testimony is necessary, a court of appeals will be reluctant to provide the party with a new trial and a second bite at the apple, so that it can find competent expert testimony.

VI. CONCLUSION

There are many issues that arise with experts during the course of preparing for and attending trial. Correspondingly, there are as many or more issues regarding experts on appeal. These issues include, but are not limited to: (1) whether a party has properly preserved error regarding the admission or exclusion of expert evidence; (2) whether the record is sufficiently complete to show error; (3) what is the appropriate standard of review for reviewing the exclusion or admission of expert testimony and the sufficiency of that evidence; and (4) what is the appropriate disposition of the case on appeal. This paper has attempted to address these issues and provide a starting

201. *Id.* at 258–60 (citation omitted); *see also* Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107, 118 n. 3 (Tex. App.—San Antonio 2004, pet. denied) (finding that because Goodyear repeatedly objected at the Daubert hearing, it sufficiently preserved its complaint to the admission of the experts' testimony).

place for any attorney that faces the daunting task of dealing with experts on appeal.

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