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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. This Article focuses on the appellate issues that arise due to the admission or exclusion of expert testimony. The Article will address the basic rules for the admission of expert testimony, preserving error regarding the admission or exclusion of expert testimony, and the various standards of review that are used in connection with expert

issues. This paper is limited to Texas state precedent and does not cover federal precedent.[1]

II. BASIC RULES REGARDING THE ADMISSION OF EXPERT TESTIMONY

A. *Expert's Opinions Must Assist the Trier of Fact*

The first step in admitting expert testimony is to ensure that the testimony is in fact appropriate for an expert to give. Texas Rule of Evidence 702 requires that expert testimony must assist the trier of fact. The rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[2] If an issue is outside the common knowledge of a layperson, expert evidence is required.[3]

However, where an expert's proposed testimony does not assist a trier of fact, it is not admissible.[4] According to the Texas Supreme Court: "When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony."[5] For example, it will normally not assist a trier of fact for

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1. Note that where the plaintiff's claim in state court is based on federal law, the state court should use state procedure in determining the admissibility of experts. *See* Abraham v. Union Pac. R.R., Co., 233 S.W.3d 13, 18 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

2. TEX. R. EVID. 702.

3. *See* FFE Transp. Servs., Inc. v. Fulgham, 154 S.W.3d 84, 90–91 (Tex. 2004) (requiring expert testimony to determine standard of care for the inspection and maintenance of the upper coupler assembly, kingpin, and base rail of a refrigerated trailer because outside of knowledge of layperson); Haddock v. Arnspiger, 793 S.W.2d 948, 954 (Tex. 1990) (holding that an expert was needed because the nature of the case was beyond the "common knowledge of laymen"); Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982) (holding that diagnosis of skull fractures is not within the experience of the layman); *see also* Turbines, Inc. v. Dardis, 1 S.W.3d 726, 738 (Tex. App.—Amarillo 1999, pet. denied) (holding that inspection and repair of an aircraft engine are not within the experience of the layman); Hager v. Romines, 913 S.W.2d 733, 734–35 (Tex. App.—Fort Worth 1995, no writ) (holding that operation of an aircraft and aerial application of herbicide are not within the experience of the layman).

4. *See* K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam); Shanley v. First Horizon Home Loan Corp., No. 14-07-01023-CV, 2009 Tex. App. LEXIS 9301, at *21–22 (Tex. App.—Houston [14th Dist.] Dec. 8, 2009, no pet.) (mem. op.) (finding no error in striking expert affidavit where it opined on defendant's duties, which was a legal issue).

5. *See Honeycutt*, 24 S.W.3d at 360.

an expert to testify concerning: (1) extreme and outrageous conduct, (2) the law, or (3) whether a witness is telling the truth.[6]

For example, in *K-Mart Corp. v. Honeycutt*, the Texas Supreme Court held that the trial court did not abuse its discretion by excluding the testimony of a plaintiff's "human factors and safety expert."[7] The court held that none of the expert's opinions would assist the jury to understand the evidence or to determine a fact issue involved in the case.[8] In that case, Lisa Honeycutt was injured when several shopping carts were pushed into her back as she sat on the lower rail of a shopping cart corral that was missing the upper rail.[9] Honeycutt's safety and human factors expert opined that: (1) the lack of a top railing created an unreasonable risk because it served as an invitation for people to sit on the lower railing, (2) Honeycutt's sitting on the lower railing was not unreasonable conduct, (3) the lack of a top railing caused Honeycutt's injuries, (4) the store employee did not receive proper training for pushing shopping carts, and (5) the store's employee did not keep a proper lookout while pushing the carts into the corral.[10]

The court held that the expert's opinions were not helpful to the jury because they involved matters that were within the jury's "collective common sense."[11] The court reasoned that the expert was no more qualified to render those opinions than the jury, and his testimony effectively invaded the province of the jury.[12] As the issues involved matters within the "average juror's common knowledge," the court held that the jury did not need any special interpretation of the facts to determine whether it was reasonable for Honeycutt to sit on the railing and whether the person who pushed the shopping carts into her was negligent.[13]

"An expert may state an opinion on a mixed question of law and fact [if] the opinion is [limited] to the relevant issues and is based on

6. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 620 (Tex. 1999) (extreme and outrageous conduct); Goldstein v. Comm'n for Lawyer Discipline, 109 S.W.3d 810, 815 (Tex. App.—Dallas 2003, pet. denied) (question of law); *In re* G.M.P., 909 S.W.2d 198, 206 (Tex. App.—Houston [14th Dist.] 1995, no writ) (truthfulness).

7. 24 S.W.3d at 359.

8. *See id.*

9. *Id.*

10. *Id.* at 360–61.

11. *Id.* at 361.

12. *See id.*

13. *Id.*

proper legal concepts.[14] "An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard."[15] For example, in *Birchfield v. Texarkana Memorial Hospital*, the Texas Supreme Court held that "[f]airness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts."[16] In that case, the court held that an expert may testify that conduct constituted "negligence" and "gross negligence" and that certain acts were "proximate cause."[17] Following the *Birchfield* case, many courts of appeals have held that the proper predicate for eliciting an opinion on a legal term of art was laid.[18]

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14. *See* GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 619–20 (Tex. 1999) (quoting Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

15. *See* Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs., 29 S.W.3d 303, 309 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 145 S.W.3d 170 (Tex 2004).

16. 747 S.W.2d 361, 365 (Tex. 1987).

17. *Id.*; *see also* Louder v. De Leon, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam) ("[E]xpert testimony on proximate cause is admissible as long as it is based on proper legal concepts.").

18. *See, e.g.*, Tex. State Secs. Bd. v. Miller, No. 03-06-00365-CV, 2009 Tex. App. LEXIS 5108, at *9–11 (Tex. App.—Austin July 1, 2009, no pet.) (mem. op.) (whether investment was a security); Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 617 (Tex. App.—Fort Worth 2004, pet. denied) (allowing lawyer to give expert opinion that attorney's advertisement violated the disciplinary rules of professional conduct); Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 354 (Tex. App.—Dallas 2004, pet. denied); Bevers v. Gaylord Broad. Co., No. 05-01-00895-CV, 2002 Tex. App. LEXIS 5083, at *11–12 (Tex. App.—Dallas July 18, 2002, pet. denied) (regarding compliance with federal aviation regulations); Pittsburgh Corning Corp. v. Walters, 1 S.W.3d 759, 777 (Tex. App.—Corpus Christi 1999, pet. denied) (stating opinion on defendant's negligence and gross negligence); Entrekin v. Raney, No. 14-97-01274-CV, 1998 Tex. App. LEXIS 7438, at *4–5 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, no pet.) (not designated for publication) (regarding the compliance with federal regulation); Isern v. Watson, 942 S.W.2d 186, 193–94 (Tex. App.—Beaumont 1997, pet. denied) (allowing expert to testify whether there was negligence, gross negligence, or both in a medical malpractice suit); Lyondell Petrochemical Co. v. Fluor Daniel, Inc., 888 S.W.2d 547, 554–55 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Crum & Forster, Inc. v. Monsanto Co., 887 S.W.2d 103, 133–35 (Tex. App.—Texarkana 1994) (allowing testimony on illegality of Mary Carter agreements), *vacated*, 1995 Tex. App. LEXIS 3673 (Tex. App.—Texarkana Mar. 9, 1995, writ dism'd by agr.) (not designated for publication); Transp. Ins. Co. v. Faircloth, 861 S.W.2d 926, 937–39 (Tex. App.—Beaumont 1993) (attorney could testify as expert on procedures required by law), *rev'd on other grounds*, 898 S.W.2d 269 (Tex. 1995); Keene Corp. v. Rogers, 863 S.W.2d 168, 176–77 (Tex. App.—Texarkana 1993, writ dism'd) (suggesting that an epidemiologist could, if supplied with the proper legal concepts, offer an opinion as to whether asbestos products are unreasonably dangerous); Metot v. Danielson, 780 S.W.2d 283, 288 (Tex. App.—Tyler 1989, writ denied) (negligence and proximate cause).

An expert, however, may not testify on pure questions of law.[19] Thus, an expert is not allowed to testify directly to his understanding of the law, but may only apply legal terms to his understanding of the factual matters at issue.[20] For example, in *National Convenience Stores Inc. v. Matherne*, the court of appeals held that an employee's expert's opinion as to the employer's duty to create safety policies, train, and warn was no evidence:

> Although an expert may testify to ultimate issues which are mixed questions of law and fact, such as whether particular conduct constitutes negligence, an expert is not competent to give an opinion or state a legal conclusion regarding a question of law because such a question is exclusively for the court to decide and is not an ultimate issue for the trier of fact. As noted above, the existence of a duty is a question of law. Thus expert testimony is insufficient to create a duty where none exists at law. Because Pearson's and Lehnherr's testimony is therefore insufficient to create a duty to provide driving rules, warnings, or training, we must determine whether such a duty exists at law.[21]

B. *Expert Must Be Qualified to Render Specific Opinion*

Before an expert can testify, he or she must be an "expert." Texas Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[22] In deciding if an expert is qualified, trial courts "must 'ensur[e] that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.'"[23] Under Texas Rule of Evidence 104(a), whether an expert is qualified is a preliminary question to be decided by the trial court.[24] "[T]he party offering the expert's testimony bears the burden to prove that the

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19. *Lyondell Petrochemical Co.*, 888 S.W.2d at 554.

20. *See* Welder v. Welder, 794 S.W.2d 420, 433 (Tex. App.—Corpus Christi 1990, no writ).

21. Nat'l Convenience Stores Inc. v. Matherne, 987 S.W.2d 145, 149 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citations omitted).

22. TEX. R. EVID. 702.

23. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006) (alteration in original) (quoting Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 719 (Tex. 1998)); *see also* Roberts v. Williamson, 111 S.W.3d 113, 121 (Tex. 2003).

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

witness is qualified under [Rule] 702."[25] "The offering party must demonstrate that the witness 'possess[es] special knowledge as to the very matter on which [the witness] proposes to give an opinion.'"[26] Thus, just because the expert may have knowledge greater than that of the jury does not by itself qualify her.[27] An expert must prove that she has knowledge, experience, or other skill in the particular specialty that applies to the issue that she is testifying about.[28]

For example, in *Broders v. Heise*, a patient died at a hospital after receiving a head injury.[29] The plaintiffs filed a medical negligence suit against the hospital and treating physicians.[30] The plaintiff called an emergency room doctor to testify as an expert.[31] The expert testified without objection that the defendants breached the standard of care in treating the decedent.[32] However, when the expert was asked whether this negligence caused the decedent's death, the defendants objected to this testimony on the basis that he was not qualified to testify as to the cause of the decedent's death.[33] The trial court excluded the expert's testimony regarding causation.[34]

The Texas Supreme Court affirmed the trial court's decision to exclude the expert's testimony on causation.[35] The court held that while the plaintiff's expert had greater knowledge than the average juror as to medicine, he was not shown to have specialized knowledge on the precise subject of causation.[36] The court stated, "given the increasingly specialized and technical nature of medicine there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on

25. *Gammill*, 972 S.W.2d at 718 (alteration in original) (quoting Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996)).

26. *Id.* at 718 (alteration in original) (quoting *Broders*, 924 S.W.2d at 152–53).

27. *See Broders*, 924 S.W.2d at 153 (stating doctor's medical expertise is greater than that of the general population, but offering party did not establish expertise as required by Rule 702).

28. *See* Walker v. Rangel, No. 14-08-00643-CV, 2009 Tex. App. LEXIS 9215, at *7–9 (Tex. App.—Houston [14th Dist.] Dec. 3, 2009, no pet.) (holding trial court erred in admitting officer's testimony where he was not qualified to render expert opinions on accident reconstruction); Spin Doctor Golf, Inc. v. Paymentech, L.P., 296 S.W.3d 354, 360–61 (Tex. App.—Dallas 2009, pet. denied) (holding expert on golf courses not qualified to render lost profits testimony).

29. 924 S.W.2d at 150.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 151.

34. *Id.*

35. *Id.* at 154.

36. *Id.* at 153.

every medical question."[37] The court held that the plaintiffs failed to prove that their expert was qualified to give an opinion on the specific question of causation.[38]

Further, in *Gammill v. Jack Williams Chevrolet, Inc.*, the Texas Supreme Court dealt with the qualifications of engineering experts.[39] After an automobile accident, the plaintiff sued the manufacturer under a products defect theory.[40] The plaintiff had two experts testify as to causation.[41] The first expert was a licensed professional engineer with a bachelor's, master's, and doctor's degree in mechanical engineering.[42] He had conducted research in biomechanics, mechanics, dynamics, vehicle occupant kinematics, and vehicle restraint systems.[43] He had investigated many restraint systems and had written many articles, papers, reports, and books summarizing the results of his research.[44]

The second expert was a licensed professional engineer with a bachelor's and master's degree in mechanical engineering.[45] He was employed by Lockheed Martin Tactical Aircraft, where he designed fighter airplanes.[46] While pursuing his master's degree, he worked as an automobile mechanic, installing cruise controls, replacing rear ends and transmissions, and repairing brakes, water pumps, cylinder heads, engine mounts, electrical shorts, and universal joints.[47] The trial court excluded the plaintiff's experts due to their lack of qualifications to testify on cause of death.[48]

The Texas Supreme Court affirmed and held that (1) the first witness was qualified but that his opinions were not reliable, and (2) that the second witness was not qualified.[49] The court stated:

> Just as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case. Trial courts must "ensur[e] that those who purport to be experts

37. *Id.* at 152.
38. *Id.* at 154.
39. 972 S.W.2d 713, 718 (Tex. 1998).
40. *Id.* at 715.
41. *See id.*
42. *Id.* at 716.
43. *Id.*
44. *Id.*
45. *Id.* at 717.
46. *Id.*
47. *Id.*
48. *Id.* at 718.
49. *Id.* at 719.

> truly have expertise concerning the actual subject about which they are offering an opinion."[50]

The court then stated that the plaintiff's second expert was qualified to give opinions on designing and testing fighter airplanes, but not on automobiles.[51] The court noted that the second expert did not have any training or experience in the design or manufacture of automobiles or their relevant component parts.[52]

In *Cooper Tire & Rubber Co. v. Mendez*, the Texas Supreme Court determined whether an expert was qualified to testify about a tire manufacturing defect.[53] Even though the expert had a degree in chemistry and a master's degree in polymer science and engineering, the court found he was not qualified to testify.[54] The court noted that tire chemistry and design is a highly specialized field and that the expert had never worked for a tire company and that the expert admitted that he was not an expert in tire design or tire manufacturing.[55] However in *Roberts v. Williamson*, the Texas Supreme Court found that a defendant's medical expert, a board-certified pediatrician, was qualified to testify about the causes and effects of a newborn's neurological injuries even though he was not a neurologist.[56]

C. *Expert Must Base Opinion on Reliable Facts*

Experts must base their opinions on facts that are accurate and reliable. Texas Rule of Evidence 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[57]

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50. *Id.* (alteration in original) (quoting Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996)).
51. *Id.*
52. *Id.*
53. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006).
54. *Id.* at 806–07.
55. *See id.* at 806; *see also* Champion v. Great Dane Ltd. P'ship, 286 S.W.3d 533, 545 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
56. 111 S.W.3d 113, 121–22 (Tex. 2003); *see also* Bechtel Corp. v. Citgo Prods. Pipeline Co., 271 S.W.3d 898, 922–25 (Tex. App.—Austin 2008, no pet.).
57. TEX. R. EVID. 703.

Texas Rule of Evidence 705(c) provides that: "If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."[58] The Texas Supreme Court has stated: "The substance of the [expert's] testimony must be considered. . . . [A]n expert's bald assurance of validity is not enough. . . . The underlying data should be independently evaluated in determining if the opinion itself is reliable."[59] This requirement deals with the reliability of the particular facts upon which an expert's opinion is based, not upon the manner in which the expert acquired his expertise or the methodologies he used in arriving at his conclusions.

An expert's opinion is inadmissible if the information on which it is based is shown to be inaccurate, inadequate, or unreliable.[60] An expert's opinion can rise no higher than the facts upon which it is based, and it cannot be based upon assumptions or unproven facts.[61] "When an expert's opinion[s are] based [upon] assumed facts that vary materially from the actual, undisputed facts, the opinion[s are] without probative value and cannot support a verdict or judgment."[62] Additionally, an expert's opinions cannot be based upon mere guess or speculation, and if so based, should be excluded.[63] However, if there is sufficient evidence to show that the underlying facts are reliable, the trial court does not err in admitting the expert's testimony.[64]

For example, in *Houston Mercantile Exchange Corp. v. Dailey Petroleum Corp.*, the plaintiff was an oil and gas equipment manufacturer who sued a competitor for conspiracy to misappropriate trade secrets and for unfair competition in marketing the plaintiff's

58. TEX. R. EVID. 705(c).

59. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711–13 (Tex. 1997).

60. *See* TEX. R. EVID. 705(c); Leigh v. Kuenstler, No. 14-08-00245-CV, 2009 Tex. App. LEXIS 7633, at *10–11 (Tex. App.—Houston [14th Dist.] Oct. 1, 2009, no pet.) (mem. op.) (holding expert's opinions on duty incorrect and therefore inadmissible because based on unreliable facts); 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); Tex. Indus., Inc. v. Vaughan, 919 S.W.2d 798, 802 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

61. Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 154–55 (Tex. App.—Texarkana 1997, writ denied).

62. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995).

63. Onwuteaka v. Gill, 908 S.W.2d 276, 283 (Tex. App.—Houston [1st Dist.] 1995, no writ); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 447 (Tex. App.—Fort Worth 1997, pet. denied) ("Unless the expert provides supporting facts, his bare conclusion is not evidence.").

64. *See* Johnston v. Smith, No. 13-05-368-CV, 2008 Tex. App. LEXIS 3890, at *19–20 (Tex. App.—Corpus Christi May 29, 2008, no pet.) (mem. op.).

equipment, a drilling jar, as its own.[65] The plaintiff offered an economist expert to testify as to its lost profits due to the defendant's actions.[66] The economist assumed that every one of the defendant's jars were used every day of every month, and that every operation of the defendant's jar represented lost profits to the plaintiff.[67] The jury awarded the plaintiff a large verdict, which the defendant appealed, arguing that there was no evidence of damages.[68] The appellate court reversed the award, stating that there was no evidence in the record that the defendant's jar was used every day of every month.[69] Also, the court noted that the economist's assumption that every operation of the defendant's jar represented lost profits to the plaintiff was not based upon evidence in the record.[70] Thus, the appellate court held that these false assumptions made the economist's testimony no evidence of the plaintiff's damages.[71]

Furthermore, in *Greenberg Traurig of New York, P.C. v. Moody*, a trial court introduced expert evidence regarding a defendant's failure to make certain disclosures that the expert assumed it had a duty to disclose.[72] On appeal, the court of appeals held that the expert's opinions were not reliable because they were based on a faulty premise of law:

> Professor Long testified that based on the law firm's fiduciary duty to IFT's board of directors, Greenberg Traurig owed a duty to disclose J. Summers' fraudulent activities to the board. The Investors essentially assert that any breach of Greenberg Traurig's duty to disclose fraud to IFT's board resulted in their damages. However, Texas law provides otherwise. . . . Thus, Professor Long's opinion about Greenberg Traurig's purported fiduciary duties to the Investors was contrary to both Texas and New York law and unreliable.[73]

65. 930 S.W.2d 242, 244–45 (Tex. App.—Houston [14th Dist.] 1996, no writ).
66. *Id.* at 247.
67. *Id.* at 248.
68. *Id.* at 245–46.
69. *Id.* at 248–49.
70. *Id.* at 248.
71. *Id.*
72. 161 S.W.3d 56, 96 (Tex. App.—Houston [14th Dist.] 2004, no pet.).
73. *Id.*

D. *Expert's Opinion Must Be Relevant*

Texas Rules of Evidence 401 and 402 require that all evidence be relevant to be admissible.[74] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[75] This requirement applies to expert testimony:

> [T]o constitute scientific knowledge which will assist the trier of fact, the proposed [scientific] testimony must be relevant and reliable.
>
> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 . . . To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving [the] factual dispute."[76]

Accordingly, a trial court must ensure that the expert's opinion is relevant to a disputed issue in the case. If it is not, the court should exclude the opinion. For example, "[c]onclusory or speculative opinion testimony is not relevant evidence because it does not tend to make the existence of material facts more probable or less probable."[77]

E. *Expert's Opinion Must Be Reliable*

Beginning with *E.I. du Pont de Nemours & Co. v. Robinson*, the Texas Supreme Court mandated that a scientific expert's opinion must be relevant and reliable before it is admissible.[78] The court set forth factors that a court must consider in determining whether a scientific expert has used reliable methodologies in arriving at her opinions:

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

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74. *See* TEX. R. EVID. 401, 402.
75. TEX. R. EVID. 401.
76. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).
77. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 637 (Tex. 2009); *see also* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002).
78. 923 S.W.2d at 556.

> scientific community; and (6) the non-judicial uses which have been made of the theory or technique.[79]

A court must look beyond an expert's statement that his opinion is based on the type of data that experts reasonably rely.[80] The court must independently evaluate the data in determining if the opinion itself is reliable.[81] The Texas Supreme Court has stated: "A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence."[82] The reliability inquiry as to expert testimony does not ask whether the expert's conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable.[83]

In *Gammill v. Jack Williams Chevrolet, Inc.* the court extended *Robinson* to non-scientific experts:

> Nothing in the language of [Rule 702] suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. *All* expert testimony should be shown to be reliable before it is admitted.[84]

However, all the factors espoused in *Robinson* cannot always be used with other kinds of expert testimony.[85] The court stated:

> But there must be some basis for the opinion offered to show its reliability. Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed.[86]

The court held that a trial court may exclude expert testimony if it concludes "that there is simply too great an analytical gap between

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79. *Id.* at 557 (citation omitted). The list is not exclusive and a trial court may use any other factor which is helpful in determining the reliability of scientific evidence. *Id.*
80. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 713 (Tex. 1997).
81. *Id.*
82. *Id.* at 714.
83. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004).
84. 972 S.W.2d 713, 726 (Tex. 1998) (emphasis added).
85. *Id.*
86. *Id.*

the data and the opinion proffered."[87] The non-scientific expert's opinion must be evaluated according to the rules governing that expert's discipline.[88] Therefore, a trial court has the responsibility to determine whether any expert used reliable methods in arriving at her opinions and conclusions.

After *Gammill*, some courts of appeals held that there were two different tests for reliability. For example, the Fort Worth Court of Appeals described the reliability tests thusly:

> To guide trial courts in assessing reliability, the supreme court has crafted two tests: the *Robinson*—factor [sic] analysis and the "analytical gap" test. Further, the supreme court has determined that expert testimony is unreliable if it fails to rule out other plausible causes. Accordingly, a trial court properly excludes expert testimony as unreliable if: (1) the foundational data underlying the opinion is unreliable; (2) the methodology used by the expert to interpret the underlying data is flawed; (3) notwithstanding the validity of the underlying data and methodology, there is an analytical gap in the expert evidence; or (4) the expert fails to rule out other plausible causes.[89]

The Texas Supreme Court addressed whether there were two separate tests for expert reliability in *Mack Trucks, Inc. v. Tamez*.[90] The court of appeals determined that the expert applied his knowledge, training, and experience and that his methodology was not easily tested by objective criteria, and therefore, the reliability of the expert's testimony should not be measured by a *Robinson*-factor analysis, but instead by the "analytical gap" test.[91] The Texas Supreme Court explained that *Gammill* did not imply that courts should never consider the *Robinson* factors for non-scientific experts:

> In *Gammill* . . . [w]e held that *Robinson* factors did not apply to the mechanical engineer expert under consideration in *Gammill*, even though his claimed expertise was scientific in nature. In so holding, however, we did not mean to imply that a trial court should never consider the *Robinson* factors when evaluating the reliability of expert testimony that is based on knowledge, training or experience, or that the factors can only be applied when evaluating scientific expert testimony. We

87. *Id.* (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).
88. *See id.* at 726.
89. Allstate Tex. Lloyds v. Mason, 123 S.W.3d 690, 697–98 (Tex. App.—Fort Worth 2003, no pet.) (citations omitted).
90. 206 S.W.3d 572, 578–79 (Tex. 2006).
91. *Id.*

> recognized that the criteria for assessing reliability must vary depending on the nature of the evidence.
>
> . . . Thus, a trial court should consider the factors mentioned in *Robinson* when doing so will be helpful in determining reliability of an expert's testimony, regardless of whether the testimony is scientific in nature or experience-based.[92]

The Texas Supreme Court again addressed whether there were two tests in *Whirlpool Corp. v. Camacho*, where the plaintiffs sued the manufacturer of a dryer based on a house fire that killed the plaintiff's son.[93] The plaintiffs claimed that the defective design of the dryer allowed accumulated lint to be drawn to the heater where it ignited and later spread to the house.[94] The plaintiffs had an electrical engineering expert testify that the dryer was defectively designed and started the fire.[95] The jury returned a verdict for the plaintiffs, and the court of appeals affirmed.[96] The Texas Supreme Court reversed, finding that there was no reliable evidence that the lint in the dryer caused the fire.[97] The court held that:

> When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions. An expert's opinion might be unreliable . . . if it is based on assumed facts that vary from the actual facts or [the opinion may] be conclusory because it is based on tests or data that do not support the conclusions reached. . . .
>
> Further, each material part of an expert's theory must be reliable.[98]

The court held that "[u]nlike review of a trial court's ruling as to admissibility of evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict."[99] "Further, a no-evidence review encompasses the entire record, including contrary evidence tending to

92. *Id.* at 579.
93. 298 S.W.3d 631, 634, 638–39 (Tex. 2009).
94. *Id.* at 634.
95. *Id.* at 634–35.
96. *Id.* at 636.
97. *Id.* at 643.
98. *Id.* at 637 (citations omitted).
99. *Id.* at 638.

show the expert opinion is incompetent or unreliable."[100] The court determined that in most cases a reviewing court should take the *Robinson* factors into account as well as the expert's experience:

> In determining whether expert testimony is reliable, a court may consider the factors set out by the Court in *Robinson* and the expert's experience. However, in very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience.[101]

The court first addressed whether the court of appeals correctly analyzed the expert's opinions under a legal sufficiency standard.[102] Even though the defendant raised a legal sufficiency objection, the court of appeals solely analyzed the case under an abuse of discretion review for the admissibility of the expert evidence.[103] Under that review, the court of appeals only used the analytical-gap test and did not review the *Robinson* factors.[104] The court of appeals then addressed whether the defendant had conclusively disproved the validity of the plaintiffs' expert's opinions.[105] The Texas Supreme Court held that the court of appeals' review was in error:

> We disagree with the Camachos' assertion that the court of appeals effectively performed a proper legal sufficiency review by determining whether Whirlpool conclusively disproved that the fire occurred as Clayton testified it did. Evaluating whether expert testimony has been conclusively disproved by the opposing party is not the same as considering whether the proponent of the testimony satisfied its burden to prove the testimony is relevant and reliable. The proponent must satisfy its burden regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.
>
> Witnesses offered as experts in an area or subject will invariably have experience in that field. If courts merely accept "experience" as a substitute for proof that an expert's opinions

100. *Id.*
101. *Id.* (footnote and citation omitted).
102. *Id.* at 638–40.
103. *Id.* at 637.
104. *Id.*
105. *Id.*

> are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions. We have recognized, and do recognize, that some subjects do not lend themselves to scientific testing and scientific methodology. But given the facts in this case, the analytical gap test was not the only factor that should have been considered.... This is not one of the few cases in which appellate review of expert evidence should be limited to either an analysis focused solely on *Robinson*-like factors or solely on an analytical gap test. We agree with Whirlpool that proper appellate legal sufficiency review pursuant to Whirlpool's challenge requires evaluating Clayton's testimony by considering both *Robinson*-type factors and examining for analytical gaps in his testimony.[106]

Turning to the application of the facts to the standards, the court held that the plaintiffs' expert testimony by an electrical engineer amounted to no evidence supporting the jury's verdict.[107] The expert testified that lint clogged a corrugated transport tube because of its wrinkled design causing lint to back up and blow through a seal into the heater box where it ignited and shot into the dryer basket, igniting clothes.[108] But the expert basically did no testing to verify his theory, which impacted the first *Robinson* factor.[109] Moreover, the expert's only test on which he founded his theory did not support all the various and critical parts of his opinion.[110] The court also held that the other *Robinson* factors did not support the reliability of the expert's opinions: the opinions were developed solely for litigation, the opinions had not been published or subjected to peer review, and the opinions had not been accepted as valid in any part of the relevant scientific community.[111] The court concluded that the facts presented were consistent with and supported a conclusion that fire was in and around the dryer, but differed from the expert's theory on the fire's origin.[112] The court reversed and rendered for the defendant.[113] The *Whirlpool* case is important because it bridges the *Robinson*-factor

106. *Id.* at 639–40 (citations omitted).
107. *Id.* at 643.
108. *Id.* at 640.
109. *Id.* at 642.
110. *Id.*
111. *Id.* at 643.
112. *Id.*
113. *Id.*

test and the analytical-gap test, and holds that in most cases, both tests should be used.

Further, each material part of an expert's theory must be reliable. For example, the issue in *Volkswagen of America, Inc. v. Ramirez* was whether a wheel that separated from a car's axle was the cause or the result of an accident.[114] An expert testified that a bearing defect in the wheel assembly caused the wheel to separate from the axle.[115] Tests conducted by the experts related to how the bearing failed, but the expert did not explain how the wheel remained in the wheel well as the car crossed a median, collided with another car, and spun around.[116] The tests did not support the expert's opinion that the wheel remained with the car for an extended period despite the bearing's failure having caused the wheel to separate from the axle early in the accident sequence.[117] The Texas Supreme Court determined that the expert's opinion was unreliable because the expert failed to explain how the wheel remained in the wheel well throughout the accident sequence.[118]

F. Trial Court Can Strike Expert Opinion Due to Rule 403

Even if a court decides that an expert's testimony is reliable, relevant, and based upon accurate information, the court may still exclude his testimony due to the grounds contained in Texas Rule of Evidence 403.[119] Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[120] Accordingly, once a court finds that an expert's opinions are admissible, the court has the additional burden to weigh the testimony against the danger of unfair prejudice, confusion of the issues, or the possibility of misleading the jury.[121]

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114. 159 S.W.3d 897, 902 (Tex. 2004).
115. *Id.* at 904.
116. *See id.* at 905–06.
117. *See id.*; *see also* Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 805 (Tex. 2006) (noting that an expert who testified that a tire was defective when it left the manufacturing plant offered no theory regarding how the tire could be used for 30,000 miles and suffer a nail puncture without failing).
118. *See Volkswagen*, 159 S.W.3d at 906.
119. State v. Malone Serv. Co., 829 S.W.2d 763, 767 (Tex. 1992); N. Dall. Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 94 (Tex. App.—Dallas 1995, writ denied).
120. TEX. R. EVID. 403.
121. *See* Tex. Workers' Comp. Ins. Fund v. Lopez, 21 S.W.3d 358, 363–64 (Tex. App.—San Antonio 2000, pet. denied).

The Texas Supreme Court held that a trial court has the sua sponte burden of determining whether the proffered expert's testimony's probative value is "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[122] The court stated:

> Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert. "[T]o the jury an 'expert' is just an unbridled authority figure, and as such he or she is more believable." A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert.[123]

Importantly, the court may have lowered the Rule 403 burden from substantially outweighed to just "outweighed."[124]

III. 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 in both rules and case law. 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:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:

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122. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995) (quoting TEX. R. EVID. 403).

123. *Id.* at 553 (alteration in original) (citations omitted).

124. *Compare id.* at 557 (requiring trial court to determine whether to exclude evidence because its probative value is *outweighed* by unfair prejudice or other factors), *with* TEX. R. EVID. 403 (giving trial court discretion to exclude evidence if it is *substantially outweighed* by unfair prejudice or other factors). *See also* Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 189 (Tex. App.—Texarkana 1998, pet. denied).

> (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
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.[125]

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
>
> (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.
>
> (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.
>
> (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

125. TEX. R. APP. P. 33.1(a).

means, such as making statements or offers of proof or asking questions in the hearing of the jury.[126]

In following these rules, to preserve error a party must make a valid, timely, and specific request, motion, or objection and obtain a ruling.[127] The objection must be timely; it must be brought within the time permitted by the rules and decisions.[128] Furthermore, in order to be timely, a complaint must be raised at a time when the trial court has the power and opportunity to correct the error alleged.[129] An objection is timely if made as soon as the ground of objection becomes apparent.[130] A party cannot make the objection for the first time on appeal—the objection at trial must be consistent with the complaint on appeal.[131] 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.[132]

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.[133] In order to preserve error, a party must object to each offer of the inadmissible evidence.[134] However, a party may preserve error by asserting a "running objection" without having to object to each individual offer.[135] 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.[136]

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126. TEX. R. EVID. 103.

127. *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).

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

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

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

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

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

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

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

135. *Volkswagen*, 159 S.W.3d at 907; Ethington v. State, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) (en banc).

136. *See Volkswagen*, 159 S.W.3d at 907.

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 overrule the objection; if the court refuses to rule, the complaining party must object to the court's failure to rule.[137] When a ruling is implied by the court's actions, no express ruling is necessary.[138] The determination of whether a court "impliedly" overrules 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. That is the safest course.

To complain about the exclusion of evidence, the offering party must make an offer of proof.[139] A party must make its offer of proof after it officially offers the evidence into record and secures an adverse ruling.[140] 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.[141]

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.[142] 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

137. TEX. R. APP. P. 33.1(a)(2).

138. *See* TEX. R. APP. P. 33.1; *see, e.g.*, Clement v. City of Plano, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.) (stating nonmovant's special exceptions were implicitly overruled by trial court granting summary judgment); Dagley v. Haag Eng'g Co., 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding trial court implicitly overruled nonmovant's objection to adequate time for discovery by granting summary judgment); Hardman v. Dault, 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet.) (holding trial court implicitly overruled counsel's objection against nonjury trial).

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

140. *Id.*

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

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

of the record.[143] 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."[144] Preserving error is not the object—the 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."[145] 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. 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.[146] Texas Rule of Civil Procedure 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."[147] Texas

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

144. TEX. R. APP. P. 44.1(a)(1); *see also* McCraw v. Maris, 828 S.W.2d 756, 757–58 (Tex. 1992).

145. Tex. R. App. P. 44.1(a)(1)–(2).

146. *See* TEX. R. CIV. P. 194.1, 194.2; *but see* Marin v. IESI TX Corp., 317 S.W.3d 314, 320 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (disclosure rules regarding experts do not apply to fact witnesses).

147. TEX. R. CIV. P. 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;

Rule of Civil Procedure 195.2 controls the timing of the disclosures if there is no scheduling order.[148] A trial court has the authority to enter a scheduling order that controls the disclosure of experts.[149] Trial courts also have discretion to enter scheduling orders that alters the amount of expert testimony. For example, in appropriate cases, a trial court may enter a scheduling order that limits a party to one expert on each issue.[150] Furthermore, the trial court generally will not abuse its discretion in enforcing its expert limitations.[151] Similarly, a trial court will generally not abuse its discretion in amending its scheduling order and allowing a late designation.[152]

Unless the court orders to the contrary, the party seeking affirmative relief must designate testifying experts ninety days before the end of the discovery period, and all other parties must designate any other experts sixty days before the end of the discovery period.[153] 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.[154] It is advisable to provide a general

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(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.

TEX. R. CIV. P. 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 the informed described in the first three sections of Rule 194.2(f). *See id.*

148. TEX. R. CIV. P. 195.2.

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

150. *See, e.g.*, Chau v. Riddle, 212 S.W.3d 699, 704–05 (Tex. App.—Houston [1st Dist.] 2006) (holding trial court did not abuse its discretion in limiting experts to one per issue and did not abuse its discretion in striking expert where one had already been designated on that issue), *rev'd on other grounds*, 254 S.W.3d 453 (Tex. 2008) (per curiam); Paselk v. Raburn, 293 S.W.3d 600, 608–09 (Tex. App.—Texarkana 2009, pet. denied) (limiting party to one expert was not a death penalty sanction without a record to indicate that additional experts were necessary).

151. Esty v. Beal Bank S.S.B., 298 S.W.3d 280, 295–96 (Tex. App.—Dallas 2009, no pet.) (holding trial court did not abuse its discretion in striking expert that was disclosed after due date in scheduling order).

152. *See* Wal-Mart Stores Tex., L.P. v. Crosby, 295 S.W.3d 346, 355–56 (Tex. App.—Dallas 2009, pet. denied).

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

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

description, in addition to specific descriptions, of what the expert will testify about.[155]

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."[156] When required, an expert's report shall include the discoverable factual observations, tests, supporting data, calculations, photographs, and opinions of the expert.[157] The report must provide the expert's opinions and the underlying basis for them.[158] An expert has the right to refine calculations and perfect reports through the time of trial.[159]

Under Texas Rule of Civil Procedure 193.6, discovery that is not timely disclosed and witnesses that are not timely designated are inadmissible at trial.[160] There is often a complaint about a party's failure to properly designate an expert or to the timeliness of the designation.[161] For example, experts must retain their work product, and a party must produce that material to the requesting party.[162] If a party or its expert destroys the expert's work product, a trial court

155. *See* Adams v. McFadden, 296 S.W.3d 743, 761–62 (Tex. App.—El Paso 2009) (holding expert disclosure sufficient because expert's specific testimony arguably fell under more general description in designation), *vacated by settlement*, 2010 Tex. LEXIS 104 (Tex. Jan. 22, 2010).

156. TEX. R. CIV. P. 195.5.

157. *See id.*

158. *See* Mauzey v. Sutliff, 125 S.W.3d 71, 84 (Tex. App.—Austin 2003, pet. denied) (concluding trial courts must ensure that expert reports fully disclose the substance of and basis for experts' mental impressions); *but see* SCTW Health Care Ctr., Inc. v. AAR Inc., No. 01-07-00762-CV, 2009 Tex. App. LEXIS 8071, at *14–23, *25 (Tex. App.—Houston [1st Dist.] Oct. 15, 2009) (mem. op.) (affirming trial court decision admitting expert testimony and finding that pretrial disclosures were adequate because an expert does not have to state all facts that support opinions and do not have to provide facts that solely supports cross-examination), *vacated in part by settlement*, 2010 Tex. App. LEXIS 2330 (Tex. App.—Houston [1st Dist.] Mar. 25, 2010, no pet.) (mem. op.).

159. *See SCTW Health Care Ctr., Inc.*, 2009 Tex. App. LEXIS 8071 at *20, *24–25 (affirming trial court admission of expert testimony on damages at trial over objection for failure to disclose because experts can refine testimony and calculations up to the time of trial); Tovar v. Arambula, No. 04-02-00640-CV, 2003 Tex. App. LEXIS 8217, at *7–8 (Tex. App.—San Antonio Sept. 24, 2003, no pet.) (mem. op.).

160. *See* Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam).

161. *See, e.g.*, Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 583–84 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

162. *See* Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37, 58 (Tex. App.—San Antonio 2006, no pet.).

may exclude the expert's testimony as a sanction.[163] The Texas Supreme Court stated why it is important to fully disclose an expert and the materials that the expert relied on:

> The expert witness occupies a unique place in our adversarial system of justice. Considered to have "knowledge, skill, experience, training, or education," that will "assist the trier of fact to understand the evidence or to determine a fact in issue," the expert is generally held out to be, and is seen by the jury as, an objective authority figure more knowledgeable and credible than the typical lay witness. For this reason, juries are prone to rely on experts to tell them how to decide complex issues without independently analyzing underlying factors. As the Supreme Court has noted, "'[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'"
>
> Coupled with the expert's vast potential for influence is the fact that experts are generally unfettered by firsthand-knowledge requirements that constrain the ordinary witness. While lay witnesses may only testify regarding matters of which they have personal knowledge, expert witnesses may testify about facts or data not personally perceived but "reviewed by, or made known" to them. If the facts or data are of a type upon which experts in the field reasonably rely in forming opinions on the subject, the facts or data need not even be admissible in evidence. Thus, in many instances, experts may rely on inadmissible hearsay, privileged communications, and other information that the ordinary witness may not. Moreover, an expert may state an opinion on mixed questions of law and fact, such as whether certain conduct was negligent or proximately caused injury, that would be off limits to the ordinary witness.
>
> Armed with these advantages, the expert witness paints a powerful image on the litigation canvas. And it is typically the hiring attorney who selects the materials that will provide color and hue. Just as a purveyor of fine art must examine the medium used in order to distinguish masterpiece from fake, a jury must understand the pallet from which the expert paints to accurately assess the testimony's worth. Given the importance that expert testimony can assume, the jury should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion.[164]

163. *Id.* at 58, 61.

164. *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007) (orig. proceeding) (citations omitted).

The failure to raise an objection about the designation of an expert will result in waiver of that complaint on appeal.[165] 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."[166] It is presumed that a response made within thirty days of trial is not reasonably prompt.[167] However, there is no presumption that a supplement served thirty days or more before trial is reasonably prompt.[168]

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.[169] The burden is on the party supplementing discovery to prove one of these two elements.[170] For example, in one case the defendants did not designate their expert when they retained him and waited until thirty days before trial to do so.[171] 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.[172]

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165. *See, e.g.*, Wal-Mart Stores Tex., L.P. v. Crosby, 295 S.W.3d 346, 355 (Tex. App.—Dallas 2009, pet. denied); Cairus v. Gomez, No. 03-06-00225-CV, 2006 Tex. App. LEXIS 10479, at *21–22 (Tex. App.—Austin Dec. 6, 2006, pet. denied) (mem. op.); *In re* Tomkins, No. 06-04-00067-CV, 2005 Tex. App. LEXIS 5317, at *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.).

166. TEX. R. CIV. P. 193.5(b).

167. *Id.*

168. *See* Snider v. Stanley, 44 S.W.3d 713, 715 (Tex. App.—Beaumont 2001, pet. denied).

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

170. *See* TEX. R. CIV. P. 193.6(b).

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

172. *Id.*; *see also* Paselk v. Raburn, 293 S.W.3d 600, 610 (Tex. App.—Texarkana 2009, pet. denied) (holding trial court did not abuse discretion in excluding expert where no good cause shown in record); *In re* Estate of Perry, No. 04-06-00205-CV, 2007 Tex. App. LEXIS 6465, at *49–51 (Tex. App.—San Antonio Aug. 15, 2007) (holding trial court did not abuse discretion in excluding expert that was designated in time but that did not serve report on time per the scheduling order), *opinion withdrawn due to settlement*, 2008 Tex. App. LEXIS 418 (Tex. App.—San Antonio Jan. 23, 2008, no pet.) (mem. op.); Baize v. Scott & White Clinic, No. 03-05-00780-CV, 2007 Tex. App. LEXIS 366, at *8–14 (Tex. App.—Austin Jan. 22, 2007, pet. denied) (mem. op.) (holding good cause did not exist for plaintiffs' failure to timely designate experts after original counsel withdrew because the patient did not retain new counsel for seven months, did not comply with a known discovery deadline, and did not request a scheduling order); Jennings v. Hatfield, No. 14-04-00907-CV, 2005 WL 2675048, at *6 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (mem. op.) (holding no error in excluding expert when all information required by Rule 194.2(f) not disclosed and no expert report provided).

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.[173] Moreover, in one 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.[174] In another case, a court held that it was proper to supplement and designate an opposing party's expert the day after the expert was deposed because the supplementing party could not have known of the favorable opinions until after the deposition.[175] Further, if the failure to disclose expert opinions is due to the opponent's own failure to supplement discovery, a trial court can find good cause and allow the testimony.[176]

One court recently issued mandamus relief to a party that had its expert struck for allegedly late disclosure of an expert where the objecting party had sufficient time to conduct discovery.[177] The court stated:

> Defendants had ample notice of the designation and ample time to depose HOA's expert and to obtain their own expert during that five-and-a-half-month period but declined to do so, preferring to stand on their own motion to strike. On this record, HOA established lack of unfair surprise or prejudice.[178]

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

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173. *See, e.g.*, Jernigan v. Somervell Cnty. Water Dist., No. 10-06-00033-CV, 2006 Tex. App. LEXIS 11002, at *3–5 (Tex. App.—Waco Dec. 20, 2006, pet. denied) (mem. op.); Gutierrez v. Gutierrez, 86 S.W.3d 729, 736 (Tex. App.—El Paso 2002, no pet.).

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

175. *See* Hooper v. Chittaluru, 222 S.W.3d 103, 110 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). The court stated:

> The Texas Rules of Civil Procedure provide that expert designations must be supplemented "reasonably promptly after the party discovers the need for such a response." Hooper's cross-designations were reasonably prompt and included the information that was available to him at the time. He could not possibly have disclosed Dr. Lambert's name before Dr. Chittaluru disclosed it to him or detailed Dr. Lambert's favorable opinions before he learned of them during the deposition. The discovery rules do not require Hooper to do the impossible.

Id. (citations omitted).

176. *See* Pugh v. Conn's Appliances, Inc., No. 09-02-514-CV, 2004 Tex. App. LEXIS 2443, at *10–12 (Tex. App.—Beaumont Mar. 18, 2004, pet. denied) (mem. op.).

177. *See In re* Kings Ridge Homeowners Ass'n, 303 S.W.3d 773, 775–76 (Tex. App.—Fort Worth 2009, orig. proceeding).

178. *Id.* at 783.

within the requirements of a scheduling order.[179] However, often a party may not know that an expert has been inadequately disclosed until the expert testifies at trial to opinions outside of his 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.[180] Furthermore, the objecting party should make a record to support the objection—which includes evidence that shows the expert was not properly disclosed.[181] This record may include a copy of the properly served requests for disclosure, a response thereto, deposition testimony, a report, and oral testimony by the attorney regarding any of the above.[182] 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.[183] The trial court should

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

180. *See* 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.) (holding complaint about undesignated witness waived where no objection made at trial).

181. *See, e.g.*, Facundo v. Solis, No. 03-05-00059-CV, 2006 Tex. App. LEXIS 318, at *4–7 (Tex. App.—Austin Jan. 12, 2006, no pet.) (mem. op.); Mora v. Chacon, No. 13-05-182-CV, 2005 Tex. App. LEXIS 8433, at *13–15 (Tex. App.—Corpus Christi Oct. 13, 2005, pet. denied) (mem. op.).

182. *See, e.g.*, Utley v. LCRA Transmission Servs. Corp., No. 04-05-00023-CV, 2006 Tex. App. LEXIS 9129, at *13–14 (Tex. App.—San Antonio Oct. 25, 2006, no pet.) (mem. op.) (holding party waived failure to disclose objection where record did not contain allegedly deficient expert report).

183. *See* TEX. R. CIV. P. 193.6(a); *see, e.g.*, Cooper v. Fleming, No. 05-04-01726-CV, 2006 Tex. App. LEXIS 68, at *2–3 (Tex. App.—Dallas Jan. 5, 2006, no pet.) (mem. op.) (holding party must show good cause for a late expert designation and that a conclusory allegation of an "accident" is not sufficient without any underlying facts); Barr v. AAA Tex., L.L.C., 167 S.W.3d 32, 36–37 (Tex. App.—Waco 2005, no pet.) (holding trial court did not err in excluding a non-retained expert who was not properly designated by responses to requests for disclosure); State v. Capitol Feed & Milling Co., No. 03-02-00749-CV, 2003 Tex. App. LEXIS 8029, at *14–17 (Tex. App.—Austin Sept. 11, 2003, no pet.) (mem. op.); Matagorda Cnty. Hosp. Dist. v. Burwell, 94 S.W.3d 75, 81–83 (Tex. App.—Corpus Christi 2002), *rev'd on other grounds*, 189 S.W.3d 738 (Tex. 2006) (per curiam); Haley v. GPM Gas Corp., 80 S.W.3d 114, 120–21 (Tex. App.—Amarillo 2002, no pet.); Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 271–72 (Tex. App.—Austin 2002, pet. denied); Mares v. Ford Motor Co., 53 S.W.3d 416, 418–19 (Tex. App.—San Antonio 2001,

properly limit the expert's testimony to the opinions disclosed unless one of the exceptions applies. 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 [Rule 193.6] paragraph (b), 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.[184]

A trial court's ruling on such a motion will be reviewed under an abuse of discretion standard.[185]

C. *Party Can Designate and Offer Evidence of Opponent's Expert*

In *Hooper v. Chittaluru*, after the defendant's expert witness prepared an initial report favorable to the defendant, the expert subsequently gave opinions in a deposition that were favorable to the plaintiff.[186] The day after the deposition the plaintiff supplemented his designation to refer to the expert's deposition testimony.[187] The trial court sustained the defendant's objections that the plaintiff had not disclosed the doctor's opinions in a timely manner and refused to allow the expert to testify in trial.[188] The court of appeals found that supplementing the designation only one day after the deposition was made "reasonably promptly after the party discovered the need for such a response" as required by Texas Rule of Civil Procedure 193.5(b).[189]

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no pet.); Vingcard A.S. v. Merrimac Hospitality Sys., 59 S.W.3d 847, 855–56 (Tex. App.—Fort Worth 2001, pet. denied) (holding that failure to provide all information requested by request for disclosure constitutes failure to respond and triggers automatic exclusion of testimony); Dennis v. Haden, 867 S.W.2d 48, 51–52 (Tex. App.—Texarkana 1993, writ denied) (holding that because party did not produce expert's report as required by pretrial order, expert should have been excluded).

184. TEX. R. CIV. P. 193.6(c); *see also* Tri-Flo Int'l, Inc. v. Jackson, No. 13-01-472-CV, 2002 Tex. App. LEXIS 7630, at *5–7 (Tex. App.—Corpus Christi Oct. 24, 2002, no pet.) (not designated for publication) (holding trial court correctly delayed trial to allow full discovery of late supplementation of expert opinions).

185. Snider v. Stanley, 44 S.W.3d 713, 718 (Tex. App.—Beaumont 2001, pet. denied) (holding trial court's ruling denying motion for continuance was not an abuse of discretion); *Capitol Feed & Milling Co.*, 2003 Tex. App. LEXIS 8029, at *5.

186. 222 S.W.3d 103, 106–07 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

187. *Id.* at 107.

188. *Id.*

189. *Id.* at 110; *see* Tex. R. Civ. P. 193.5(b).

The trial court implied that it was "inherently improper to call an opponent's expert adversely" when it repeatedly stated that the plaintiff "cannot hijack [the opponent's] expert."[190] The court of appeals noted that "the Texas Supreme Court has disapproved of attempts to assert ownership over an expert" and called the practice "inconsistent with the primary objective of discovery—to seek the truth."[191] Ultimately, the court of appeals compared expert testimony to any other type of evidence, such as documents, that "unquestionably can be used against the producing party."[192] Finally, the court of appeals found that the evidence was material and was not cumulative as the witness's testimony was "damaging testimony against a party by its own expert [and] . . . would have added substantial weight" to the plaintiff's case.[193] The exclusion was harmful, and, as such, the court of appeals reversed the trial court's order striking the expert's testimony as an abuse of discretion.[194] Several courts have addressed issues involving cross-designated experts, and have implicitly assumed that such practice is permissible.[195] However, it should be noted that if an expert used to work for the defendant and knows privileged and confidential information about the defendant, the expert arguably cannot then use that information and testify for the plaintiff in a suit against the defendant.[196]

D. Party Waives Privilege on Information Provided to Testifying Expert

When a party retains an expert, it must provide information and facts so that the expert can render his or her opinions. The party

190. *Hooper*, 222 S.W.3d at 108.
191. *Id.*
192. *Id.*
193. *Id.* at 110.
194. *See id.* at 112–13.
195. *See, e.g.*, Crawford v. Hope, 898 S.W.2d 937, 943–44 (Tex. App.—Amarillo 1995, writ denied) (finding no abuse of discretion in preventing plaintiff from calling defendant's expert because plaintiff did not cross-designate that expert); Dennis v. Haden, 867 S.W.2d 48, 51–52 (Tex. App.—Texarkana 1993, writ denied) (finding harmful error in prohibiting plaintiff from calling defendant's expert as rebuttal witness); Kreymer v. N. Tex. Mun. Water Dist., 842 S.W.2d 750, 753 (Tex. App.—Dallas 1992, no writ) (discussing procedure for cross-examining expert designated by both parties).
196. *See In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 151 (Tex. App.—Fort Worth 2002, orig. proceeding) (holding plaintiff's counsel should have been disqualified where plaintiff's counsel retained a consulting expert that used to work for the defendant and had the defendant's confidential and privileged information).

should be careful not to provide the expert with privileged materials because any information provided to a testifying expert who reviews those materials is discoverable by the party's opponent. For example, in *In re Christus Spohn Hospital Kleberg*, a medical malpractice case, the defendant hospital inadvertently provided its retained testifying expert with privileged documents.[197] At the expert's deposition, it was discovered that the privileged materials had been produced to the expert and that the expert had reviewed them to some extent.[198] The hospital filed a motion to return the documents under the "snap back" provision of Texas Rule of Civil Procedure 193.3(d).[199] The trial court denied the hospital's motion.[200] On writ of mandamus review, the Texas Supreme Court held that the hospital could not seek the return of the privileged documents and if the hospital still intended to use that particular expert, the privileged documents were fair game:

> In light of these important policy concerns that underlie the expert-disclosure rule, we conclude that Rules 192.3(e)(6) and 192.5(c)(1) prevail over Rule 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production. That is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced.[201]

E. 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, the party has an obligation to object to the evidence before trial or when the evidence is offered at trial.[202] 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:

197. 222 S.W.3d 434, 436 (Tex. 2007) (orig. proceeding).
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 440–41.
202. *See* Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998).

> To preserve a complaint that scientific evidence is unreliable 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.[203]

Absent a proper complaint, error in the admission of expert testimony is waived.[204]

2. *Procedure for Preserving Error Before Trial*

Challenges to experts should be made as early in the litigation process as possible.[205] 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 . . . ." [206] Therefore, "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the [appropriate] standards . . . ."[207] A party should file a motion to challenge its opponent's expert and set a pretrial 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.[208] A motion to exclude an expert is similar to a no-evidence motion for summary judgment in that the burden is initially on the nonmovant to contradict the allegations in the motion. However, unlike a no-evidence motion, the evidence may not be viewed in the light most favorable to the nonmovant.

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203. *Id.* (citations omitted).

204. *See, e.g.*, Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); Askew v. Askew, No. 02-04-109-CV, 2005 Tex. App. LEXIS 8329, at *17 (Tex. App.—Fort Worth Oct. 6, 2005, no. pet.); Weidner v. Sanchez, 14 S.W.3d 353, 364–65 (Tex. App.—Houston [14th Dist.] 2000, no pet.); 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.3d 654, 665 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

205. *See Ellis*, 971 S.W.2d at 412 (Gonzales, J., concurring).

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

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

208. *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, no pet.).

A ruling on a pretrial hearing is sufficient to preserve error in the admission or exclusion of expert testimony.[209] 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 an objection that was not expressly raised in the pretrial motion or raised at trial.[210] Further, just filing a pretrial motion will not be enough to preserve error—the party should set the motion for hearing and obtain a ruling from the trial court.[211] One court has stated: "[a]n adverse ruling also appears to be required."[212] 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.[213] 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.[214]

Notwithstanding the ability to preserve error solely pretrial, 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

209. *See* KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. KG v. Davis, 175 S.W.3d 379, 390 (Tex. App.—Houston [1st Dist.] 2005, no pet.); DaimlerChrysler Corp. v. Hillhouse, 161 S.W.3d 541, 554 n.5 (Tex. App.—San Antonio 2004), *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.).

210. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 143–44 (Tex. 2004) (stating party waived objection to qualification where pretrial motion only addressed reliability); Cass v. Stephens, 156 S.W.3d 38, 63 (Tex. App.—El Paso 2004, pet. denied).

211. *See, e.g.*, Harris Cnty. Flood Control Dist. v. Roberts, 252 S.W.3d 667, 673 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding party waived objections by failing to get ruling on pretrial motion); Hirschfeld Steel Co. v. Kellogg Brown & Root, Inc., 201 S.W.3d 272, 286–87 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *In re* Interest of S.A.P., 169 S.W.3d 685, 691 (Tex. App.—Waco 2005, no pet.) (holding party waived error despite filing pretrial 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 party must have ruling on expert motion in record to preserve error, but did not address implied or implicit ruling concept).

212. *Smoak*, 134 S.W.3d at 890 n.1.

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

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

and obtain a ruling.[215] Like all testimony, an expert's testimony can differ at trial from what was said before trial. A party should re-urge objections at trial, obtain running objections, 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 of objecting to experts is more structured when a trial court sets a pretrial 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 pretrial orders.[216] The purpose of Rule 166 is to simplify and shorten the trial.[217] "When a trial court's pretrial scheduling order changes the deadlines set forth in a procedural rule, the trial court's order prevails."[218] Rule 166 provides that a trial court can set due dates for the disclosure of experts, but does not expressly mention setting deadlines to file objections to expert evidence.[219] It does state that a trial court can set deadlines for "such 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."[220] Moreover, trial courts can enter serious, suit-ending sanctions for the failure to comply with a scheduling order.[221]

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 pretrial order. In *Daniels v. Yancey*, the court addressed an argument

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215. *See, e.g.*, Royce Homes, L.P. v. Neel, No. 10-03-00127-CV, 2005 Tex. App. LEXIS 1514, at *2–3 (Tex. App.—Waco Feb. 23, 2005, pet. denied) (mem. op.) (requiring parties to make objections to expert testimony at trial after ending pretrial hearing on expert qualifications without ruling); *Cass*, 156 S.W.3d at 63 (holding objection to expert evidence waived if same evidence is offered without objection elsewhere in trial); Soliz v. Cofer, No. 03-01-00246-CV, 2002 Tex. App. LEXIS 3069, at *23–24 (Tex. App.—Austin May 2, 2002, pet. denied) (not designated for publication) (holding error not preserved where no objection at trial and no ruling on objection before 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).

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

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

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

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

220. *Id.*

221. *See* Koslow's v. Mackie, 796 S.W.2d 700, 704 (Tex. 1990) (affirming trial court's striking of pleadings due to failure to comply with Rule 166).

that a party waived his expert objections by not filing them within the time required by the pretrial order.[222] After the court entered the pretrial order, the trial date was moved by agreement.[223] The defendant filed an expert challenge, which the trial court granted, after the deadline that was in the original scheduling order.[224] On appeal, the plaintiff argued that the challenge was waived.[225] 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."[226] 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 pretrial 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 pretrial 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 could 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.[227] Until this issue is decided, a party should file challenges to experts in conformity with any requirements contained in a pretrial 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.[228]

222. 175 S.W.3d 889, 891 (Tex. App.—Texarkana 2005, no pet.).
223. *See id.* at 893.
224. *See id.* at 892–93.
225. *See id.* at 893.
226. *Id.*
227. Judge Harvey Brown, *Procedural Issues Under* Daubert (pt. 2), 36 HOUS. L. REV. 1133, 1142–44 (1999).
228. *See* Trevino v. Trevino, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.) (holding trial court implicitly modified scheduling order by granting summary judgment that was filed after a dispositive motion deadline).

4. *Motion in Limine Versus Motion to Exclude Expert Testimony*

A party can seek to exclude expert evidence before trial via motion to strike or exclude expert testimony or by filing a motion in limine. However, these two motions are substantively different and affect preservation of error differently. In Texas state court a party will not preserve error regarding the admission of expert testimony when the only objection to that testimony is raised by a motion in limine.[229] 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.[230] Specifically:

> 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.[231]

The motion in limine does not preserve error as to any issue raised therein.[232]

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.[233] 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. 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

229. 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) (ruling objection solely by motion in limine was not sufficient to preserve error).

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

231. Fort Worth Hotel Ltd. P'ship v. Enserch Corp., 977 S.W.2d 746, 757 (Tex. App.—Fort Worth 1998, no pet.).

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

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

(3) obtain a ruling on the offer.[234] For example, in *Owens v. Perez ex rel. San Juana Morin*, a party waived any error in the exclusion of expert testimony after a trial court had granted a motion in limine on the evidence by failing to approach during trial and offering the evidence, securing a ruling, and then making an offer of proof.[235]

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.[236]

The court in *Brookshire Bros. 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.[237] The court of appeals looked beyond the name of the motion and solely looked to the relief requested in the motion.

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 pretrial motion to strike that will preserve error regardless of its title.

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234. *See* Johnson v. Garza, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied) (per curiam); Tempo Tamers, Inc. v. Crow-Hous. Four, Ltd., 715 S.W.2d 658, 662–63 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

235. 158 S.W.3d 96, 108 (Tex. App.—Corpus Christi 2005, no pet.); *see also* Acadian Geophysical Servs., Inc. v. Cameron, 119 S.W.3d 290, 300 (Tex. App.—Waco 2003, no pet.).

236. 20 S.W.3d at 203–04 (citations omitted).

237. 176 S.W.3d 30, 35 n.3 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

However, even if the motion is sufficient to be a motion to strike or 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.

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 does have 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.[238] A clear objection at the beginning of the expert's testimony does preserve error. For example, in *Guadalupe-Blanco River Authority v. Kraft*, the Texas Supreme Court held that an objection made when an expert witness begins his testimony was timely.[239] Further, an objection in the middle of the expert's testimony, before the objectionable matter is offered, will be sufficient to preserve error.[240]

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

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

239. Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002). 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. (alteration in original).

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

> or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.[241]

However, in civil cases the trial court has discretion as to whether to allow a voir dire examination.[242] 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 underlying facts and data.[243] However, trial courts are usually given great deference in the presentation, order, and timing of evidence, and a trial court will likely not reversibly err in allowing or disallowing any particular questions in a voir dire examination.[244] 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.[245]

Further, depending on the facts of the case, an objection at some later point in the testimony may still preserver error. For example, in *Kerr-McGee Corp. v. Helton*, the Texas 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.[246]

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241. *In re* Zamora, No. 09-06-504-CV, 2007 Tex. App. LEXIS 5852, at *10–11 (Tex. App.—Beaumont July 26, 2007, orig. proceeding) (mem. op.) (alteration in original) (quoting TEX. R. EVID. 705(b)).

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

243. *Id.*

244. *See* Green v. Gemini Exploration Corp., No 03-02-00334-CV, 2003 Tex. App. LEXIS 3703, at *29–30 & n.13 (Tex. App.—Austin May 1, 2003, pet. denied) (mem. op.).

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

246. *Id.* (citations omitted).

Furthermore, the Texas Supreme 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 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.[247]

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. Moreover, in *Iracheta*, the court seemed to hold that a party must only object after the grounds become "fully apparent." However, a cautious attorney should still raise an objection to an expert before the end of cross because the court has not held that a party can wait until after cross to raise an objection for the first time where the grounds for an objection are reasonably apparent or fully apparent before the end of cross-examination.

Parties have waived an objection to expert testimony by failing to properly object to the proffered expert testimony.[248] 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

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

248. *See* Old Republic Ins. Co. v. Weeks, No. 13-07-00451-CV, 2009 Tex. App. LEXIS 4139, at *14 (Tex. App.—Corpus Christi June 11, 2009, pet. denied) (mem. op.) (holding party waived objection to qualification of expert by only objecting to reliability); Hartis v. Century Furniture Indus., Inc., 230 S.W.3d 723, 736 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (admitting undesignated testimony was not reversible error where it was cumulative with other unobjected to testimony); N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 130 (Tex. App.—Beaumont 2001, pet. denied) (failing to object to expert's testimony waived party's objection to computer animation summarizing expert's testimony); Energen Res. MAQ, Inc. v. Dalbosco, 23 S.W.3d 551, 557 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); Weidner v. Sanchez, 14 S.W.3d 353, 366 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

expert's testimony is too late and will result in the waiver of the objections.[249]

Moreover, a party should raise all relevant grounds for objection at trial because it will waive grounds raised on appeal that are inconsistent with the ground raised at trial.[250] "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 court's discretion as gatekeeper under *Havner*."[251] The Texas Supreme Court held that a party waived an objection to the expert's qualifications by only challenging the expert's reliability.[252]

Although a simple "objection" will not suffice, there are no magic words that need to be said to preserve any particular objection.[253] 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."[254] 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 pretrial motion.[255] Moreover, in *SeaRiver Maritime, Inc. v. Pike*, a party preserved error on expert objections by incorporating its pretrial motion to exclude the expert.[256] A prudent party, however,

249. 170 S.W.3d 871, 875 (Tex. App.—Texarkana 2005, no pet.). *But cf. Weeks*, 2009 Tex. App. LEXIS 4139, at *14 (implying that objection to reliability of plaintiff's expert was sufficient when made at the close of the plaintiff's case).

250. *See, e.g., In re* Interest of A.M., No. 13-09-00276-CV, 2009 Tex. App. LEXIS 8528, at *17 n.3 (Tex. App.—Corpus Christi Nov. 5, 2009, no pet.) (mem. op.) (holding party waived objection to doctor's qualification by only objecting to authentication and hearsay of medical records); Page v. State Farm Lloyds, 259 S.W.3d 257, 266 (Tex. App.—Waco 2008) (objecting to opinions as conclusory did not preserve objection that opinions were not supported by facts), *aff'd in part, rev'd in part on other grounds*, 315 S.W.3d 525 (Tex. 2010); Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 126–27 (Tex. App.—Texarkana 2008) (objecting to opinions as conclusory did not preserve objection to methodology), *rev'd on other grounds*, 313 S.W.3d 837 (Tex. 2010) (per curiam).

251. 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).

252. *See* Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 143–44 (Tex. 2004).

253. *See* S.E.A. Leasing, Inc. v. Steele, No. 01-05-00189-CV, 2007 Tex. App. LEXIS 1337, at *12 (Tex. App.—Houston [1st Dist.] Feb. 22, 2007, pet. denied) (mem. op.).

254. 292 S.W.3d 22, 30 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

255. 149 S.W.3d 213, 237 n.18 (Tex. App.—Fort Worth 2004, pet. denied).

256. No. 13-05-0033-CV, 2006 Tex. App. LEXIS 4905, at *8 (Tex. App.—Corpus Christi June 18, 2006, pet. denied) (mem. op.).

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. Courts have 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.[257] Moreover, if the evidence is merely cumulative of other testimony, any error in its admission may be harmless and not reversible.[258] Accordingly, a party should be careful to raise appropriate objections to all similar evidence.

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 though it had obtained a pretrial 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 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 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.[259]

If the court sustains an objection and refuses to allow an expert to testify, the party who offered the testimony must ensure that the

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257. *See* Davis v. Fisk Elec. Co., 187 S.W.3d 570, 587–88 (Tex. App.—Houston [14th Dist.] 2006), *rev'd on other grounds*, 268 S.W.3d 508 (Tex. 2008); Duperier v. Tex. State Bank, 28 S.W.3d 740, 755–56 (Tex. App.—Corpus Christi 2000, pet. dism'd by agr.).

258. *See* Peek v. Rudik, No. 11-06-00045-CV, 2008 Tex. App. LEXIS 1527, at *18 (Tex. App.—Eastland Feb. 28, 2008, no pet.) (mem. op.).

259. *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 *7–8.

record reflects the substance of the testimony.[260] This can be done by an offer of proof. To show harm, the party must show that the testimony is admissible, controlling on a material issue, and is not cumulative.[261] The offer must be specific enough to enable the reviewing court to determine the admissibility of the disputed evidence.[262] Simply offering an entire deposition transcript may not be sufficient to preserve error.[263] As one court held: "Because the substance of [the expert's] testimony was not 'apparent from the context' . . . we have no means to assess the harm, if any, arising from excluding that testimony."[264] Moreover, the Texas Supreme Court has stated that the evidence must be understandable:

> [T]he burden of presenting understandable evidence that will persuade the trial court is on the presenting party. When an expert's "processes" or "methodologies" are obscured or concealed by testimony that is excessively internally contradictory, non-responsive or evasive, a trial court will not have abused its discretion in determining that the expert's testimony is not admissible.[265]

A party should be careful to make the offer of proof before the trial court rules on the admissibility of the expert. In *Mack Trucks, Inc. v. Tamez*, the Texas Supreme Court held that a trial court did not abuse its discretion in excluding an expert after a *Robinson* hearing.[266]

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260. *See* U.S. Bank Nat'l Ass'n v. Stanley, 297 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2009, no pet.); Fletcher Aviation, Inc. v. Booher, No. 14-04-00712-CV, 2005 Tex. App. LEXIS 4048, at *5 (Tex. App.—Houston [14th Dist.] May 26, 2005, no pet.) (mem. op.) (per curiam) (holding party waived exclusion of expert evidence where the record did not indicate what the excluded evidence would have been); Ulogo v. Villanueva, 177 S.W.3d 496, 501–02 (Tex. App.—Houston [1st Dist.] 2005, no pet.); De La Garza v. Beckett, No. 13-00-785-CV, 2002 WL 34214278, at *3 (Tex. App.—Corpus Christi Aug. 22, 2002, no pet.) (not designated for publication).

261. *See* Belt v. Comm'n For Lawyer Discipline, 970 S.W.2d 571, 574 (Tex. App.—Dallas 1997, no pet.); *see also* Mentis v. Barnard, 870 S.W.2d 14, 16 (Tex. 1994).

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

263. *See, e.g.*, Carreon v. Nat'l Standard Ins. Co., No. 01-85-0233-CV, 1986 WL 20850, at *5 (Tex. App.—Houston [1st Dist.] July 31, 1986, writ ref'd n.r.e.) (not designated for publication) (holding party waived error by offering entire deposition transcript where only a few isolated issues were relevant to offer). *But see* Hooper v. Chittaluru, 222 S.W.3d 103, 108 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (holding party did preserve error by offering entire deposition transcript where 90% of it was relevant to offer).

264. Fletcher v. Minn. Mining & Mfg. Co., 57 S.W.3d 602, 608 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

265. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 578 (Tex. 2006).

266. *Id.* at 576–77.

The court determined that it could not review evidence offered by the expert in a bill of exceptions filed after the ruling.[267]

IV. OBJECTION TO EXPERT NOT REQUIRED IN SOME INSTANCES

Historically, when evidence is admitted without objection, a party cannot complain on appeal regarding the admission.[268] This principle is equally true for expert testimony.[269] However, since *Maritime Overseas Corp. v. Ellis*, the Texas Supreme Court has held that in certain situations an appellate court may disregard expert evidence as no evidence absent an objection at trial. 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.[270]

The Texas 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

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267. *Id.* at 577–78.

268. *See, e.g.*, TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1(a).

269. *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, 409–10 (Tex. 1998).

270. 136 S.W.3d 227, 231 (Tex. 2004) (alteration in original).

> the evidence even in the absence of any objection to its admissibility.[271]

The court made a distinction "between no evidence challenges to the reliability of expert testimony in which we evaluate the 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."[272] 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.[273] Alternatively, 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.[274]

In *General Motors Corp. v. Iracheta*, the Texas Supreme Court once again reviewed the sufficiency of a plaintiff's expert's testimony where there was no objection to the admission of the evidence, and held that the expert's testimony was conclusory and constituted no evidence to support the jury finding of proximate cause.[275] The court then reiterated this conclusion in *City of Keller v. Wilson*, stating that "incompetent evidence is legally insufficient to support a judgment, even if admitted without objection."[276] It explained: "This exception frequently applies to expert testimony. . . . And if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded."[277] Thus, as described in more detail later in this article, under *City of Keller*, evidence showing that supporting evidence is incompetent cannot be disregarded when conducting a legal-sufficiency review.[278]

The court attempted to better explain the difference between a mere conclusion and an objection to reliability in *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*[279] The court noted that an expert's testimony is conclusory when the expert merely gives

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271. *Id.* at 233.
272. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 910 (Tex. 2004).
273. *Coastal Transp. Co.*, 136 S.W.3d at 233.
274. *Id.* at 233; *see also* Paradigm Oil, Inc. v. Retamco Operating, Inc., 242 S.W.3d 67, 74 n.4 (Tex. App.—San Antonio 2007, pet. denied).
275. 161 S.W.3d 462, 470–72 (Tex. 2005).
276. 168 S.W.3d 802, 812 (Tex. 2005).
277. *Id.* at 812–13.
278. *See id.*
279. *See* 249 S.W.3d 380, 389–90 (Tex. 2008).

an unexplained conclusion or asks the jury to "take my word for it" because of his status as an expert.[280] In *Arkoma*, the court found that an expert's opinions were not conclusory even though the expert's foundational data was not in the record, and it was not entirely clear how the expert had reached his conclusions.[281] The court stated:

> [The expert's] testimony could have been a lot clearer; his references to "up here" and "right there" on slides and posters used at trial often make it hard to tell what he is talking about. But we cannot say on this record that his opinions were unreliable or speculative. Nor were they conclusory as a matter of law; [the expert] did not simply state a conclusion without any explanation, or ask jurors to "take my word for it." It is true that without the foundational data in the appellate record, we cannot confirm that "cash off my runs . . . divided by mcf" yielded the $1.62, $1.41, $1.43, and $1.59 prices he calculated as the low range for damages. But experts are not required to introduce such foundational data at trial unless the opposing party or the court insists.[282]

The court further explained when a party should object to preserve error:

> Texas law requires an objection to expert testimony before or during trial if the objection "requires the court to evaluate the underlying methodology, technique, or foundational data," but no objection is required if the complaint "is restricted to the face of the record," as when the complaint is that an opinion was speculative or conclusory on its face, or assumed facts contrary to those on the face of the record.[283]

In this last statement, the court added that where an expert's presumed facts vary from the facts in the record, an opposing party may complain of this defect without an objection at trial.[284]

In *City of San Antonio v. Pollock*, a case that dealt with benzene exposure due to a city landfill, the court analyzed the sufficiency of expert evidence where there was no objection at trial to the testimony.[285] The plaintiff's experts testified at length about benzene in the landfill but there was a gap between that evidence and the plaintiff's alleged exposure in her home.[286] The court stated: "Bare,

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280. *See id.* at 389.
281. *Id.*
282. *Id.* at 389–90 (footnotes omitted).
283. *Id.* at 388 (footnotes omitted).
284. *See id.*
285. 284 S.W.3d 809, 815–16 (Tex. 2009).
286. *Id.* at 819.

baseless opinions will not support a judgment even if there is no objection to their admission in evidence."[287] Furthermore:

> When a scientific opinion is admitted in evidence without objection, it may be considered probative evidence even if the basis for the opinion is unreliable. But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.[288]

The court analyzed the plaintiff's expert's testimony at length and found there were analytical gaps between the factual basis for the expert's opinions:

> There is no evidence whatever from which one could infer the concentration to which Tracy Pollock was exposed in the ambient air of her home and yard, but at the highest concentration possible, the methane—and consequently the level of benzene—could have been only a fraction of that in the sealed monitoring well. Kraft's opinion that she was chronically exposed to benzene concentrations of 160 ppb has no basis in the record. Indeed, it is directly contradicted by his own data showing such concentrations present only in the well. Kraft's opinion is the kind of naked conclusion that cannot support a judgment.[289]

There was a dissent in *Pollock* that argued that the complaint about the analytical gap was one that required an objection. The dissenting justices explained:

> The City argues that Kraft's opinion is conclusory because he does not explain how the benzene concentration level in the Pollock home can be the same as that in a sealed testing well. Although Kraft's opinions were predicated on various reports and an EPA landfill gas emissions model, the City maintains that his testimony contains a fatal "analytical gap" because he failed to account for atmospheric conditions. This analytical gap, the City argues, renders Kraft's opinion conclusory.
>
> The complaint, however, goes to Kraft's methodology or technique in evaluating the data because he was comparing benzene concentrations not only at different locations but also at different points in time. . . .
>
> . . . .

287. *Id.* at 816.
288. *Id.* at 818.
289. *Id.* at 819.

> . . . [T]he Court assumes the existence of an analytical gap that may have existed, but also might have been explained had the City made an appropriate objection.
>
> . . . .
>
> The opinions and testimony of the engineer and doctor here are far removed from the "bare conclusions" we rejected as conclusory in *Coastal*. . . .
>
> The City's present complaints about analytical gaps is nothing more than an unpreserved reliability challenge. Analytical gaps are not complaints about naked opinions, lacking any basis in the record, but rather are assertions that specific errors or omissions in an expert's analysis render his or her opinion unreliable. . . . The Court's opinion today unfortunately blurs the distinction between expert testimony that purports to have a basis in science (unreliable expert testimony) and expert testimony that lacks any apparent support apart from the expert's claim to superior knowledge (conclusory expert testimony).[290]

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.[291] Under the facts of other cases, other courts have held that expert testimony was not so conclusory as to be no evidence.[292]

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290. *Id.* at 825–26, 828 (Medina & O'Neill, JJ., dissenting).

291. *See, e.g.*, Paradigm Oil, Inc. v. Retamco Operating, Inc., 242 S.W.3d 67, 74–75 (Tex. App.—San Antonio 2007, pet. denied); Price v. Divita, 224 S.W.3d 331, 337 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); Tex. Dep't of Transp. v. Martinez, No. 04-04-00867-CV, 2006 WL 1406571, at *7 (Tex. App.—San Antonio May 24, 2006, pet. denied) (mem. op.); Arredondo v. Rodriguez, 198 S.W.3d 236, 240 & n.2 (Tex. App.—San Antonio 2006, no pet.); Taylor v. FFE Transp. Servs., Inc., No. 14-03-01430-CV, 2005 WL 725676, at *3 (Tex. App.—Houston [14th Dist.] Mar. 31, 2005, no pet.) (mem. op.); W. Atlas Int'l, Inc. v. Randolph, No. 13-02-00244-CV, 2005 WL 673483, at *3 (Tex. App.—Corpus Christi Mar. 24, 2005, no pet.) (mem. op.); Reinicke v. Aeroground, Inc., 167 S.W.3d 385, 390–91 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); El Dorado Motors, Inc. v. Koch, 168 S.W.3d 360, 366–68 (Tex. App.—Dallas 2005, no pet.).

292. *See, e.g.*, Towers of Town Lake Condo. Ass'n v. Rouhani, 296 S.W.3d 290, 298 (Tex. App.—Austin 2009, pet. denied); Gonzalez v. Salinas, No. 04-06-00266-CV, 2007 WL 2042758, at *3 (Tex. App.—San Antonio July 18, 2007, no pet.) (mem. op.); Durham Transp. Co. v. Beettner, 201 S.W.3d 859, 868 n.5 (Tex. App.—Waco 2006, pet. denied); Dupont Emps. Recreation Ass'n v. A.V.A. Servs., Inc., No. 01-04-00053-CV, 2005 WL 1118043, at *6 (Tex. App.—Houston [1st Dist.] May 12, 2005, no pet.) (mem. op.); United Servs. Auto. Ass'n v. Croft, 175 S.W.3d 457, 463–64, 466 (Tex. App.—Dallas 2005, no pet.); Gabriel v. Lovewell, 164 S.W.3d 835, 846 (Tex. App.—Texarkana 2005, no pet.); Pettit v.

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.[293] 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, or (4) in a motion for judgment notwithstanding the evidence.[294] Further, a party must preserve a factual sufficiency challenge by alleging it in a motion for new trial.[295] 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.[296]

V. EXPERTS IN SUMMARY JUDGMENT PROCEDURE

In most cases, one party will file a summary judgment motion on one or more of its opponent's claims or defenses. This often requires either the summary judgment movant or nonmovant to file expert evidence.

A. Expert Evidence is Appropriate Summary Judgment Evidence

In the context of summary judgment proceedings, there is a common argument that retained experts are, per se, biased and interested witnesses, and that their testimony should do no more than merely create a fact question. Put in context, before the 1978 amendments to Rule 166a, no summary judgment movant could file a summary judgment motion based on expert testimony.[297] Uncontroverted interested party or expert testimony did no more

Dowell, No. 10-01-00420-CV, 2005 WL 1907101, at *3 (Tex. App.—Waco Aug. 10, 2005) *rev'd on other grounds sub nom.* Providence Health Ctr. v. Dowell, 262 S.W.3d 324 (Tex 2008); Welch v. McLean, 191 S.W.3d 147, 159 (Tex. App.—Fort Worth 2005, no pet.) Geoscience Eng'g & Testing, Inc. v. Allen, No. 01-03-00402-CV, 2004 WL 2475280, at * (Tex. App.—Houston [1st Dist.] Nov. 4, 2004, pet. denied) (mem. op.).

293. *See* TEX. R. APP. P. 33.1(d).

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

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

296. *See, e.g.*, S.E.A. Leasing, Inc. v. Steele, No. 01-05-00189-CV, 2007 Tex. App LEXIS 1337, at *11–16 (Tex. App.—Houston [1st Dist.] Feb. 22, 2007, pet. denied) (mem op.); City of Dallas v. Redbird Dev. Corp., 143 S.W.3d 375, 385 (Tex. App.—Dallas 2004 no pet.).

297. *See* Duncan v. Horning, 587 S.W.2d 471, 473 (Tex. Civ. App.—Dallas 1979, nc writ).

than create a fact issue and did not prove an issue as a matter of law.[298] In 1978, Rule 166a(c) was amended to allow a motion to be supported by interested witnesses and expert testimony under certain circumstances.[299] Rule 166a(c) now provides that when a party files a motion for summary judgment, the motion may be supported by uncontroverted testimonial evidence of an interested witness or of an expert witness, if the evidence is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[300] Accordingly, a summary judgment movant may attach expert evidence if it meets the requirements set forth above. If the expert testimony does not meet those requirements, the nonmovant should object to the expert as an interested witness. Moreover, if a movant attaches evidence that is solely expert in nature, and it meets the requirements set forth above, that evidence may only be controverted by testimony from another expert.[301]

But rule 166a(c)'s requirement that the expert's testimony be clear, consistent and subject to evaluation should not be placed on the summary judgment nonmovant. Rule 166a(f) provides that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[302] These are different standards. A nonmovant merely has to file evidence to create a fact issue, not prove a proposition as a matter of law.[303] The nonmovant's controverting affidavit is adequate if it presents some probative evidence of the fact at issue.[304] So long as the expert's conclusions are based on facts reasonably relied upon by

298. *See id.*

299. *Id.*

300. TEX. R. CIV. P. 166a(c).

301. *See* Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam) ("Lay testimony is insufficient to refute an expert's testimony."); Adair v. Veritas DGC Land, Inc., No. 14-06-00254-CV, 2007 WL 2790362, at *6 (Tex. App.—Houston [14th Dist.] Sept. 27, 2007, pet. denied) (mem. op.).

302. TEX. R. CIV. P. 166a(f).

303. *See* Trapnell v. John Hogan Interests, Inc., 809 S.W.2d 606, 610 (Tex. App.—Corpus Christi 1991, writ denied); *see also* Pena v. Neal, Inc., 901 S.W.2d 663, 668 (Tex. App.—San Antonio 1995, writ denied) ("Dr. Calder's type of affidavit would not be sufficient to entitle a party to judgment as a matter of law; however, in this particular case, it is sufficient to raise a fact issue.").

304. *See Trapnell*, 809 S.W.2d at 611; *see also* Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam); Schronk v. City of Burleson, No. 10-07-00399-CV, 2009 WL 2215081, at *11 (Tex. App.—Waco July 22, 2009, pet. denied) (stating nonmovant's expert affidavit does not have to be free from contradiction).

experts in that field that would be admissible at trial, and the exper raises a fact question on those issues the movant seeks to disprove, ar affidavit will defeat summary judgment.[305] A nonmovant's interested expert testimony is not improper; rather, conflicting expert testimony merely creates a fact question for a jury.[306]

B. *Expert Evidence Must Be Competent and Admissible*

When a party introduces expert evidence in a summary judgmen proceeding, it should be careful that the expert's opinions are fully supported as if it were at trial. In Texas state court, the standard fo admissibility of evidence in a summary judgment proceeding is the same as the standard at trial.[307]

For example, in *United Blood Services v. Longoria*, the Texa Supreme Court required summary judgment proof of an expert' qualifications in support of the response to a motion for summary judgment.[308] "As a practical matter, this holding means that a party relying on an expert [cannot] wait until trial to develop the expert' qualifications."[309] The court rejected the approach of waiting fo trial.[310] Accordingly, a party who is relying on expert testimony i summary judgment proceedings should attempt to have the exper qualified before the summary judgment hearing or submission date.[31 If the expert is excluded, the party can either bolster the expert' qualifications and methodology with additional affidavits or hir another expert who can meet the admissibility standards.[312]

The form of summary judgment expert evidence should either b an affidavit or deposition excerpts. An expert's unsworn report is no

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305. *See Trapnell*, 809 S.W.2d at 611.

306. *See* Gravis v. Physicians & Surgeons Hosp. of Alice, 427 S.W.2d 310, 311–1 (Tex. 1968).

307. *See* United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam Dupuy v. Am. Ecology Envtl. Servs. Corp., No. 12-01-0160-CV, 2002 WL 1021342, at * (Tex. App.—Tyler May 14, 2002, no pet.) (not designated for publication); Bayless v. U.S Rentals, Inc., No. 14-98-00337-CV, 1999 WL 274920, at *3 (Tex. App.—Houston [14t Dist.] May 6, 1999, no pet.) (not designated for publication).

308. 938 S.W.2d at 30.

309. Praytor v. Ford Motor Co., 97 S.W.3d 237, 242 (Tex. App.—Houston [14th Dist 2002, no pet.).

310. *See United Blood Servs.*, 938 S.W.3d at 30. ("[N]o difference obtains between th standards for evidence that would be admissible in a summary judgment proceeding an those applicable at a regular trial.").

311. Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOU L. REV. 1303, 1348 (1998).

312. *Id.*

evidence; an expert report is not an affidavit, sworn testimony, nor competent summary judgment evidence. In *City of San Juan v. Gonzalez*, the court held that an expert's report that was not an affidavit or deposition testimony was not competent summary judgment evidence and must be disregarded.[313] Accordingly, a party should obtain a competent affidavit from its expert wherein the expert swears to all of the facts and opinions in his report.

In preparing the affidavit, the party should be careful to follow all of the rules for competent affidavit testimony. It should contain: (1) a statement that the affiant's statements are based on personal knowledge and are true and correct, (2) facts that show the affiant's personal knowledge, (3) a jurat (not an acknowledgement) that it is sworn testimony, and (4) a notary public's signature and stamp.[314]

The affidavit should also contain: (1) the expert's training, education, and experience; (2) all the facts upon which the expert bases her opinions; (3) a showing that experts in her field reasonably rely on the facts, if the facts are otherwise inadmissible; (4) the methodologies that the expert undertook in reaching her opinions and any factors that would bolster the credibility of those methods; (5) the expert's opinions in specific and concrete terms; and (6) some showing of how the expert's testimony is helpful and relevant. Conclusory statements in an expert's affidavit are insufficient to create a fact question.[315] For example, in *IHS Cedars Treatment Center of Desoto, Texas, Inc. v. Mason*, the Texas Supreme Court held that the affidavit testimony of a medical malpractice plaintiff's expert was insufficient to create a question of fact because the witness simply opined that the alleged negligent conduct of the defendants proximately caused the

313. 22 S.W.3d 69, 72–73 (Tex. App.—Corpus Christi 2000, no writ); *see also* Moron v. Heredia, 133 S.W.3d 668, 671 (Tex. App.—Corpus Christi 2003, no pet.) (holding report not competent summary judgment evidence).

314. *See City of San Juan*, 22 S.W.3d at 72–73.

> While lay witnesses may only testify regarding matters of which they have personal knowledge, expert witnesses may testify about facts or data not personally perceived but "reviewed by, or made known" to them. If the facts or data are of a type upon which experts in the field reasonably rely in forming opinions on the subject, the facts or data need not even be admissible in evidence.

Id. See also In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007) (orig. proceeding) (citations omitted).

315. *See* IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 803 (Tex. 2004); Cammack The Cook, L.L.C. v. Eastburn, 296 S.W.3d 884, 894 (Tex. App.—Texarkana 2009, pet. denied). *But see* Schronk v. City of Burleson, No. 10-07-00399-CV, 2009 WL 2215081, at *9 (Tex. App.—Waco July 22, 2009, pet. denied) (finding expert affidavit was sufficiently detailed).

plaintiff's injuries without any explanation of how their conduct was the cause-in-fact of the injuries.[316] The affidavit provided no explanation or analysis to bolster the conclusion reached by the expert.[317] Finally, the party offering the expert affidavit should timely file it or seek leave of court to consider the late filed evidence.[318]

C. *Preserving Objections to Summary Judgment Expert Evidence*

Historically, in order to preserve error as to a movant's objection to the nonmovant's evidence, the movant must have obtained an express ruling on the objections in a written order.[319] Texas Rule of Appellate Procedure 33.1, however, now provides that a separate, signed order is no longer required to preserve an issue for appellate review.[320] Accordingly, a signed order should no longer be required to preserve an objection to a nonmovant's evidence where the trial court orally ruled on such objection and that ruling appears in the record.[321] Therefore, a party should request that the reporter's record be prepared and sent to the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor. However, a careful practitioner should still have the trial

316. *See* 143 S.W.3d at 803.

317. *See id.*; *see also* Ramirez v. Mansour, No. 04-06-00536-CV, 2007 Tex. App LEXIS 6035, at *12–16 (Tex. App.—San Antonio Aug. 1, 2007, no pet.) (mem. op.) (affirming trial court's decision to strike expert's testimony that did not prove methodologies or link facts to expert's opinions and trial court's order granting summary judgment without the evidence); Abraham v. Union Pac. R.R., Co., 233 S.W.3d 13, 22–24 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding trial court properly granted summary judgment because the affidavit of plaintiffs' expert was unreliable as he produced no scientific data showing that the nature and extent of plaintiffs' chemical exposure was similar to exposure necessary to promote disease development); Jacob v. Int'l Cellulose Corp., No. 03-06-00210-CV, 2007 Tex. App. LEXIS 3314, at *17–23 (Tex. App.—Austin Apr. 27, 2007, no pet.) (mem. op.) (affirming trial court's striking of expert testimony and affidavit because they were too conclusory and did not have sufficient facts to support opinions); Juarez v. Elizondo, No. 04-06-00433-CV, 2007 Tex. App. LEXIS 2133, at *10–12 (Tex. App.—San Antonio Mar. 21, 2007, pet. denied) (mem. op.) (affirming summary judgment where expert's opinions were conclusory and not supported by facts).

318. *See* Sprowl v. Dooley, No. 05-06-00359-CV, 2007 Tex. App. LEXIS 3499, at *6–7 (Tex. App.—Dallas May 8, 2007, no pet.) (mem. op.) (holding that without leave of court an expert affidavit filed late will not be considered by an appellate court in a summary judgment proceeding).

319. *See* Utils. Pipeline Co. v. Am. Petrofina Mktg., 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).

320. *See* TEX. R. APP. P. 33.1(c).

321. *See* Columbia Rio Grande Reg'l Hosp. v. Stover, 17 S.W.3d 387, 395–96 (Tex App.—Corpus Christi 2000, no pet.) (holding error is preserved if the reporter's record o the summary judgment hearing shows that the trial court announced an oral ruling on th objection).

court reduce all rulings on summary judgment evidence objections to writing as some courts are still citing old authority and requiring written rulings.[322]

Additionally, Rule 33.1(a) states that in order to preserve a complaint for appellate review, the record must show that the trial court either expressly or implicitly ruled on an objection that was sufficiently specific to make the trial court aware of the complaint.[323] There has been great debate in Texas's courts of appeals about whether a court of appeals can imply a ruling on an objection to summary judgment evidence due to the trial court's granting of the motion. Some courts hold that under the facts of the case, an implied ruling can exist in a summary judgment context.[324] Under this standard, in granting a summary judgment motion, a trial court implicitly sustains the movant's objections to evidence that, if considered, would create a fact issue and implicitly denies the nonmovant's objections to evidence that is necessary to support the summary judgment. Either way, the timely raised objections are simply preserved for appellate review. Otherwise, an appellate court infers that the trial court intentionally granted a summary judgment motion when it knew the evidence created a fact issue.

But most courts hold that a court of appeals cannot imply a ruling.[325] For example, the San Antonio Court of Appeals disagreed with implicit rulings and held:

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322. *See* Crocker v. Paulyne's Nursing Home, Inc., 95 S.W.3d 416, 420–21 (Tex. App.—Dallas 2002, no pet.).

323. *See* TEX. R. APP. P. 33.1(a)(1)–(2).

324. *See* Praytor v. Ford Motor Co., 97 S.W.3d 237, 242 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Trusty v. Strayhorn, 87 S.W.3d 756, 760 (Tex. App.—Texarkana 2002, no pet.); Clement v. City of Plano, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.); Dagley v. Haag Eng'g Co., 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston [14th Dist.] 2000, no pet); *Columbia Rio Grande Reg'l Hosp.*, 17 S.W.3d at 395–96; Williams v. Bank One, N.A., 15 S.W.3d 110, 114–15 (Tex. App.—Waco 1999, no pet); Frazier v. Yu, 987 S.W.2d 607, 609–10 (Tex. App.—Fort Worth 1999, pet. denied); Blum v. Julian, 977 S.W.2d 819, 823–24 (Tex. App.—Fort Worth 1998, no pet.).

325. *See* Gellatly v. Unifund CCR Partners, No. 01-07-00552-CV, 2008 Tex. App. LEXIS 5018, at *10 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (mem. op.); Anderson v. Limestone Cnty., No. 10-07-00174, 2008 Tex. App. LEXIS 5041, at *4–5 (Tex. App.—Waco July 2, 2008, pet. denied) (mem. op.); Delfino v. Perry Homes, 223 S.W.3d 32, 34–35 (Tex. App.—Houston [1st Dist.] 2006, no pet.); Hixon v. Tyco Int'l, Ltd., No. 01-04-01109-CV, 2006 Tex. App. LEXIS 9494, at *8–10 (Tex. App.—Houston [1st Dist.] Oct. 31, 2006, no pet.) (mem. op.); Palacio v. AON Props., Inc. 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); Mitchell v. Baylor Univ. Med. Ctr., 109 S.W.3d 838, 842–43 (Tex. App.—Dallas 2003, no pet.); Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P., 114 S.W.3d 48, 51 (Tex. App.—Eastland 2003, no pet.); Wilson v. Thomason Funeral Home, Inc., No. 03-02-00774-CV, 2003 Tex. App. LEXIS 6358, at *12 (Tex. App.—Austin June

> [R]ulings on a motion for summary judgment and objections to summary judgment evidence are not alternatives; nor are they concomitants. Neither implies a ruling—or any particular ruling—on the other. In short, a trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment . . . .[326]

In general, there is great confusion regarding when objections to summary judgment evidence are preserved. Many commentators have noted the conflict among the courts of appeals on this important issue.[327]

It is judicially inefficient for an appellate court to reverse a trial court's summary judgment, which is otherwise correct, because the trial court failed to expressly rule on proper objections to otherwise incompetent evidence. A court of appeals should analyze whether the objection was meritorious and whether the evidence should be considered. Notwithstanding, until the Texas Supreme Court clears this confusion, a cautious party will request express rulings, and submit proposed rulings on summary judgment evidence in either a separate order or the order granting a summary judgment. Further, if

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12, 2003, no. pet.) (mem. op.); Allen *ex rel.* B.A. v. Albin, 97 S.W.3d 655, 663 (Tex. App.—Waco 2002, no pet.); Jones v. Ray Ins. Agency, 59 S.W.3d 739, 752–53 (Tex. App.—Corpus Christi 2001, pet. denied); Ball v. Youngblood, No. 05-00-00691-CV, 2001 Tex. App. LEXIS 5660, at *5 (Tex. App.—Dallas Aug. 21, 2001, no pet.) (not designated for publication); Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 435–36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Well Solutions, Inc. v. Stafford, 32 S.W.3d 313, 316–17 (Tex. App.—San Antonio 2000, no pet.); Hou-Tex., Inc. v. Landmark Graphics, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

326. *Well Solutions, Inc.*, 32 S.W.3d at 316–17.

327. *See, e.g.*, Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 448 (2006) ("There is dispute among the courts of appeals concerning what constitutes an implicit holding, and even if an objection may be preserved under Texas Rule of Civil Procedure 33.1(a)(2)(a) by an implicit ruling."); Omar Kilany & Prescott Smith, *Implied Rulings on Summary Judgment Objections: Preservation of Error and Tex. R. App. P. 33.1(a)(2)(A)*, 15 APP. ADVOC., no.1, Spring 2002, at 4, 7, 9, *available at* http://www.tex-app.org; David F. Johnson, *The No-Evidence Motion for Summary Judgment in Texas*, 52 BAYLOR L. REV. 929, 966–67 (2000); Charles T Frazier, Jr. et al. Celotex *Comes To Texas: No-Evidence Summary Judgments and Other Recent Developments in Summary Judgment Practice*, 32 TEX. TECH L. REV. 111, 131 (2000); *see also* 10 WILLIAM V. DORSANEO III et al., *Texas Litigation Guide* § 145.03[2][a] (2010); 3 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 18.20 (2d ed. Supp. 2010); MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS § 10.2 (Michol O'Connor & Byron P. Davis eds., 2007); Tim Patton, *Selected Unsettled Aspects of Summary Judgment Practice and Procedure*, 1 State Bar of Tex. Prof. Dev. Program, Advanced Civil Trial Course 26, 13.1, at 2–5 (2003).

the trial court still refuses to rule, the party should object to the trial court's failure to rule.[328]

D. *The Discovery Rules Can Preclude an Expert from Providing Evidence in a Summary Judgment Proceeding*

There was a split in the intermediate courts of appeals regarding whether an undesignated expert can provide evidence in a summary judgment proceeding. Most of the appellate courts addressing whether the discovery rules apply in a summary judgment case have applied the revised discovery rules to summary judgments.[329] Other courts had found that the discovery rules do not apply to summary judgment proceedings, and that a trial court cannot strike an undesignated or under designated expert.[330]

In *Chau v. Riddle*, the court of appeals affirmed a trial court's striking of expert evidence.[331] Even though the Texas Supreme Court reversed the court of appeals on a different issue, it noted as follows: "In this Court, Chau challenges the court of appeals' holding that the trial court did not abuse its discretion in enforcing a docket control order or in striking part of Chau's expert testimony. We agree with the court of appeals' resolution of those issues."[332] More recently, in *Fort Brown III Villas Condominium Ass'n v. Gillenwater*, the court held that a trial court did not abuse its discretion in striking an expert where no good cause existed for the untimely designation.[333] Accordingly, if a party intends to rely on expert evidence in a summary judgment proceeding, the party should fully designate the

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328. *See* TEX. R. APP. P. 33.1(a)(2)(B).

329. *See* Thompson v. King, No. 12-06-00059-CV, 2007 Tex. App. LEXIS 2768, at *6 (Tex. App.—Tyler Apr. 11, 2007, pet. denied) (mem. op.); F.W. Indus., Inc. v. McKeehan, 198 S.W.3d 217, 220–21 (Tex. App.—Eastland 2005, no pet.); Cunningham v. Columbia/St. David's Healthcare Sys., L.P., 185 S.W.3d 7, 10–11 (Tex. App.—Austin 2005, no pet.); Villegas v. Tex. Dep't of Transp., 120 S.W.3d 26, 34–35 (Tex. App.—San Antonio 2003, pet. denied); Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 273 (Tex. App.—Austin 2002, pet. denied).

330. *See, e.g.*, Alaniz v. Hoyt, 105 S.W.3d 330, 340 (Tex. App.—Corpus Christi 2003, no pet.), *abrogated by* Fort Brown III Villas Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 882 (Tex. 2009) (per curiam); Johnson v. Fuselier, 83 S.W.3d 892, 897 (Tex. App.—Texarkana 2002, no pet.), *abrogated by* Fort Brown III Villas Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 882 (Tex. 2009) (per curiam).

331. 212 S.W.3d 699, 704–05 (Tex. App.—Houston [1st Dist.] 2006), *rev'd on other grounds*, 254 S.W.3d 453 (Tex. 2008) (per curiam).

332. *Chau*, 254 S.W.3d at 455.

333. 285 S.W.3d at 882; *but cf.* Schronk v. City of Burleson, No. 10-07-00399-CV, 2009 WL 2215081, at *11 (Tex. App.—Waco July 22, 2009, pet. denied) (holding discovery rules regarding experts do not apply to plea to the jurisdiction).

expert according to the Texas Rules of Civil Procedure and according to any scheduling order.

VI. METHODS OF CHALLENGING RULING ON EXPERT OBJECTIONS

Absent an express exception, a party can only appeal a final judgment. Texas Civil Practice and Remedies Code section 51.014 sets forth the most common exceptions to the general rule that interlocutory rulings are not appealable.[334] That provision does not provide for an interlocutory appeal of a ruling on the admission or exclusion of expert evidence. Therefore, generally a party may not appeal a ruling on an objection to an expert until the trial court executes a final judgment.

However, the Texas Civil Practice and Remedies Code also allows for a permissive appeal in Texas.[335] This procedure may allow a party to appeal a traditionally unappealable interlocutory ruling when it involves a controlling issue of law as to which there is a substantial ground for difference of opinion, the immediate appeal may materially advance the resolution of the litigation, and the parties agree.[336] If all conditions are met for its use, the permissive appeal can be used to appeal a ruling on an objection to an expert.

In addition to appeals, an appellate court may review some interlocutory rulings via mandamus proceedings. Historically, appellate courts would deny mandamus petitions based on a complaint about an expert ruling.[337] However, in *In re McAllen Medical Center, Inc.*, the Texas Supreme Court granted mandamus relief to review a trial court's decision to admit expert testimony over an objection to the expert's qualifications.[338] The court stated that mandamus is typically available where "the very act of proceeding to trial – regardless of the outcome – would defeat the substantive right involved."[339] This opinion may make mandamus a viable option for

334. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.
335. *See id.* § 51.014(d).
336. *Id.*
337. *See In re* Osborne, No. 09-09-00405-CV, 2009 Tex. App. LEXIS 7136, at *1–3 (Tex. App.—Beaumont Sept. 4, 2009, orig. proceeding) (mem. op.) (per curiam); *In re* Garlock Sealing Techs. L.L.C., No. 14-06-00467-CV, 2006 WL 2669365, at *1 (Tex. App.—Houston [14th Dist.] Sept. 19, 2006, orig. proceeding) (mem. op.) (per curiam); *In re* Pena, No. 13-05-00316-CV, 2005 WL 1120127, at *1–3 (Tex. App.—Corpus Christi May 12, 2005, orig. proceeding) (mem. op.) (per curiam).
338. 275 S.W.3d 458, 461–62 (Tex. 2008) (orig. proceeding).
339. *Id.* at 465.

challenging expert rulings even though it only expressly dealt with health care liability statutes.

For example, the Fort Worth Court of Appeals issued mandamus relief to a party that had its expert struck for allegedly late disclosure of an expert where the objecting party had sufficient time to conduct discovery.[340] The court held that the plaintiff did not have an adequate remedy at law because the ruling vitiated the plaintiff's ability to present his claim:

> Appellate courts will not intervene to control incidental trial court rulings when an adequate remedy by appeal exists. But a party will not have an adequate remedy by appeal (1) when the appellate court would not be able to cure the trial court's discovery error, (2) when the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error, or (3) when the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record or the trial court, after proper request, refuses to make it part of the record.
>
> With respect to the second scenario, the relator must establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources. When, for example, a trial court imposes discovery sanctions that effectively preclude a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment.
>
> . . . .
>
> . . . On this record, the exclusion of its expert's testimony prevents HOA's ability to fairly try this lawsuit, with foreseeable harm as the result. HOA's claims at trial, unless shown to be meritless by a proper procedural vehicle, will be eviscerated without introduction of expert testimony, and trial rendered no more than an empty exercise. Remedy by appeal in a discovery mandamus is not adequate where a party is required "to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal . . . ."[341]

340. *See In re* Kings Ridge Homeowners Ass'n, 303 S.W.3d 773, 783–84, 786 (Tex. App.—Fort Worth 2009, orig. proceeding).

341. *Id.* at 785–86 (citations omitted).

Accordingly, depending on the facts of the case, mandamus may be a viable alternative in seeking review of a trial court's rulings on expert objections.

VII. 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.

A. Whether Expert Testimony is Necessary

Expert testimony is only required where the matter is beyond the understanding of common laypersons.[342] 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.[343] 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. For example, after a lengthy analysis, one appellate court held that a jury could determine whether a defendant used a backhoe properly without expert evidence.[344]

B. Expert Disclosure—Discovery Rulings

A court of appeals will review a trial court's decision in the area of discovery—expert disclosures—by an abuse of discretion standard.[345] "A trial court abuses its discretion when its ruling is

342. *See* Horak v. Newman, No. 03-05-00170-CV, 2009 Tex. App. LEXIS 5629, at *33 (Tex. App.—Austin July 21, 2009, no pet.) (mem. op.); Huffaker v. Wylie LP Gas, Inc., No. 07-08-0133-CV, 2009 Tex. App. LEXIS 3741, at *9 (Tex. App.—Amarillo May 29, 2009, pet. denied) (mem. op.).

343. *See* FFE Transp. Servs, Inc. v. Fulgham, 154 S.W.3d 84, 89 (Tex. 2004).

344. *See* Jonah Water Special Util. Dist. v. White, No. 03-06-00626-CV, 2009 Tex. App. LEXIS 7072, at *15 (Tex. App.—Austin Aug. 31, 2009, pet. denied) (mem. op.); *see also* Wells Fargo Bank, N.A. v. Crocker, No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791, at *14–15 (Tex. App.—Corpus Christi Dec. 29, 2009, pet. denied) (mem. op.) (holding expert testimony not necessary regarding fiduciary's breach of duty to fully disclose when within common knowledge of jury).

345. *See* Gregorian v. Ewell, No. 02-03-010-CV, 2004 Tex. App. LEXIS 1936, at *3 (Tex. App.—Fort Worth Feb. 26, 2004, pet. denied) (mem. op.); Vingcard A.S. v. Merrimac Hospitality Sys., Inc., 59 S.W.3d 847, 855 (Tex. App.—Fort Worth 2001, pet. denied).

arbitrary, unreasonable or without reference to any guiding rules or legal principles."[346] Under this standard, a trial court's decision on whether an expert has been properly disclosed and whether the expert's testimony should be excluded or limited as a sanction is given great deference.

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.[347] Furthermore, a trial court's rulings concerning the admission or exclusion of summary judgment evidence are reviewed under an abuse of discretion standard.[348] This is consistent with holdings that a trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard.[349] Additionally, the abuse of discretion standard applies to both qualifications and methodologies.[350] Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion.[351] If the appellate court finds that there was evidence to support a finding that the expert was qualified and his opinions were reliable, then the trial court does not abuse its discretion in admitting the testimony.[352] A trial court abuses its discretion in excluding expert testimony if the testimony is relevant to the issues in the case and is based on a reliable foundation.[353]

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

347. *See* Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 578 (Tex. 2006); Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995); Norstrud v. Trinity Universal Ins. Co., 97 S.W.3d 749, 752 (Tex. App.—Fort Worth 2003, no pet.); Martinez v. City of San Antonio, 40 S.W.3d 587, 592 (Tex. App.—San Antonio 2001, pet. denied); Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 287 (Tex. App.—Texarkana 2000, no pet.); *In re* Interest of D.S., 19 S.W.3d 525, 527 (Tex. App.—Fort Worth 2000, no pet.).

348. *See* Sanders v. Shelton, 970 S.W.2d 721, 727 (Tex. App.—Austin 1998, pet. denied).

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

350. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 713–14 (Tex. 1997) (methodologies); Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996) (qualifications).

351. *See* Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 810 (Tex. 2002).

352. *See* Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 38–39 (Tex. 2007).

353. *See* State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 874 (Tex. 2009) (reversing condemnation proceeding where trial court improperly excluded state's appraisal expert who relied on acceptable appraisal methodology).

Because the party sponsoring the expert bears the burden of showing that the expert's testimony is admissible, the burden of presenting understandable evidence that will persuade the trial court is on the presenting party.[354] When an expert's "processes" or "methodologies" are obscured or concealed by testimony that is excessively internally contradictory, nonresponsive or evasive, a trial court will not have abused its discretion in determining that the expert's testimony is not admissible.[355]

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 great weight challenges, and as a matter of law challenges.[356] Depending on 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

a. As a Matter of Law Challenge

When a party challenges the negative finding on an issue that it 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."[357] If there is any evidence of probative force to raise a fact issue on the question, the court of appeals should deny the challenge.[358] A court of appeals should first review the record to see if there is any evidence to support the finding, and, if there is none, then

354. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

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

356. 3 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE, § 44:3 (2d ed. 1998).

357. Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978).

358. *See id.*; *see also* Hunter v. Ford Motor Co., 305 S.W.3d 202, 207–08, 210 (Tex. App.—Waco 2009, no pet.) (holding plaintiff's expert did not prove the defect as a matter of law); Liberty Mut. Ins. Co. v. Burk, 295 S.W.3d 771, 780 (Tex. App.—Fort Worth 2009, no pet.) (holding expert's testimony inconclusive because cross-examination showed expert's testimony was internally inconsistent).

the court reviews the record to see if the issue was proven as a matter of law.[359]

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.

Generally, a fact finder has the right to disregard even uncontradicted testimony from disinterested witnesses—even expert witnesses—unless the issue concerns a subject where the fact finder cannot form a correct opinion based on their own experience and knowledge.[360] As the Texas Supreme Court said in *McGalliard v. Kuhlmann*:

> [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 that of experts.[361]

Moreover, even though uncontradicted by an opposing expert, opinion testimony of expert witnesses is not binding upon the trier of fact if more than one possible conclusion may be drawn from the facts.[362]

However, there are occasions where some courts have held that expert testimony is sufficient to meet the "as a matter of law" standard. The cases have normally revolved around attorney's fees

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359. *See* Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 940 (Tex. 1991).

360. *See* 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).

361. 722 S.W.2d at 697.

362. Gregory v. Tex. Emp'rs. Ins. Ass'n, 530 S.W.2d 105, 107 (Tex. 1975).

issues where a defendant does not present conflicting evidence and does not cross-examine the plaintiff's expert.[363] However, the Texas Supreme Court has recently limited a party's ability to establish attorney's fees as a matter of law. In *Smith v. Patrick W.Y. Tam Trust*, there was dispute over the breach of a lease agreement, and the jury awarded the landlord $65,000 in damages but no attorney's fees.[364] The landlord appealed, claiming that the jury should have awarded it attorney's fees as a matter of law.[365] The court of appeals affirmed the damages award but vacated and rendered on the attorney's fees, awarding $47,438.75 based on records offered by the landlord's attorney.[366] The court reasoned that the records' admission and the attorney's uncontradicted testimony could be taken as true as a matter of law.[367] The tenant appealed to the Texas Supreme Court, and the principal issue was whether $47,438.75 in attorney's fees were proven as a matter of law when there was uncontradicted evidence to support that award.[368] The Texas Supreme Court noted that:

> The reasonableness of attorney's fees is generally an issue for the trier of fact. In *Ragsdale v. Progressive Voters League*, however, we held that a court may award attorney's fees as a matter of law when the testimony on fees "'is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon.'"
>
> . . . .
>
> . . . But *Ragsdale* recognized that its rule would not apply whenever attorney's fees testimony is undisputed:
>
> > [W]e do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed. For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only raise a fact issue to be determined by the trier of fact.

363. *See* Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990) (per curiam) (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 to disprove the same, but did not do so).

364. 296 S.W.3d 545, 546 (Tex. 2009).

365. *See id.* at 546–47.

366. *Id.*

367. *Id.*

368. *Id.*

> We also cautioned that the factfinder had to consider "the amount of money involved." Seven years later, we added a corollary: the factfinder should consider "the amount involved and the results obtained," among other things.[369]

The court then held that the court of appeals erred in awarding the attorney's fees as a matter of law because the jury could have reasonably considered the amount in controversy ($65,000) and the results obtained (one-third of that requested) in awarding less than the whole amount sought:

> The court of appeals awarded the full amount requested, despite the jury's rejection of a substantial portion of the damages sought. Those fees, even though supported by uncontradicted testimony, may not be awarded by a court as a matter of law.
>
> . . . .
>
> . . . Although it could have rationally concluded that, in light of the amount involved and the results obtained, a reasonable fee award was less than the full amount sought, no evidence supported the jury's refusal to award any attorney's fees (as the court of appeals correctly noted). The trial court could have directed the jury to reform its verdict, but the court was not free to set a reasonable fee on its own. Accordingly, the Smiths are entitled to a new trial on attorney's fees.
>
> On retrial, the evidence may support a similar fee award, but that is a matter within the jury's purview. On this record, the Trust is not entitled to its fees as a matter of law.[370]

Therefore, the court found that the evidence only created a fact issue as to the correct amount of fees, and that the court of appeals should have remanded for a new trial on the issue of the correct amount of fees. The *Smith* case is interesting because the Texas Supreme Court has now held that even where the evidence of attorney's fees is uncontroverted (no opposing evidence and no cross-examination), a party may still not be entitled to an award of fees as a matter of law where other factors are present.

b. No-Evidence Issues—Traditional View

When a party challenges the positive finding on a issue that his opponent has the burden of proof on at trial, the party raises a legal insufficiency or no-evidence issue. Historically, when reviewing a no-evidence challenge, a court of appeals should "'view the evidence in a

369. *Id.* at 546–48 (alteration in original) (citations omitted).
370. *Id.* at 548–49 (citations omitted).

light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary.'"[371]

No-evidence points must only be sustained when the record discloses one of the following situations:

> (a) . . . [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.[372]

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.[373]

c. No-Evidence Issues—*City of Keller*'s New Scope of Review

Moreover, the Texas Supreme Court has revisited the scope of review regarding a no-evidence issue. In *City of Keller v. Wilson*, the court engaged in an extensive analysis of legal sufficiency principles.[374] The court found that the standard should remain the same and does not change depending on the motion in which it is asserted.[375] "Accordingly, the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review."[376] That test is:

> [W]hether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.[377]

371. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004) (quoting Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001).

372. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003) (quoting Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

373. Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998).

374. *See* 168 S.W.3d 802, 810–28 (Tex. 2005).

375. *See id.* at 823.

376. *Id.*

377. *Id.* at 827.

This standard shifts the review from a traditional legal sufficiency review to a "reasonable juror" standard.[378] For example, in *Wal-Mart Stores, Inc. v. Spates*, the court set forth the standard of review as: "We review a summary judgment for evidence that would enable reasonable and fair- minded jurors to differ in their conclusions."[379]

Furthermore, in *City of Keller*, the court included a lengthy discussion of the "contrary evidence that cannot be disregarded" by the jury when rendering a verdict or by the appellate court when reviewing that verdict on no-evidence grounds.[380] Accordingly, the court's categories concern not only evidence that jurors must consider but also evidence a reviewing court should not disregard in conducting a legal sufficiency review.

Under *City of Keller*, there are exceptions to the general rule that requires evidence contrary to the nonmovant's position to be disregarded. Some of those exceptions are:

> (1) Contextual evidence—"[T]he lack of supporting evidence may not appear until all the evidence is reviewed in context;"[381]
>
> (2) Competency evidence—"[E]vidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evidence' when contrary evidence shows it to be incompetent;"[382]
>
> (3) Circumstantial equal evidence—"'When the circumstances are equally consistent with either of two facts, neither fact may be inferred.' In such cases, we must 'view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances;'"[383] and
>
> (4) Consciousness evidence—When reviewing consciousness evidence, a no-evidence review must encompass "'all of the surrounding facts, circumstances, and conditions, not just individual elements or facts.'"[384]

Accordingly, a court must review all of the evidence to determine if there is some evidence. Furthermore, a court may not disregard certain types of evidence when a reasonable juror could not do so—the scope of review has been enlarged.

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378. William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233–34 (2005).
379. 186 S.W.3d 566, 568 (Tex. 2006).
380. 168 S.W.3d at 810–18.
381. *Id.* at 811.
382. *Id.* at 812–13.
383. *Id.* at 813–14.
384. *Id.* at 817.

In *Cooper Tire & Rubber Co. v. Mendez*, using the enlarged scope of review, the Texas Supreme Court looked at other evidence to show that the expert in question did not base his opinions on reliable facts:

> Weighing conflicting admissible evidence is of course a matter for the jury, but we may consider the testimony of these opposing experts because "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." "[I]f an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded." Grogan's reliance on a report that undermines his hypothesis is another reason for concluding that his testimony was unreliable.[385]

Most recently, in *Whirlpool Corp.v. Camacho*, the court reaffirmed the expanded scope of review for sufficiency challenges to experts:

> Unlike review of a trial court's ruling as to admissibility of evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict. Further, a no-evidence review encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable.[386]

d. No-Evidence Challenges with Expert Testimony

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.[387] 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."[388]

In determining whether an expert's testimony constitutes some evidence, "an expert's bare opinion will not suffice" and "[t]he

385. 204 S.W.3d 797, 804 (Tex. 2006) (citations omitted) (quoting *City of Keller*, 168 S.W.3d at 813).

386. 298 S.W.3d 631, 638 (Tex. 2009) (citations omitted).

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

388. *Id.*

substance of the testimony must be considered."[389] Further, "[t]he underlying data should be *independently* evaluated in determining if the opinion itself is reliable."[390] The proponent of the evidence bears the burden of demonstrating that the expert's opinion is reliable.[391] Regarding the scope of review, the Texas Supreme Court stated that a reviewing court must look at all the evidence to review the competency of the expert evidence:

> [The exception to the legal sufficiency 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.[392]

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 opinion is no evidence and should be disregarded in a no-evidence review.[393]

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389. *Id.* at 711.
390. *Id.* at 713 (emphasis added).
391. *Id.* at 731 (Gonzalez, J., concurring).
392. City of Keller v. Wilson, 168 S.W.3d 802, 812–13 (Tex. 2005) (footnotes omitted).
393. *See, e.g.*, Gen. Motors Corp. v. Harper, 61 S.W.3d 118, 130 (Tex. App.—Eastland 2001, pet. denied).

The Texas Supreme Court addressed the appropriate standard for a no-evidence review in *Whirlpool Corp. v. Camacho*.[394] The court held that "[u]nlike review of a trial court's ruling as to admissibility of evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict."[395] "Further, a no-evidence review encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable."[396] The court first addressed whether the court of appeals correctly analyzed the expert's opinions under a legal sufficiency standard.[397] Even though the defendant raised a legal sufficiency objection, the court of appeals solely analyzed the case under an abuse of discretion review for the admissibility of the expert evidence.[398] Under that review, the court of appeals only used the analytical-gap test and did not review the *Robinson* factors.[399] The court of appeals then addressed whether the defendant had conclusively disproved the validity of the plaintiffs' expert's opinions.[400] The Texas Supreme Court held that the court of appeals' review was in error:

> We disagree with the Camachos' assertion that the court of appeals effectively performed a proper legal sufficiency review by determining whether Whirlpool conclusively disproved that the fire occurred as Clayton testified it did. Evaluating whether expert testimony has been conclusively disproved by the opposing party is not the same as considering whether the proponent of the testimony satisfied its burden to prove the testimony is relevant and reliable. The proponent must satisfy its burden regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.
>
> Witnesses offered as experts in an area or subject will invariably have experience in that field. If courts merely accept "experience" as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively

394. Whirlpool Corp. v. Camacho, 298 S.W. 3d 631, 638 (Tex. 2009).
395. *Id.*
396. *Id.*
397. *Id.* at 638–40.
398. *Id.* at 637.
399. *Id.*
400. *Id.*

> insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions. We have recognized, and do recognize, that some subjects do not lend themselves to scientific testing and scientific methodology. But given the facts in this case, the analytical gap test was not the only factor that should have been considered. . . . This is not one of the few cases in which appellate review of expert evidence should be limited to either an analysis focused solely on *Robinson*-like factors or solely on an analytical gap test. We agree with Whirlpool that proper appellate legal sufficiency review pursuant to Whirlpool's challenge requires evaluating Clayton's testimony by considering both *Robinson*-type factors and examining for analytical gaps in his testimony.[401]

Turning to the application of the facts to the standards, the court held that the plaintiffs' expert testimony by an electrical engineer amounted to no evidence supporting the jury's verdict.[402]

An 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 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 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.[403]

Though not quoted in this article, the court goes through a long, detailed analysis of the evidence and testimony.[404] 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.

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401. *Id.* at 639–40 (citations omitted).
402. *Id.* at 643.
403. 161 S.W.3d 462, 472 (Tex. 2005).
404. *Id.* at 464–72.

e. Preserving Legal Sufficiency Challenge

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 to a fact question, and (4) in a motion for judgment notwithstanding the verdict.[405] To properly object, a party need only state that there is no evidence of an issue; the party does not need to specify why there is no evidence of the issue.[406] However, a party may not globally object to all issues having no evidence.[407] 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.[408] Both the Texas Supreme Court and the intermediary courts of appeals have jurisdiction to review legal sufficiency issues.[409]

2. 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 Texas 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.[410]

405. *See* Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985).
406. *See* Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd., 249 S.W.3d 380, 387 (Tex. 2008).
407. *See id.*
408. *See* Horrocks v. Tex. Dep't of Transp., 852 S.W.2d 498, 499 (Tex. 1993) (per curiam).
409. *See* TEX. CONST. art. V, § 6(a); TEX. GOV'T CODE ANN., §§ 22.001(a) (West 2004), 22.225 (West Supp. 2010).
410. 953 S.W.2d 706, 712 (Tex. 1997).

This different standard of review was also hinted at by Justices Hecht and Phillips when 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.[411]

Soon after *Havner*, the Texarkana Court of Appeals discussed the apparent difficulty 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.[412] Similarly, the San Antonio Court of Appeals stated: "The question of the admissibility of expert testimony goes hand in hand with this court's analysis under a legal sufficiency challenge."[413] Moreover, that court held that it reviewed de novo expert testimony under a no-evidence review: "Where 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."[414]

If the courts of appeals review expert testimony de novo under a legal sufficiency review, parties will have the ability to argue anew the *Robinson* factors, and the appellate court will not give any deference to the trial court's determination. 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

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411. *See* Mar. Overseas Corp. v. Ellis, 971 S.W.2d 402, 421 (Tex. 1998) (Hecht & Phillips, JJ., dissenting).

412. Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 192 (Tex. App.—Texarkana 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.

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

414. Mo. Pac. R.R. Co. v. Navarro, 90 S.W.3d 747, 750 (Tex. App.—San Antonio 2002, no pet.); *see also* Walker v. Thomasson Lumber Co., 203 S.W.3d 470, 475 (Tex. App.—Houston [14th Dist.] 2006, no pet.); Gen. Motors Corp. v. Burry, 203 S.W.3d 514, 538 (Tex. App.—Fort Worth 2006, pet. denied); Matt Dietz Co. v. Torres, 198 S.W.3d 798, 802 (Tex. App.—San Antonio 2006, pet. denied); Gross v. Burt, 149 S.W.3d 213, 237 (Tex. App.—Fort Worth 2004, pet. denied); Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107, 113 (Tex. App—San Antonio 2004, pet. denied).

be considered de novo.[415] In other words, courts of appeals will review the *Robinson* factors, the underlying facts, and the expert opinions without giving deference to the trial court's express or implied determinations.

3. *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, after considering all the evidence, the court's judgment is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.[416] 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.[417] This review requires the appellant to 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.[418] 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 finder's 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.[419] To preserve a factual sufficiency of the evidence challenge in a jury trial, a party must file a motion for new trial that alleges a factual sufficiency challenge.[420] However, when challenging the amount of damages as excessive, a motion for remittitur can preserve a factual sufficiency challenge.[421] In a nonjury trial, it is not necessary to preserve a factual sufficiency challenge.[422]

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415. *See, e.g.*, Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 470–71 (Tex. 2005).
416. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).
417. *See* Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam).
418. *See id.*
419. M.D. Anderson Hosp. & Tumor Inst. v. Felter, 837 S.W.2d 245, 247 (Tex. App.—Houston [1st Dist.] 1992, no writ).
420. TEX. R. CIV. P. 324(b)(2)–(3); Cecil v. Smith, 804 S.W.2d 509, 510 (Tex. 1991).
421. *See* Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777–78 (Tex. 1989) (per curiam).
422. *See* TEX. R. APP. P. 33.1(d); Avila v. Gonzalez, 974 S.W.2d 237, 248 (Tex. App.—San Antonio 1998, pet. denied).

Only the intermediary courts of appeals have jurisdiction to consider factual sufficiency issues.[423]

4. *Factual Sufficiency Review of Expert Testimony*

Many courts that have reviewed expert testimony under a factual sufficiency review have not reversed under that standard.[424] That is 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. 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. Moreover, "[i]n a battle of competing expert testimony . . . it is the sole prerogative of the jury to determine the weight and credibility of the witnesses."[425] 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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> . . . .
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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

423. *See* TEX. CONST. art. V, § 6(a); TEX. GOV'T CODE ANN. § 22.225 (West Supp. 2010).

424. *See, e.g.*, Quiroz v. Covenant Health Sys., 234 S.W.3d 74, 82–83, 87–89 (Tex. App.—El Paso 2007, pet. denied); Morrell v. Finke, 184 S.W.3d 257, 281–82, 286–90 (Tex. App.—Fort Worth 2005, pet. denied); Welch v. McLean, 191 S.W.3d 147, 159, 161 (Tex. App.—Fort Worth 2005, no pet.); Norstrud v. Trinity Universal Ins. Co., 97 S.W.3d 749, 755–56 (Tex. App.—Fort Worth 2003, no pet.); *see also* Cruz *ex rel.* Cruz v. Paso Del Norte Health Found., 44 S.W.3d 622, 646–47 (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.) (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); 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).

425. Bennett v. Coghlan, No. 01-04-00104-CV, 2007 WL 2332969, at *6 (Tex. App.—Houston [1st Dist.] Aug. 16, 2007, pet. denied) (mem. op.).

> 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.[426]

This is even truer where a party fails to preserve error as to particular challenges to expert testimony.[427]

However, it is possible that an expert's testimony may be sufficient to meet a legal sufficiency review, yet fail on a factual sufficiency issue. Moreover, there are cases where expert testimony is not required. 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. 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.

VIII. 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: admissibility of the evidence versus 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.[428] To show error in excluding proper evidence, an appellant should show: (1) the trial court erred in excluding the evidence, (2) the evidence that was excluded, (3) the evidence was

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

427. *See, e.g.*, *Norstrud*, 97 S.W.3d at 755 (stating absent an objection the proper weight to give expert testimony is for the jury to decide).

428. *See* TEX. R. APP. P. 44.1(a)(1); Reliance Steel & Aluminum Co. v. Sevcik, 267 S.W.3d 867, 871 (Tex. 2008); Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 144 (Tex. 2004).

controlling on a material fact and was not cumulative, and (4) the error probably caused the rendition of an improper judgment.[429] If these standards are met, a party is entitled to a reversal and a remand for a new trial.[430]

However, the Texas Supreme Court has recognized the "impossibility of prescribing a specific test to determine whether a particular error is harmful, and entrust[s] that determination to the sound discretion of the reviewing court."[431] "A reviewing court must evaluate the whole case from voir dire to closing argument, considering the 'state of the evidence, the strength and weakness of the case, and the verdict.'"[432] "[I]t is not necessary for the complaining party to prove that 'but for' the exclusion of evidence, a different judgment would necessarily have resulted."[433] The complaining party must only show "that the exclusion of evidence probably resulted in the rendition of an improper judgment."[434] The erroneous admission of evidence is "likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference" in the judgment.[435] However, "if erroneously admitted . . . evidence was crucial to a key issue, the error [is] likely harmful."[436]

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

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429. *See* TEX. R. APP. P. 44.1(a)(1); Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 617 (Tex. 2000); *see also* Pena v. Edwards Cnty., No. 04-09-00039-CV, 2009 WL 4669300, at *1 (Tex. App.—San Antonio Dec. 9, 2009, no pet.) (mem. op.) ("Error in the admission of testimony is deemed harmless and is waived if the objecting party subsequently permits the same or similar evidence to be introduced without objection.").

430. *See* Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 275 (Tex. 1995); Duer Wagner & Co. v. City of Sweetwater, 112 S.W.3d 628, 631 (Tex. App.—Eastland 2003, no pet.) (holding improper exclusion of expert evidence required remand for new trial); *see also* State v. Bristol Hotel Asset Co., 293 S.W.3d 170, 174–75 (Tex. 2009) (remanding case for new trial when jury heard expert evidence of compensable and non-compensable damages).

431. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 870 (Tex. 2009); McCraw v. Maris, 828 S.W.2d 756, 757–58 (Tex. 1992); Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 821 (Tex. 1980).

432. *Reliance Steel*, 267 S.W.3d at 871 (quoting Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 841 (Tex. 1979)).

433. *McCraw*, 828 S.W.2d at 758.

434. *Id.*

435. *Reliance Steel*, 267 S.W.3d at 873.

436. *Id.*

trial.[437] If an appellate court finds that (1) an expert's testimony should be struck, (2) the testimony was the only evidence to support a required element, and (3) 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.[438]

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."[439] 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."[440] However, courts have not been inclined to grant a new trial in the interest of justice due to the inadequacy of expert testimony.

For example, in *Kerr-McGee*, the Texas 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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> . . . .
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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[] [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

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

438. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 720, 724–30 (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 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, 452, 457 (2000).

439. TEX. R. APP. P. 43.3.

440. TEX. R. APP. P. 60.3.

> 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.
>
> The United States Supreme Court recently observed: "It is implausible to suggest, post-*Daubert*, that parties will initially 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.
>
> 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.[441]

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.

IX. CONCLUSION

There are many, 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

441. Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 258–60 (Tex. 2004) (citations omitted); *see also* Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107, 118 n.3 (Tex. App.—San Antonio 2004, pet. denied).

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

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