MAKING AND DEFENDING A DAUBERT CHALLENGE OF A MENTAL HEALTH OR DRUG EXPERT

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CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2018); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2019)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2019)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2017); Appellate Law (2007-2020)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

Magazines:

A New Day: Same Sex Marriages: Emerging Gender Identity Issues; IN CHAMBERS Fall 2015; Texas Center for the Judiciary, p 10.

Error Preservation for Evidentiary Rulings; THE ADVOCATE Fall 2016; State Bar of Texas, p. 19.

Follow the Money, TEXAS BAR JOURNAL December 2016; pp. 808-809.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise

Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018); Attacking and Defending Trusts in Divorce (2019)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012); Sanctions in Texas Courts: Trial and Appeal (2018)

SBOT's **New Frontiers in Marital Property Law**: Busting Trusts Upon Divorce (2003); Distinguishing Enterprise Goodwill from Personal Goodwill (2006); Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); Distributions from Business Entities: Six Possible Approaches to Characterization (2015);

Texas Center for the Judiciary: Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements (2014); Same-Sex Marriage and Gender Identity Issues (2015); Same-Sex Marriage and Gender Identity Issues (2016); Dividing the Estate Upon Divorce (2017); 20 Rules for Characterizing Marital Property in Texas (2017); Current Issues Related to Child Custody, (2019); Current Issues Relating to Parental Presumptions and Third Party Standing, (2020)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); Selective Fiduciary Issues in Family Law, 10th Annual Fiduciary Litigation Course (2015); Evidence & Experts, SBOT Child Protection Law Section (2019); Rethinking Our Approaches to Determining Divisible Goodwill Upon Divorce, Kentucky Society of CPAs (2020); The Clash of Business Fiduciary Duties With Other Duties (2020); History of the Texas Supreme Court Through Rebellion, Reconstruction, & Restoration (1860-1876) (2021); Texas Supreme Court Chief Justices Calvert, Greenhill, & Pope (2021)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

Making and Defending a *Daubert* Challenge of a Mental Health or Drug Expert

by

Richard R. Orsinger
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I. INTRODUCTION. In this Article, the Texas Rules of Evidence are called "TRE;" the Federal Rules of Evidence are called "FRE." The Texas Rules of Civil Procedure are called "TRCP." The Texas Rules of Appellate Procedure are called "TRAP." The Texas Family Code is called "TFC." A suit affecting the parent-child relationship under the Texas Family Code is called a "SAPCR." The Texas Department of Protective & Regulatory Services is called "DPRS."

II. FACTUAL TESTIMONY, LAY OPINIONS AND EXPERT TESTIMONY. There are three types of testimony a witness can give: factual testimony, lay opinions, or expert testimony and opinions. The U.S Court of Appeals for the Seventh Circuit commented that "[t]he difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter is confined to testifying from personal knowledge." *United States v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996). Actually, this description is a little off, because lay witnesses can also testify to opinions.

Any competent witness, lay or expert, can testify to facts based on personal knowledge. A lay witness can also testify to lay opinions, when they are rationally based on the witness's perception. An expert can testify to expert opinions based on personal knowledge or based on information s/he has reviewed or been made aware of. Another distinction is that, upon objection, a lay witness must establish that his/her testimony is based on personal knowledge before giving the testimony, but an expert can testify to an expert opinion without first disclosing the underlying facts or data. Finally, an expert can testify to opinions based on his or her expertise, which may be given great weight by the factfinder who lacks such expertise.

Rather that distinguishing a lay witness from an expert witness, it is more helpful to distinguish between lay testimony and expert testimony. John F. Sutton, Jr., former Dean of the University of Texas School of Law (who taught the author of this Article Legal Ethics and the Law of Evidence in 1973 and 1974), made the following observations in his 1993 article on the Texas Rules of Evidence, which at the time were identical to the FRE. Dean Sutton highlighted the very point of the preceding paragraph:

> A witness who is qualified as an expert may testify in three different ways: he may testify to his personal knowledge of the facts in issue, in which case he testifies to opinions under Rule 701; he may provide the factfinder with general back-ground information regarding the theory and principles relative to his field of expertise; and he may evaluate specific data and facts in issue in light of his experience in a particular specialized field, in which case he testifies to opinions under Rule 702. A witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 "expert." If his opinion

> rests on firsthand knowledge--that is, if it is rationally based on his own perceptions--then testimony under Rule 701 is also permissible. The greater his experiential capacity, the more likely his opinions will "help" the trier of fact under Rule 701, and the greater the likelihood that his testimony will "assist" the jury under Rule 702. For example, the plaintiff in *Teen-Ed, Inc. v. Kimball International, Inc.*, [620 F.2d 399 (3d Cir. 1980)], offered his tax accountant's testimony regarding lost profits. The trial court, proceeding under the erroneous assumption that only an expert could offer opinion testimony, excluded the evidence because the plaintiff had not designated the accountant as an expert before trial. The Third Circuit reversed, stressing that the proffered opinion was predicated entirely on the witness' firsthand knowledge of Teen-Ed's books. He was thus eligible under Rule 701 to give an opinion on lost profits based upon the inferences drawn from his knowledge of Teen-Ed's books. The court held that the accountant's potential qualifications as an expert did not prevent him from testifying within the narrower confines of Rule 701.
>
> To the extent that the defendant in *Teen-Ed* was able to cross-examine and rebut the accountant's opinion adequately, the decision is sound. In *Teen-Ed*, the fact that the accountant was a participant in the events to which he testified and not an expert hired to testify tends to excuse the trial court's failure to distinguish between lay and expert witnesses. An arbitrary and artificial distinction between lay and expert witnesses should not prompt exclusion of relevant, helpful information from witnesses with adequate experiential qualifications. [Footnotes omitted]

Sutton, John F., Jr., *Article VII: Opinions And Expert Testimony*, 30 HOUS. L. REV. 797, 819-20 (1993).

A. FACTUAL TESTIMONY. A lay witness (non-expert) can testify only to facts based upon personal knowledge. TRE 602, Lack of Personal Knowledge, provides:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Note that a predicate must be laid to show that the witness is testifying based on personal knowledge. Lawyers frequently do not "lay the foundation" of personal knowledge for their witnesses, and many times the opposing attorney fails to object. If the proper predicate is not laid in soliciting testimony, the opposing party should object: "Your Honor I object that there is no showing of personal knowledge." Or the opponent can object and ask the court's permission to take the witness on "voir dire" to verify whether the witness is about to testify based on personal knowledge.

It should be noted that an expert may give factual testimony if relating matters personally observed that do not require expertise.

B. LAY OPINIONS. The rule that a fact witness can testify only based upon personal knowledge does not prohibit the witness from giving opinion testimony. Lay opinion testimony is permissible on two conditions. TRE 701 says:

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception; and
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Subparagraph (a) precludes a lay opinion that is based on hearsay or assumed facts, which distinguishes it from expert opinions under TRE 702. Subparagraph (a) also says that the lay opinion also must be rationally based on perception, suggesting that the trial court must exclude lay opinions that are not rational. Subparagraph (b), which has a counterpart in the expert witness rule TRE 702, requires that the lay opinion be helpful and relevant.

It should be noted that an expert may give a lay opinion under TRE 701, where the opinion is rationally based upon perception (i.e., experienced through one or more of the five senses) and does not involve scientific, technical, or other specialized knowledge that are the exclusive province of TRE 702.

C. EXPERT TESTIMONY. In 1954, Charles T. McCormick, a native of Dallas and professor (and dean) at the University of Texas School of Law, published his HANDBOOK OF THE LAW OF EVIDENCE, which said:

> An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both.

Section 13.

The echo of Professor McCormick's voice can be heard in TRE 702:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The thrust of TRE 702 can be reduced to (i) qualifications and (ii) helpfulness.

1. Expert's Qualifications. Under TRE 702, a person may testify as an expert only if s/he has knowledge, skill, experience, training or education that would help the trier of fact in understanding the evidence or deciding an issue in the case. *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702. *Id*. The decision of whether an expert witness is qualified to testify is within the trial court's discretion, and will be reversed on appeal only if the ruling is an abuse of discretion, meaning that the trial court acted without reference to any guiding rules or principles. *Id*.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Id*. at 153. *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"). However, a general level of knowledge or skill does not suffice. TRE 702 requires that the witness's expertise go to the very matter on which the expert is to give an opinion. *Broders v. Heise*, 924 S.W.2d at 153, citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), *cert. denied*, 503 U.S. 912 (1992). The expert must have knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify the expert to give an opinion that helps the jury. *Broders v. Heise*, 924 S.W.2d at 153. Stated differently, the offering party must demonstrate that the witness possesses "special knowledge as to the very matter on which he proposes to given an opinion." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). *See United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997); Linda Addison, *Recent Developments in Qualifications of Expert Witnesses*, 61 TEX. B.J. 41 (Jan. 1998) [Westlaw cite: 61 TXBJ 41]. In *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2003), the Supreme Court considered the qualifications of an expert who had a Ph.D. in plant physiology, and worked in the field on the physiology of plants, malnutrition, the way the environment affects plants. The Supreme Court held the witness to be qualified, against a challenge that he was not a plant pathologist.

2. Helping the Trier of Fact. TRE 702 requires that the expert's testimony "help the trier of fact to understand the evidence or to determine a fact in issue." When an issue is beyond jurors' common understanding, expert testimony is even required. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("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"). In *Assiter v. State*, 58 S.W.3d 743, 751 (Tex. App.–Amarillo 2000, no pet.), the court wrote:

> Two themes are prevalent within the language of the rule allowing the use of expert testimony. First, the jury must not be qualified to intelligently and to the best possible degree determine the particular issue without benefit of the expert witness's specialized knowledge. Second, the use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror. *See Duckett*, 797 S.W.2d at 914. When the jury is equally competent to form an opinion about

> the ultimate fact issues as is the expert, or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam).

In *Lawson v. Trowbridge*, 153 F.3d 368, 378–80 (7th Cir.1998), the court wrote:

> A trial court "is not compelled to exclude [an] expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir.1996). "All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury." *Williams*, 81 F.3d at 1441 (7th Cir.1996).

D. RELIABLE METHODOLOGY. In *U.S. v. Downing*, 753 F.2d 1224, 1226 (3rd Cir. 1985), the court evaluated the helpfulness of expert testimony regarding human perception and memory in connection with the reliability of eyewitness identifications. The court wrote:

> The district court refused to admit the testimony of a psychologist offered by the defendant, apparently because the court believed that such testimony can never meet the "helpfulness" standard of Fed. R. Evid. 702. We hold that the district court erred. We also hold that the admission of such expert testimony is not automatic but conditional. First, the evidence must survive preliminary scrutiny in the course of an in limine proceeding conducted by the district judge. This threshold inquiry, which we derive from the helpfulness standard of Rule 702, is essentially a balancing test, centering on two factors: (1) the reliability of the scientific principles upon which the expert testimony rests, hence the potential of the testimony to aid the jury in reaching an accurate resolution of a disputed issue; and (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury. Second, admission depends upon the "fit," i.e., upon a specific proffer showing that scientific research has established that particular features of the eyewitness identifications involved may have impaired the accuracy of those identifications.

This Federal Court of Appeals conceived of helpfulness to the jury as consisting of three components: reliability of the expert's underlying principles; the requirement that the scientific research directly address the question in the case; and the idea that the expert testimony should be excluded if it might overwhelm or mislead the jury. Other courts found different ways to articulate the requirements of expert testimony under FRE 702. Finally, the U.S. Supreme Court spoke in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), articulating the standard for admissibility of expert testimony that has come to dominate the discussion. In the Court's Majority Opinion, Justice Blackmun cited *Downing* several times, *Daubert*, at 591 & 594.

1. *Daubert/Kuhmo Tire* Standards of Reliability. In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that the then-existing version of FRE 702[1] overturned earlier case law requiring that expert scientific testimony must be based upon principles that have "general acceptance" in the field to which they belong. *See Frye v.*

[1]FRE 702 was rewritten in 2000 to incorporate *Daubert* relevancy analysis.

U.S., 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for novel scientific expert testimony). In *Daubert*,[2] the Supreme Court held that "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, at 592-93. The Supreme Court gave a non-exclusive list of factors to consider on the admissibility of expert testimony in the scientific realm: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. These standards are oriented toward science-based opinions ("hard" science). Chief Justice Rehnquist, joined by Justice Stevens concurred and dissented. Speaking of Part II–B, the requirement of scientific validity, Chief Justice Rehnquist wrote:

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. ... The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 592-593. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 593. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the "`criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.'" *Ibid*.
>
> I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

In his Concurring and Dissenting Opinion, Chief Justice Rehnquist also expressed concern about the difference between scientific expert opinion, to which scientific validity applied, and technical or other specialized knowledge that did not require proof of scientific validity. *Id*. at 600. One writer called this "the boundary problem." Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 Va. L. Rev. 1933, 1962-1972 (2001).

The Opinion in *Daubert* instructed federal judges to apply reliability standards to experts who rely on scientific principles, without imposing the same requirement on experts who are testifying based upon knowledge or experience. This created the "boundary problem" of distinguishing scientific evidence from non-scientific evidence. The Supreme Court reduced the boundary problem of

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[2] The attorney who represented Jason Daubert in the U.S. Supreme Court wrote that the correct pronunciation is "Dowburt." Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L. J. 867, 867 (1994).

distinguishing between scientific evidence on the one hand, and knowledge and experience on the other hand, in *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 148 (1999). In *Kumho Tire*, the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to determine the expert's reliability. *Id*. at 153. A different kind of boundary problem persists, however, in that some courts and some commentators continue to attempt to apply the *Daubert* factors of testability, peer review, error rate, standards and controls, and general acceptance, to non-scientific expert testimony. Many courts have said that *Daubert* factors apply to "hard science" and not "soft science." The distinction was made in *Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000), where the Court said: "The 'hard' sciences, areas in which precise measurement, calculation, and prediction are generally possible, include mathematics, physical science, earth science, and life science. The 'soft' sciences, in contrast, are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology. *See The New Columbia Encyclopedia* 2450 (1975)." *Id.* at 542, n. 5.

Another issue is at what level of abstraction does the *Daubert* analysis apply? Justice Blackmun wrote: "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, at 594-595 (footnote omitted). This distinction, between principles and methodology (that *are* focus of judicial scrutiny) and the conclusions reached (that are *not* the focus of judicial scrutiny) is not easily implemented, since scientific principles can impact the conclusions that an expert can validly draw from the facts of the case.

It is ironic that FRE 702 "reflects an attempt to liberalize the rules governing the admission of expert testimony." *Weisgram v. Marley Co.*, 1169 F.3d 514, 523 (8th Cir. 1999), *aff'd*, 528 U.S. 440 (2000). The Rule "favors admissibility if the testimony will assist the trier of fact." *Clark v. Heidrick*, 150 F.3d 912, 915 (8th Cir. 1998). Doubt regarding "whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Id*. (citation and internal quotation omitted). Yet in practice *Daubert*'s interpretation of FRE 702, and state courts' interpretations of their state-rule analogues, have greatly increased the number of courtroom battles in which the contestants seek to exclude expert testimony. And this kind of *Daubert* admissibility contest, in civil litigation at any rate, is a "rich man's" game, since it can take thousands of dollars per side to mount or defend against a *Daubert* attack.

In a twist on error rate, in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), an expert was attacked on appeal because a previous prediction he mad+e, about the effect a Texas law requiring abortion facilities to meet the minimum standards for ambulatory surgical centers, proved to be inaccurate. The Court of Appeals ruled that this expert's testimony in the current case was only the "ipse dixit" of the expert. The U.S. Supreme Court reversed, saying that the expert's current "opinion rested upon his participation, along with other university researchers, in research that tracked 'the number of open facilities providing abortion care in the state by ... requesting information from the Texas Department of State Health Services ... [, t]hrough interviews with clinic staff[,] and review of publicly available information.'" Regarding the expert's earlier error in estimating the effect of the law, the Court went on to say: "If every expert who overestimated or

underestimated any figure could not be credited, courts would struggle to find expert assistance. Moreover, making a hypothesis — and then attempting to verify that hypothesis with further studies, as Dr. Grossman did — is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it." *Id.* at 2316-17.

2. *Robinson*/*Gammill* Standards of Reliability. The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable and relevant. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed slightly different factors for the trial court to consider regarding reliability: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. The burden is on the party offering the evidence to establish the reliability underlying such scientific evidence. *Id*. at 557. "[E]ach material part of an expert's theory must be reliable." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009).

In *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997), the Supreme Court expanded the reliability requirements to include the underlying data:

> If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. 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.

In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance (discussed below) requirements of *Robinson* apply to all types of expert testimony, whether or not it is based on science. In *Gammill* a unanimous Supreme Court said:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [FN47]
>
> We agree with the Fifth, Sixth, Ninth, and Eleventh Circuits that Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule 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. [FN48]

Gammill, at 725-26. After noting that the reliability and relevancy criteria listed in *Daubert* may not apply to experts in particular fields, the Texas Supreme Court noted that nonetheless there are reliability criteria of some kind that must be applied:

> [E]ven if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility.

Gammill, at 724:

In *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001), the Court said: "A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be based on a reliable foundation." The Court continued:

> In *Robinson*, we identified six nonexclusive factors to determine whether an expert's testimony is reliable and thus admissible. *Robinson*, ... at 557. But in *Gammill* we recognized that the *Robinson* factors may not apply to certain testimony. *Gammill*, ... at 726. In those instances, there still must be some basis for the opinion offered to show its reliability, and, ultimately, the trial court must determine how to assess reliability. *Gammill*, ... at 726. If an expert relies upon unreliable foundational data, any opinion drawn from that data is likewise unreliable. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Further, an expert's testimony is unreliable even when the underlying data is sound if the expert's methodology is flawed.

In *Gharda USA Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2014), the Supreme Court described admissible expert testimony as involving (i) qualifications, (ii) relevancy, and (ii) reliability. The Court said:

> Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation. *Helena Chem. Co.*, 47 S.W.3d at 499. Expert opinion testimony is relevant when it is "sufficiently tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute." *Robinson*, 923 S.W.2d at 556 (citation omitted). Courts generally determine the reliability of an expert's chosen methodology by applying the *Robinson* factors.

The Court went on to say:

> Reliable expert testimony must be based on a probability standard, rather than on mere possibility. ... Expert testimony is unreliable "if there is too great an analytical gap between the data on which the expert relies and the opinion offered." ... Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in the record, and the expert's ultimate opinion. ... Analytical gaps may include circumstances in

> which the expert unreliably applies otherwise sound principles and methodologies, the expert's opinion is based on assumed facts that vary materially from the facts in the record, or the expert's opinion is based on tests or data that do not support the conclusions reached. (Citations omitted.)

Id. at 349.

3. *Kelly v. State* Standards of Reliability. In *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the Texas Court of Criminal Appeals established a reliability requirement for expert testimony even before the U.S. Supreme Court decided *Daubert*. In *Kelly v. State*, the Court posed the question of "whether [the] testimony will help the trier of fact understand the evidence or determine a fact in issue." The Court went on to say that "the trial court's first task is to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results," because "[u]nreliable ... scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue." *Id*. at 388. *Kelley* articulated seven non-exclusive factors to consider:

> (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person who applied the technique on the occasion in question.

Id.

The Court of Criminal Appeals extended reliability requirements beyond novel science to include all scientific testimony in *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (applying *Kelly*-reliability standards to DWI intoxilyzer).

a. Legislative Enactments. In *Reynolds v. State*, 204 S.W.3d 386, 390-91 (Tex. Crim. App. 2006), the Court of Criminal Appeals recognized that the Texas Legislature had stepped in and provided that certain scientific evidence would be admissible even against a challenge to its reliability. The Court wrote:

> In the context of breath test results, the Legislature has already determined that the underlying science is valid, and that the technique applying it is valid as long as it is administered by individuals certified by, and using methods approved by the rules of, DPS.[26] The fact of certification is sufficient to meet the *Kelly* criteria with respect to the competence of the breath test operator. That the opponent of the evidence can demonstrate that the operator has not retained all of the knowledge that was required of him for certification is a circumstance that goes to the weight, not the admissibility, of the breath test results.

> Harmonizing the Transportation Code and Rule 702, we hold that, when evidence of alcohol concentration as shown by the results of analysis of breath specimens taken at the request or order of a peace officer is offered in the trial of a DWI offense, (1) the underlying scientific theory has been determined by the legislature to be valid; (2) the technique applying the theory has been determined by the legislature to be valid when the specimen was taken and analyzed by individuals who are certified by, and were using methods approved by the rules of, DPS; and (3) the trial court must determine whether the technique was properly applied in accordance with the department's rules, on the occasion in question.
>
> In a *Kelly* hearing, then, at which the results of a breath test are challenged, all the trial court need do to satisfy its "gate-keeping" function is to determine whether the technique was properly applied in accordance with the rules of DPS on the particular occasion in question.

The case of *In re C.G.W. v. B.F.W.*, 675 S.W.2d 323, 328 (Tex. App. -- San Antonio 1984, no writ), the court noted that "[t]he Texas legislature has indicated its approval of blood test evidence by making such evidence conclusive in pretrial proceedings in paternity suits if 'the tests show by clear and convincing evidence that the alleged father is not the father of the child'"). The court in *In Interest of B.M.N.*, 570 S.W.2d 493, 502 (Tex. Civ. App.--Texarkana 1978, no writ), wrote that "[t]he reliability of blood tests as an indicator of the truth has been fully established and we see no reason why the Texas legislature could not give such tests the conclusiveness outlined in [the Family Code]."

Where the Legislature has determined that the scientific principles underlying a test are valid, the only issues that remain are whether the test protocols can be followed and what conclusions can you draw from the test results.

b. Judicial Notice. In the years since *Kelly v. State* was decided, the Court of Criminal Appeals has addressed the question of when the reliability of scientific principles have become established as a matter of law. In *Emerson v. State*, 880 S.W.2d 758, 764 (Tex. Crim. App. 1994), the Court of Criminal Appeals determined the reliability of the HGN (horizontal gaze nystagmus) field sobriety test, which is based on a correlation between alcohol intoxication and eye movement. The Court evaluated (i) theory, (ii) technique, and (iii) application. *Id.* 768-69. The Court said it was "authorized to take judicial notice of any scientific fact which 'is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" It could do so by examining scientific articles "outside the record of the instant case ...." *Id.* The Court observed that "NHTSA has since concluded that the HGN test is the single most effective field sobriety test in determining whether an individual is alcohol-impaired." *Id*. at 766. The Court also noted that the HGN test had been found reliable by courts in Arizona, Iowa, and Ohio. The Court held that the HGN test was sufficiently reliable to be admissible under TRE 702, and also that the technique employed in the test, as designed by the NHTSA, is reliable under TRE 702. *Id.* at 768. However, in determining the proper scope of HGN testimony, the Court rejected the use of the HGN test to quantify the degree of blood alcohol content. *Id* at 768.[3] In *Weatherred v. State*, 15 S.W.3d 540, 542

[3]A later court noted that the question of whether the theory and technique were applied properly must be supported by evidence in the specific case. *McCarthy v. State*, No. 01-12-00240-CR (Tex. App.–Houston [1st Dist.] Oct. 3, 2013, no pet.) (mem.op.).

n. 4 (Tex. Crim. App. 2000), the Court of Criminal Appeals said that "once a particular type of scientific evidence is well established as reliable, a court may take judicial notice of that fact, thereby relieving the proponent of the burden of producing evidence on that question." But the Court said that where the court system has not already determined that a science-based theory or technique is reliable, it will be considered to be novel and require proof of reliability.

In *Hernandez v. State*, 116 S.W.3d 26, 28-29 (Tex. Crim. App. 2003), the Court made this observation about the interplay between general acceptance and judicial notice:

> A party seeking to introduce evidence of a scientific principle need not always present expert testimony, treatises, or other scientific material to satisfy the *Kelly* test. It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert*/*Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings.[4]
>
> Similarly, once some courts have, through a *Daubert*/*Kelly* "gatekeeping" hearing, determined the scientific reliability and validity of a specific methodology to implement or test the particular scientific theory, other courts may take judicial notice of the reliability (or unreliability) of that particular methodology.[5]
>
> Trial courts are not required to reinvent the scientific wheel in every trial. However, some trial court must actually examine and assess the reliability of the particular scientific wheel before other courts may ride along behind. Some court, somewhere, has to conduct an adversarial gatekeeping hearing to determine the reliability of the given scientific theory and its methodology.

See the discussion of judicial notice in Section XI below.

4. Standards of Reliability for Mental Health Experts. In *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994), in rejecting a cause of action against an expert who testified to child abuse in a court case, the Supreme Court said:

> Psychology is an inexact science. There is an inherent risk that someone might be falsely accused of sexually abusing a child; in such cases, injury is almost certain to result. The magnitude of the burden of guarding against the injury is also uncertain. While mental health professionals may be able to conduct tests to determine whether there is indicia of sexual abuse, the quality of information they can acquire is limited. The child is often the main source of the information, and young children can have difficulty communicating abuse of that nature. Thus, while the risk of injury to an accused parent is real, it is only part of the equation. Furthermore, the risk of an erroneous determination of abuse is ameliorated, in part, by the availability of criminal sanctions against a person who knowingly reports false information in a custody proceeding. See TEX. FAM. CODE ANN. § 34.031.

a. The Family Law Section's EXPERT WITNESS MANUAL. *Daubert* was decided in 1993, and *Robinson* in 1995. As the awareness of *Daubert* and *Robinson* began to emanate into Texas family law practice, there was a concern that Texas courts had no established basis for determining when psychological testimony might be admissible in family law cases. Starting in the Fall of 1997, the State Bar of Texas Family Law Section undertook to prepare and publish the Section's EXPERT WITNESS MANUAL, to determine what standards of admissibility should apply to mental health testimony and financial expert testimony in family law cases. For a year, a group of Texas family lawyers met with a group of psychologists from Dallas and Houston, on most alternating Saturdays, at the Cloud Room in the Hobby Airport Terminal Building in Houston. Slowly, and with difficulty, the lawyers learned the social science underpinnings of psychology, and the psychologists learned the ways in which mental health expert testimony might meet the *Daubert-Robinson* reliability requirements. The EXPERT WITNESS MANUAL relating to mental health experts was completed in 1999, and sold widely to Texas family lawyers and judges.

Twenty-seven years after the *Daubert* Opinion was announced, the discussions are quite different from before, but things haven't changed all that much. Like Chief Justice Rehnquist, most lawyers and judges still do not understand falsifiability and rate of error, and psychologists continue to reason from psychological principles that are valid and reliable at a general level to applications in particular cases that are not as robustly based on scientific fact and scientific reasoning. Truth is, there will always be an analytical gap between things you can reliably say about human psychology generally and the constellation of factors at play among the small number of individuals involved in a particular family.

In the unforgettable words of Leo Tolstoy: "Happy families are all alike, every unhappy family is unhappy in its own way." Tolstoy, ANNA KARÉNINA, p. 3 (Tr. Constance Garnett 1901). Good social science can establish a lot of things, but the claim to a scientific underpinning weakens over that "last mile" to your destination: what is best for a particular child in a particular family at a particular time?

b. Federal Decisions. There are many Federal court decisions applying *Daubert* criteria to psychological evidence.

In *U.S. v. Hall*, 93 F. 3d 1337, 1342-43 (7th Circuit 1996), the Court said:

> Social science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply Rule 702 and Daubert. *See*, e.g., C. Robert Showalter, "Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era," 2 Va. J. Soc. Pol'y & L. 211 (1995); David L. Faigman, "The Evidentiary Status of Social Science Under Daubert: Is It 'Scientific,' 'Technical,' or 'Other' Knowledge?," 1 Psychol. Pub. Pol'y & L. 960 (1995). Notwithstanding these difficulties, however, social science testimony is an integral part of many cases, ranging from employment discrimination actions, to family law matters, to criminal proceedings. As such, whether it is hard to do or not, courts must apply the rules of evidence to these experts as faithfully as they can.
>
> Because the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects

> genuine expertise -- a reliable body of genuine specialized knowledge -- and something that is nothing more than fancy phrases for common sense. It is nevertheless true that disorders exist, and the very fact that a layperson will not always be aware of the disorder, its symptoms, or its consequences, means that expert testimony may be particularly important when the facts suggest a person is suffering from a psychological disorder. Suppose, for example, it were relevant for a jury to decide whether a person's use of foul or abusive language was intended to harm another person. Most of the time, the jury would be able to assess the circumstances without the need for expert testimony, since foul language is an unfortunate part of everyday life. In some cases, however, the individual might be suffering from Gilles de la Tourette's syndrome, which is a rare disorder manifested by grimaces, grunts, and in about half of all cases, episodes of the use of foul language. AMA Encyclopedia of Medicine at 487 (1989). See also The Encyclopedia of Mental Health, Ada P. Kahn & Jan Fawcett, eds., at 375-76 (1993). A defendant wishing to explain his behavior by showing that he had Tourette's syndrome would need expert testimony both on the condition itself and his own affliction. In other cases, the question whether a person has voluntarily joined certain activity may be central. If a possible explanation is that the person is suffering from post-traumatic stress disorder, the jury would need expert testimony to allow it to take this possibility into account. *See, e.g.*, *United States v. Winters*, 729 F.2d 602 (9th Cir.1984); Encyclopedia of Mental Health at 300-01.
>
> Even if it is clear that the field in general qualifies for expert testimony, the proffered testimony may or may not be based upon the expert's special skills. In *United States v. Benson*, 941 F.2d 598 (7th Cir.1991), this court made the straightforward point that "[a]n expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his] opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness's expertise) rather than simply an opinion broached by a purported expert." *Id.* at 604. Unless the expertise adds something, the expert at best is offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403....
>
> In the proper circumstances, experts in psychiatry and psychology can meet both these hurdles: real science, and testimony based thereon.

In *U.S. v. Joseph*, 542 F. 3d 13, 21-22 (2nd Circuit 2008), the appellate court considered the admissibility of the testimony of the defendant's psychologist in a prosecution for soliciting sex with a minor over the internet. The trial court excluded the testimony, and the case was reversed on other grounds, but the appellate court commented:

> Dr. Herriot's field of study and experience qualified him to offer relevant testimony. He has conducted a large number of interviews and studied chat-room conversations to understand sexual behavior on the Internet. Social science "research, theories and opinions cannot have the exactness of hard science methodologies," ... and "expert testimony need not be based on statistical analysis in order to be probative," .... "[P]eer review, publication, potential error rate, etc. ... are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." .... In such cases, the place to "quibble with [an expert's] academic

> training" is "on cross-examination" and goes to his "testimony's weight ... not its admissibility." [Citations omitted].

The Court also commented on helpfulness:

> Dr. Herriot's opinions appear to be highly likely to assist the jury "to understand the evidence." Fed.R.Evid. 702. ... Although some jurors may have familiarity with Internet messaging, it is unlikely that the average juror is familiar with the role-playing activity that Dr. Herriot was prepared to explain in the specific context of sexually oriented conversation in cyberspace. Many prospective jurors at Joseph's trial acknowledged that they had never visited a chat-room, and professed no understanding of what occurs there. Obviously a jury would not have to accept Joseph's claim that he planned only to meet "Julie" to learn who she was and that he lacked any intention to engage in sexual conduct with her, but the frequent occurrence of such "de-mask[ing]" of chat-room participants might provide support for his defense.
>
> Numerous courts have upheld the admission of expert testimony to explain conduct not normally familiar to most jurors. *See*, *e.g.*, *United States v. Hayward*, 359 F.3d 631, 635 (3d Cir.2004) (modus operandi of child molesters); *United States v. Alzanki*, 54 F.3d 994, 1005-06 (1st Cir. 1995) (tendency of abuse victims to remain with their abusers); *United States v. Azure*, 801 F.2d 336, 340 (8th Cir.1986) (inability of children to distinguish truth from fantasy). Dr. Herriot's testimony would seem to be similarly relevant.

In *U.S. v. Shamsud-Din*, Case No. 10 CR 927, United States District Court (N.D. Illinois, Eastern Division, January 31, 2012), the trial court considered a motion to exclude the testimony of a medical doctor proffered by the government in a prosecution for sex trafficking of a minor. The defendant attacked the expert's qualifications, reliability of her methodology, and relevance of her testimony. The trial court wrote:

> Defendant contends that Dr. Cooper's work cannot meet the mandates of *Daubert* because she "offers no theory or methodology, much less a theory or methodology that can be tested or peer reviewed by anyone else." (Def.'s Mot. at 13.) Defendant believes that Dr. Cooper's interactions with victims were varied -- "including as a treating physician, an expert witness, as the editor of a text book to which former child prostitutes contributed writings, at conferences, etc." -- and that her interactions cannot constitute "a statistically significant sample of those who have been sex trafficked."
> * * *
> In the present case, Defendant overlooks the nature of Dr. Cooper's academic and professional discipline and how this relates to her expertise. Dr. Cooper's expertise comes from her experience, training and interactions with victims, law enforcement, and others with specialized knowledge of the sex trafficking trade. She does not rely primarily on the hard sciences in support of her expert opinion, nor must she to avoid disqualification under *Daubert*. *See*, *e.g.*, *United States v. Joseph*, 542 F.3d 13, 21 (2d Cir. 2008) (holding that "[s]ocial science research, theories and opinions cannot have the exactness of hard science methodologies and expert testimony need not be based on statistical analysis in order to be probative") (internal citations and quotation marks omitted); *Laatsch*, 359 F.3d at 919

("[T]he *Daubert* framework is a flexible one that must be adapted to the particular circumstances of the case and the type of testimony being proffered[.]"); *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 2001) ("Of course, *Daubert* is a flexible test and no single factor, even testing, is dispositive."); *Lawson v. Trowbridge*, 153 F.3d 368, 375-76 (7th Cir. 1998) (finding no abuse of discretion in admitting expert testimony of police officers that "was not scientific — either in a hard or soft (social science) way — and it was entirely descriptive rather than based on empirical study of any sort").

Dr. Cooper developed her expertise on sex trafficking through her own medical practice and personal interviews with victims, among others, regarding their experiences with the prostitution and sex trafficking trade. She has participated in and reviewed case analyses and reports from national and international law enforcement bodies charged with investigating child sex trafficking and its perpetrators. She has worked with others in the field, including Dr. Richard Estes from the University of Pennsylvania, with whom she co-edited a two volume treatise entitled "Child Sexual Exploitation."

Medical professionals, like Dr. Cooper, working in the social sciences frequently base their opinions on interviews and interactions with victims and others, and Defendant cites no authority that would require Dr. Cooper to have conducted "statistically significant" studies as a prerequisite to offer expert testimony. See *United States v. Anderson*, 560 F.3d 275, 281 (5th Cir. 2009) (finding no abuse of discretion where district court qualified witness as an expert on "typical characteristics of adolescent prostitutes and[] behavior of pimps" based on witness' experience assisting victims of sex crimes); *Trowbridge*, 153 F.3d at 375 (stating that the *Daubert* test of reliability is "more helpful" in evaluating the reliability of empirical and scientific studies, rather than the reliability of descriptive testimony in the field of social science); see also *Kumho Tire Co.*, 526 U.S. at 141 (noting that *Daubert* calls for a "flexible" inquiry).

Accordingly, based on Dr. Cooper's background, experience, and qualifications, including her interactions with numerous victims of sex trafficking and others who have personal knowledge of the trade, the Court rejects Defendant's arguments as to the reliability of, including the sufficiency of the factual basis for, Dr. Cooper's anticipated expert testimony.

c. Texas Appellate Court Decisions. In *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the Court of Criminal Appeals extended the *State v. Kelly*-based requirement of reliability to include opinions from mental health experts, but indicated that the *Kelly* list of factors did not apply. Instead, the Court of Criminal Appeals suggested the following factors be applied to fields of study outside of the hard sciences (such as social science or fields relying on experience and training as opposed to the scientific method): (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Nenno*, at 561.

An early Texas case applied *Daubert* standards to a psychological expert. *See America West Airline Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ) (somewhat unorthodox methods of mental health worker in arriving at DSM-III-R diagnosis did not meet the admissibility requirements of *Robinson*). However, a number of later Texas civil cases have embraced the

reliability standards of *Nenno v. State* and not *Daubert* or *Robinson* when determining the admissibility of expert testimony about human psychology.

In *In re J.B.*, 93 S.W.3d 609, 625 (Tex. App.--Waco 2002, pet. denied), a divided court of appeals reversed a judgment terminating parental rights on the grounds that the psychologist expert who testified to conducting a parental assessment did not meet *Robinson* reliability standards with regard to the testing. The Waco Court of Appeals subsequently adopted the more lenient *Nenno* approach in *In re J.R.*, 501 S.W.3d 738, 747 (Tex. App.--Waco 2016, no pet.): "[A] fair reading of this Court's more recent pronouncement in *S.R.* yields a finding that we apply the *Nenno* factors to evaluate soft-science testimony in civil cases."

In *In re G.B.*, No. 07-01-0210-CV, *4 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.), the trial court was affirmed in letting a licensed professional counselor testify to best interest and the mother's parenting abilities based on "the SASSI, STAXI, the CAP and the Circumplex" tests, which the counselor testified were "widely used and accepted in the field of licensed professional counselors." The appellate court did not address the validity and reliability of these tests for use in a forensic context, as opposed to their use as an aid to counseling.

In *Interest of A.J.L. & C.R.L.*, 136 S.W.3d 293, 301 (Texas App.--Fort Worth 2004, no pet.), the court affirmed the trial court allowing a licensed professional counselor with a bachelor's degree in psychology, and a master's degree in counselor education with an emphasis on play therapy, and who had attended continuing education seminars, and who testified to research on play therapy, to testify that her interactions with the child using puppets in a play-acting scenario convinced her that the child felt that he needed to protect his baby sister and that he had been traumatized at home. The appellate court commented:

> Play therapy uses toys as "therapeutic metaphors" to help children express themselves and their feelings. Iafrate described the types of play therapy that she used. First, she built a safe environment and rapport with the child using the client-centered method. Eventually she switched to the more directive Alderian [sic, Adlerian] method where the therapist is more interactive in helping the child identify important aspects of their environment. She used these techniques in a manner consistent with her training during her fourteen counseling sessions with A.J.L.

Id. at 299. The expert's defense of drawing factual conclusions from play therapy was not scientifically rigorous, and the appellate court's analysis was superficial. A better decision might have resulted if the opponent had used a behavioral scientist (i.e., a licensed psychologist) to explore the reliability and validity studies of this particular methodology, (if any), and particularly the reliability of conclusions drawn using play therapy about whether certain past events or did not occur.

In *Taylor v. Texas Dept of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650 (Tex. App.--Austin 2005, pet. denied), the court said that "some cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors are not appropriate and do not strictly govern in those instances." The court used instead the *Nenno* standards, which reflect the view that in fields other than hard sciences, such as the social sciences, factors like an expert's education, training, and

experience are more appropriate factors in testing reliability than the scientific method. The *Taylor* court ruled that a social study prepared by a social worker was admissible under *Nenno* standards.

The Legislature stepped into the questions of methodology used by psychologists in parent-child litigation by prescribing that a licensed psychologist "may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child unless the licensee has conducted a child custody evaluation." 22 Tex. Admin. Code § 465.18. So the professional standards for a psychologist conducting a child custody evaluation refer to the Family Code provisions regarding child custody evaluations. The Legislature has promulgated reliability standards that must be observed in SAPCRs that do not involve the DPRS. See Section III.B below.

d. Psychology Publications. Co-authors Fradella, Fogarty, and O'Neill, in their article *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPPERDINE L. REV. 403 (2003), addressed the implications of the Supreme Court's invoking in *Daubert* the view of the philosopher of science Karl Popper that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." *Daubert*, *supra* at 593, quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989). Fradella et al. wrote that this was a problem for social sciences in general because "[m]any of the social sciences 'rely predominantly on retrospective observational studies rather than on controlled experimentation, and do not necessarily meet the ... standard of falsifiability.'" Fradella, *supra* at 412, quoting Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMPLE L. REV. 55, 69 (1998). Recognizing that some persons argue that social science evidence should be held to *Daubert* standards, Fradella et al. note that --

> the social sciences have their own standards for assessing validity and reliability. These standards include, but are not limited to (1) replicability, (2) logic, (3) adherence to recognized methodologies, (4) construct validity (i.e., how well data analysis "fits" into preexisting theory), (5) adherence to proper statistical sampling and statistical procedures for data analysis, (6) avoidance of bias, and (7) qualifications of the researcher.

Fradella, *supra* at 412, n. 59, citing several articles. The clear thrust of *Kuhmo Tire*, *Gammill*, and *Nenno* is that in areas of expertise that are not governed by established rules of physics, chemistry, biology, etc., the reliability standards that the profession has created for itself should be a reference point for admissibility.

Authors Dahir, Richardson, Ginsburg, and Gatowski, *Judicial Application of Daubert to Psychological Syndrome and Profile Evidence: A Research Note*, published in 11 PSYCHOLOGY PUBLIC POLICY AND LAW 62 (March 2005) wrote:

> The authors present previously unreported results from a nationwide survey (N=325) of state trial judges (S. I. Gatowski et al., 2001) that was conducted pre-*Kumho*. The authors report how the 1993 *Daubert* guidelines were applied to psychological syndrome and profile evidence, and the impact of the decision on the admissibility of such evidence. They found that judges' views of and experience with psychological testimony varied widely and that most judges neither understood nor applied the more technical *Daubert* guidelines, such as falsifiability and error rate, when assessing psychological evidence. Overall, the findings

> suggest that at that time *Daubert*'s impact on the admissibility of psychological syndrome and profile testimony is negligible and that most judges were more comfortable with pre-*Daubert* standards when this type of testimony is proffered.
>
> <https://www.researchgate.net/profile/Sophia_Gatowski/publication/232493859_Judicial_Application_of_Daubert_to_Psychological_Syndrome_and_Profile_Evidence_A_Research_Note/links/59593ad9458515ea4c62c441/Judicial-Application-of-Daubert-to-Psychological-Syndrome-and-Profile-Evidence-A-Research-Note.pdf?origin=publication_detail>

In preparing this Article, a more recent survey was not located.

e. Failure to Prove Reliability of a Psychiatric Opinion. *Coble v. State*, 330 SW 3d 253, 277-80 (Tex. Crim. App. 2010), is an example of the failure to establish reliability of a psychiatric opinion of future dangerousness in a death penalty case. The Court wrote:

> Here, there is no question that Dr. Coons is a genuine forensic psychiatrist with a lengthy medical career, but the issue under Rule 702 is whether his "future dangerousness" testimony is based upon the scientific principles of forensic psychiatry.
>
> From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area.[61] There is no objective source material in this record to substantiate Dr. Coons's methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the ipse dixit of the witness.[62] Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions,[63] Dr. Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.
>
> Dr. Coons stated that he relies upon a specific set of factors: history of violence,[64] attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own,[65] but are they ones that the forensic psychiatric community accepts as valid?[66] Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time?[67] Some of Dr. Coons's factors have great intuitive appeal to jurors and judges,[68] but are they actually accurate predictors of future behavior? Dr. Coons forthrightly stated that "he does it his way" with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric assessment of appellant after his eighteen years of

> nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.
>
> Based upon the specific problems and omissions cited above, we conclude that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this particular case.[69] We conclude that the trial judge therefore abused his discretion in admitting Dr. Coons's testimony before the jury.

E. RELEVANCE. *Daubert* and *Robinson* contain a relevancy requirement, to be applied to expert evidence. The Texas Supreme Court said *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (Tex.1995):

> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402. (Citing *Daubert*, 509 U.S. at 590).

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case. *See e.g., U. S. v. Bonds*, 12 F.3d 540, 555 (6th Cir.1993) (relevance under *Daubert* requires that there "be a 'fit' between the inquiry in the case and the testimony). Other courts address the same concern in a discussion of "helpfulness."

Federal courts have stated that the burden to demonstrate relevancy of expert opinion is on the proponent of the evidence.

TRE 401 says that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." In *Henley v. State*, 493 S.W.3d 77, 83–84 (Tex. Crim. App. 2016), the Court said "to be relevant, evidence must be material and probative. For evidence to be material, it must be shown to be addressed to the proof of a material proposition, which is 'any fact that is of consequence to the determination of the action.' 'If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.' For evidence to be probative, it 'must tend to make the existence of the fact 'more or less probable than it would be without the evidence.' (Footnotes and citations omitted.) In *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004), the Court said: "To be relevant, '[e]vidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence'"). In *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001), the Court said that "[t]here is no purely legal test to determine whether evidence will tend to prove or disprove a proposition – it is a test of logic and common sense."

F. UNDERLYING DATA. TRE 705 pertains to an expert's underlying data. Pay particular attention to TRE 705(c) establishing a gatekeeper function for the trial judge concerning the facts

or data supporting an expert's opinion.

> RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION
>
> (a) *Stating an Opinion Without Disclosing the Underlying Facts or Data*. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it— without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.
>
> (b) *Voir Dire Examination of an Expert About the Underlying Facts or Data*. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.
>
> (c) *Admissibility of Opinion*. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.
>
> (d) *When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury*. If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

1. Gatekeeping Based on Sufficient Data to Support an Expert's Opinion. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient factual basis for her opinion. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 SW 2d 706, 714 (Tex. 1997), the Supreme Court wrote: "If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." TRE 705(d) establishes a balancing test for underlying facts or data that are inadmissible except to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

2. Hearsay Exceptions Allowing Unsworn Statements. There are a number of exceptions to the hearsay rule that allow unsworn out-of-court statements to come into evidence. These hearsay exceptions are gathered in TRE 803, and include present sense impression; excited utterance; then-existing mental, emotional or physical condition; statements made for medical diagnosis or treatment; business records; public records; and statements in learned treatises. Only two of these exceptions have a reliability standard built-in: both the business record and public record exception allow the opponent to challenge the lack of trustworthiness of the source of information. Should hearsay statements that are not subject to an explicit reliability or trustworthiness condition nonetheless be subjected to *Daubert* reliability analysis?

The subject of the reliability of a child witnesses recollections of prior events is considered in more detail in Section IV below. They are subject to scrutiny, and the Texas Family Code imposes

safeguards to relating out-of-court statements of children in court proceedings. See Section IV below. In *U. S. v. Renville*, 779 F. 2d 430 (8th Cir. 1985), the court addressed when statements made by a suspected child victim met the FRE 803(4) exception to the hearsay rule, as statements made for purposes of medical diagnosis or treatment, or describing medical history, past or present symptoms, etc. the court focused on whether the out-of court statement was "reasonably pertinent" to diagnosis or treatment. The Eighth Circuit Court of Appeals applied a two-part test: "first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Id.* at 436. The court noted, however, that "that a declarant's statements relating the identity of the individual allegedly responsible for his injuries or condition 'would seldom, if ever,' be reasonably pertinent to treatment or diagnosis." *Id.* at 436. The Court made an exception, however, for "[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment." *Id.* at 436. The court concluded: "We therefore believe that statements of identity to a physician by a child sexually abused by a family member are of a type physicians reasonably rely on in composing a diagnosis and course of treatment." *Id.* at 438. Note that meeting an exception to the hearsay rule and meeting a *Daubert* reliability standard are entirely different things. There is no "trustworthiness" component to the medical diagnosis hearsay exception, like there is for business records under TRE 803(6)(E) and public records under TRE 803(8)(B).

It seems odd that reliability standards recognized in the field of psychology regarding the dangers of interviewing children would be ignored when allowing direct reports of a child's statements to be introduced into evidence. See Section IV of this Article. The same can be said for the safeguards regarding admission of unsworn statements of a suspected child victim set out in TFC §§ 104.002 and 104.006. See Section IV below.

G. PROBATIVE VALUE VS. PREJUDICIAL EFFECT. TRE 403 provides:

> Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons
>
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Sometimes otherwise admissible expert testimony should be excluded because it is unfairly prejudicial. However, as noted in *State v. Moran*, 728 P.2d 248, 254 (Ariz. 1986), "just because expert testimony about behavioral characteristics is exceedingly persuasive does not mean it is unfairly prejudicial." The Advisory Committee Notes for the 1973 version of FRE 403 said:

> Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The court in *U. S. v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001) said: "[t]he district court has considerable discretion in performing the Rule 403 balancing test. However, exclusion of evidence

under Rule 403 that is otherwise admissible under the other rules 'is an extraordinary remedy and should be used sparingly,'" citing *U.S. v. Rodriguez*, 192 F.3d 946, 949 (10th Cir. 1999).

III. SPECIFIC ISSUES WITH MENTAL HEALTH EXPERTS. In *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1961), Justice David L. Bazelon, who championed the view that it should be a defense to prosecution that a crime was committed as a result of mental disease or mental defect, not the alternative standard of being the product of an irresistible impulse, wrote that the testimony of psychiatrists and psychologists regarding the defendant's schizophrenia was admissible. The barriers to admissibility he discussed in his Opinion are unfamiliar to us today, and did not focus on reliability of methodology, but the case was a seminal one in allowing mental health experts, particularly psychologists, to testify as experts.

A. LICENSURE. Persons who must be licensed to deliver mental health services in Texas include: medical doctors, psychologists, licensed clinical nurse specialists, licensed professional counselors, licensed chemical dependency counselors, marriage and family therapists, licensed social workers, and licensed sex offender treatment providers. If the propose expert is not licensed in the field s/he proposes to testify in, his/her qualifications may be suspect, and the act of testifying may subject the witness to an investigation or sanction from the licensing board for performing mental health services without a license.

B. LEGISLATIVE REQUIREMENTS FOR CHILD CUSTODY EVALUATIONS. Under TFC ch. 107, subch. D, the court can order a child custody evaluation. TFC § 107.113 requires that the evaluator prepare a report which must be filed with the court and served on the parties. TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence."

1. Qualifications. The Legislature has given us some criteria by which to gauge the qualifications of an expert on child custody. TFC § 107.104, Child Custody Evaluator: Minimum Standards, requires an expert who is to perform a child custody evaluation to have: a master's degree; license as a social worker, professional counselor, marriage and family therapist, psychologist, or board certified MD psychiatrist; 2 years of supervised experience evaluating physical, intellectual, social, and psychological functioning and needs; at least 10 court-ordered child custody evaluations made under the supervision; or a doctoral degree licensed in a human services field with course work and practical experience in child custody evaluations; plus 8 hours of family violence training. Compliance with these standards is mandatory. TFC § 107.105 adds that the evaluator "must demonstrate, if requested, appropriate knowledge and competence in custody evaluation services consistent with the professional models, standards and guidelines." A statutory exception to these minimum standards is allowed for counties with population under 500,000. TFC § 107.106.

The Texas Administrative Code sets out alternative qualifications for a licensed psychologist to conduct a child custody evaluation. Title 22, Tex. Admin. Code § 465.18, says:

> Notwithstanding any other grounds for qualification, the Board has determined that a licensed psychologist is qualified to conduct child custody evaluations if the licensee:
>
> (i) has obtained a minimum of 8 professional development hours directly related to the

performance of child custody evaluations since becoming a licensed psychologist, and is board certified in forensic psychology by the American Board of Professional Psychology (ABPP); or

(ii) has obtained a minimum of 40 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and has conducted at least three child custody evaluations under the supervision of a qualified licensee.

Title 22, Tex. Admin. Code § 465.18.

TFC § 104.008(a) says that "[a] person may not offer an expert opinion or recommendation relating to conservatorship of or possession of or access to a child at issue in a suit unless the person has conducted a child custody evaluation relating to the child under Subchapter D, Chapter 107." TFC § 104.008(c) says: "This section does not apply to a suit in which the Department of Family and Protective Services is a party.' However, the fact that a custody evaluation is not statutorily required, before a witness can make a custody or possession recommendation in a DFPS proceeding, does not mean that the criteria for custody evaluators and custody evaluations have no application. They are perfectly fine criteria for the court to use in performing its gatekeeping function regarding the reliability of an expert's data and methodology. And the exemption for suits in which the DFPS is a party does not supplant the provision in 22 Tex. Admin. Code § 465.18, saying that a licensed psychologist cannot make a recommendation on conservatorship, possession, or access without first conducting a child custody evaluation. See Section XI.C.4 above.

A custody evaluation is not necessarily the same thing as a recommendation that the parent-child relationship be terminated. This raises the question of whether TFC § 107.104 and Administrative Code §465.18 apply to an expert who is recommending that the parent-child relationship be terminated?

The problem with drawing a hard line between a child custody evaluation and a parental termination evaluation is that the distinction can collapse in most situations. Under a strict interpretation, a witness could be qualified to recommend for or against custodial placement with the parents or within the family or with the DFPS, but would not be qualified to recommend permanent termination of the parent-child relationship. However, a recommendation for or against termination inherently involves embracing or rejecting custody arrangements that fall short of permanent termination. A better and more practical approach would be to use the TFC and Administrative Code standards for custody evaluations as a model for termination recommendations, but requiring that the mental health professional have continuing professional education regarding parental termination and alternative arrangements, and have conducted the required number of supervised evaluations of parental termination disputes.

2. Underlying Data and Methodology. TFC § 107.109 sets out the "basic elements" of a child custody evaluation. They include (i) a personal interview with the parties seeking court-ordered relationship with the child; (ii) interviews with the children; (iii) observation of the children with each party; (iv) observation and interview with another child who lives on a full-time basis in the home but is not subject to the suit; (v) information from collateral sources; (vi) criminal history of residents of the household; and (vii) an assessment of the relationship between each child and each party seeking a court-ordered relationship. If any of these basic elements is missing, the evaluator

must disclose what and why, and discuss the effect of its omission. TFC § 107.109(b). The Court can order psychometric testing. TFC § 107.110. The psychology profession has other standards that go beyond TFC § 107.109, and they should be considered along with the statutory requirements.

3. Reporting Requirement. TFC § 107.113 provides that a child custody evaluator who conducts a child custody evaluation shall prepare a report containing the evaluator's findings, opinions, recommendations, and answers to specific questions asked by the court relating to the evaluation. TFC § 107.108(f) requires that the child custody evaluator state the basis for the evaluator's conclusions or recommendations, and the extent to which information obtained limits the reliability and validity of the opinion and the conclusions and recommendations of the evaluator. Court orders appointing the child custody evaluator frequently include specific points to be covered in the report.

C. THERAPIST GIVING FORENSIC RECOMMENDATIONS. There is a generally accepted view that it is improper for a person's therapist to serve as a forensic expert regarding the patient, because of a conflict in loyalties ("dual role"). A therapist must act in the best interest of the patient, but in a SAPCR a forensic expert must put the best interest of the child first. A seminal article on the subject was *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, written by Stuart A. Greenberg of the University of Washington and Professor Daniel W. Shuman, of Southern Methodist University School of law, published in 28 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE (1997) pp. 50-57. (Professor Shuman was a member of the Family Law Council's Expert Witness Manual Committee).

Dual role issues were more recently explored in Sara Gordon, *Crossing the Line: Daubert, Dual Roles, and the Admissibility of Forensic Mental Health Testimony*, 37 CARDOZO L. REV. 1345 (2016), where she wrote:

> Psychiatrists and other mental health professionals often testify as forensic experts in civil commitment and criminal competency proceedings. When an individual clinician assumes both a treatment and a forensic role in the context of a single case, however, that clinician forms a dual relationship with the patient—a practice that creates a conflict of interest and violates professional ethical guidelines. The court, the parties, and the patient are all affected by this conflict and the biased testimony that may result from dual relationships. When providing forensic testimony, the mental health professional's primary duty is to the court, not to the patient, and she has an obligation to give objective and truthful testimony. But this testimony can result in the patient's detention or punishment, a legal outcome that implicates the mental health professional's corresponding obligation to "do no harm" to the patient. Moreover, the conflict of interest created by a dual relationship can affect the objectivity and reliability of forensic testimony.
>
> A dual clinical and forensic relationship with a single patient is contrary to quality patient care, and existing clinical and forensic ethical guidelines strongly discourage the practice. Notwithstanding the mental health community's general consensus about the impropriety of the practice, many courts do not question the mental health professional's ability to provide forensic testimony for a patient with whom she has a simultaneous clinical relationship. Moreover, some state statutes require or encourage clinicians at state-run facilities to engage in these multiple roles. This Article argues that the inherent conflict

> created by these dual roles does not provide a reliable basis for forensic mental health testimony under Federal Rule of Evidence 702 and should not be admitted as reliable expert testimony by courts.

Id. at 1345. The author continued:

> [M]any authors have written in peer-reviewed journals about the impropriety of the practice, and there is a general consensus in the mental health community that clinicians should not engage in dual-role relationships with patients.
> * * *
> If we, therefore, consider forensic mental health testimony under the most applicable *Daubert* factors—general acceptance and peer review—such testimony should be excluded as unreliable under *Daubert*. The psychological and psychiatric literature expresses overwhelming support for minimizing the practice of dual relationships and for exercising caution when relying on information gained as a result of forensic evaluations when a clinician also has a therapeutic relationship with the patient. Moreover, the ethical codes for both professions explicitly warn clinicians against the practice. [Footnotes omitted.]

Id. at 1386. The article is available at:

<https://scholars.law.unlv.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1992&context=facpub> [3-5-2020].

Unfortunately, Professor Gordon didn't define what she meant by a "forensic role" or "forensic testimony." Much more thought needs to be given as to how the "dual role" prohibition applies to factual testimony, lay opinions, and expert testimony.

The American Psychological Association's ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT provides:

> 3.05 Multiple relationships
>
> (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.
>
> A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

The California Association of Marriage and Family Therapists' *Code of Ethics* provides:

> Rule 8.4 DUAL ROLES:
>
> Marriage and family therapists avoid providing both treatment and evaluations for the same clients or treatment units in legal proceedings such as child custody, visitation, dependency, or guardianship proceedings, unless otherwise required by law or initially appointed pursuant to court order.

Additional supporting standards are listed at:

> <https://www.zurinstitute.com/clinical-updates/forensic-dual-relationships> [2-26-2020].

Tex. Admin. Code Rule §465.18(b)(5) governing psychologists provides: "(5) When seeking or receiving court appointment or designation as an expert for a forensic evaluation a licensee specifically avoids accepting appointment or engagement for both evaluation and therapeutic intervention for the same case. A licensee provides services in one but not both capacities in the same case."

As previously discussed, it is more productive to distinguish testimony based on its content and not the identity of the witness testifying. From that perspective, a therapist could potentially (i) testify to facts that were personally observed, or (ii) give lay opinions that are rationally based on personal knowledge and helpful to the jury but do not rely on expertise, or (iii) give expert testimony and give expert opinions that may but are not required to be based on personal knowledge. Which category of testimony is a therapist prohibited from giving? Can a therapist properly testify to her personal observations about a patient's mental health, parenting abilities, or relationship with the child, but just not make a custody recommendation or suggest a child placement or recommend for or against termination of parental rights? There needs to be a lot more discussion about this issue.

D. PSYCHOLOGICAL TESTING. Psychological testing is routinely included in child custody evaluations.

1. General Acceptance. A recent article evaluated the frequency of use, general acceptance, and frequency of challenge, of psychological tests. Neal, Slobogin, Saks, Faigman, and Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST, 135-164 (Sage 2019). This study is one of the relatively few recent studies on the application of *Daubert* admissibility standards to psychological testimony, and is a "must read" for lawyers and judges. Based on a survey of forensic psychologists and a search of the Westlaw database of three years of court opinions, the authors identified fourteen "generally accepted" psychological tests, based upon their being reported as frequently used by clinicians and given ratings of acceptability or no ratings regarding acceptability. Five tests were listed as "general acceptance debated," as they were frequently used but rated as unacceptable by many, or were rated as acceptable but seldom used. Eleven tests were rated as "not generally acceptable" because they were infrequently used and rated as unacceptable for use in forensic settings. The tests that were generally accepted with generally favorable reviews were the Minnesota Multiphasic Personality Inventory (MMPI), the Personality Assessment Inventory (PAI), the Psychopathy Checklist (PCL-R), the Structured Interview of Reported Symptoms (SIRS), the Trauma Symptom Inventory (TSI), and the Wechsler Adult Intelligence Scale

(WAIS). The Millon Clinical Multiaxial Inventory (MCMI) and the Rorschach Inkblot Texas (Rorschach) were rated "general acceptance debated" with "mixed reviews." *Id*. at 149-150, Table 3 and Table 4.

In the 876 legal cases reviewed on Westlaw from 2016, 2017, and 2018, the MMPI was mentioned in 485 cases, the Rorschach in 59 cases, and the PCL in 50 cases. 372 cases did more than just mention the test, but only 19 involved challenges to admissibility. *Id*. at 150. The majority of the remainder of the 372 cases involved discussions of how the test was used or whether the test results were interpreted properly. *Id*. at 151-52. Very few cases discussed fit, validity, or helpfulness. *Id*. at 152.

El-Shenawy, *Traditional Psychological Tests Usage in Forensic Assessment*, 3 J. OF FORENSIC LEGAL INVESTIGATION (2007), reported usage rates of psychological tests in forensic situations. The author reported a 2014 study by Neal & Grisso, *Assessment Practices and Expert Judgment Methods in Forensic and Psychiatric: An International Snapshot*, 41 J. OF CRIMINAL JUSTICE AND BEHAVIOR 1406-1421 (2014), which surveyed 434 experts involved in 868 cases and found that 74.2% use "structured tools" (i.e., objection psychological tests) "to aid clinical judgment." *Id*. at 3. The MMPI was used in 15.2% of the evaluations and the PAI in 9.6%. *Id*. Various other tests were used for violence risk assessments. *Id*. El-Shenawy also cites Archer, Buffington-Vollum, Streday, & Handel, *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, J. OF PERSONAL ASSESSMENT 84-94 (2006), who surveyed members of the American Psychological Association and diplomates of the American Board of Forensic Psychology, and determined that they used the MMPI-2 and the WAIS, and in custody cases also used the PAI, the Parenting Stress Index (PSI), the Child Behavior Checklist (CBCL), and the Personality Inventory for Children (PIC) *Id*. at 3.

2. Reliability and Validity. El-Shenawy discussed the importance of the degree of standardization of a psychological test, meaning "the standardization group or normative sample" to which the test individual's test results will be compared. *Id*. at 4. The standardization group must be "representative and large enough to make such comparisons." *Id*. at 4. Good examples are the MMPI-2, MMPI-2-RF, MMPI-A, and the Wechsler Intelligence Scales. *Id*. El-Shenawy next mentions reliability[4] and validity.[5] A test must be both reliable and valid to use for forensic evaluation. Validity during the construction of the test is not sufficient; validity in the evaluation process must also be considered. *Id*. p. 4. Also, some tests have the ability to validate each other (incremental validity), which increases overall validity. *Id.* 4. El-Shenawy third concern is that traditional psychological tests are of limited utility in answering "psycho-legal questions." *Id.* at 4. El-Shenawy cites Greenberg, Otto, & Long, *The Utility of Psychological Testing in Assessing Emotional Damages in Personal Injury Litigation*, 10 ASSESSMENT 411-29 (2003), as recommending that forensic evaluators should use psychological tests to generate hypotheses regarding the legal issues that can be accepted or rejected, and not to rely on testing without corroboration by other information. Greenberg's comments are

[4]In psychology, "reliability" "refers to the consistency of a measure." Psychologists consider three types of consistency: over time (test-retest reliability), across items (internal consistency), and across different researchers (inter-rater reliability). < https://opentextbc.ca/researchmethods/chapter/reliability-and-validity-of-measurement> [3-10-2020].

[5]In psychology, "validity" "is the extent to which the scores from a measure represent the variable they are intended to…" Three major types of validity are face validity, content validity, and criterion validity. *Id.*

worth noting:

> Psychological testing and assessment instruments frequently play a small but important role when psychologists assist the courts as emotional damage experts in personal injury matters. However, examiners frequently, if sometimes inadvertently, mislead the court with test interpretations that are based on clinical rather than forensic populations and that fail to appreciate the lack of robustness of clinical measures in this forensic context. Whereas published computerized interpretations repeatedly remind experts that personality test results should only be used as a method to generate hypotheses about the examinee that are to be subjected to further investigation and consideration, experts all too often inform the courts of test interpretations as if the test results were measures of clinical constructs rather than plaintiffs' self-reports of symptoms.

Greenberg, taken from article abstract.

Apart from the overall reliability and validity of psychological tests from a psychometric point of view, there is also an issue regarding proper administration of the test and proper interpretation of the test.

3. Relevancy or Fit. Assuming the reliability and validity of the psychological test, the next step is applying the test results to the factual and legal questions in the case. There is much less literature and case law on the use of these tests in parent-child litigation compared to criminal cases. Marjory E. DeWard wrote a student note, *Psychological Evaluations: Their Use and Misuse in Illinois Child Abuse and Neglect Cases*, 54 DEPAUL L. REV. 971 (2005):

> When psychological tests are based on objective measures instead of subjective impressions they can provide useful, scientifically based information. While tests may effectively diagnose certain mental illnesses, they do not directly measure the effects of such a diagnosis on parenting capacity. Furthermore, not all psychological tests can be truly objective, scientifically based tests. Although they can provide a standard procedure for evaluations, and thus ensure that relevant information comes to light, the tests do not measure parental fitness directly.

Id. at 988. *Daubert*, *Robinson*, *Gammill*, and *Nenno*, all require the court to determine whether the underlying data and the expert's opinion are relevant to the issues in the case.

E. MENTAL DISORDERS. The go-to authority on psychiatric diagnoses is the Diagnostic and Statistical Manual of Mental Disorders (5th Ed.), commonly called "DSM-5." The DSM series of books has been published by the American Psychiatric Association, a group of American M.D. psychiatrists. While the process of creating and testing the categories and diagnostic criteria of mental disorders was arduous and exacting, it focused on improving the reliability of getting the same diagnoses at different times and from different diagnosticians who were looking at the same data, and not the underlying validity of the taxanomic categorization of distinct mental disorders. The value of the product is impaired by the fact that the edifice underlying the DSM-5 was created by psychiatrists, largely to the exclusion of psychologists, and relies on as primary inputs the kind of information a psychiatrist gets from talking to the patent in the office for several 50-minute

sessions (i.e., self-reporting by the patient), without the benefit of psychological testing or (in most instances) the requirement of getting corroborating information from third parties. The Council for Evidence-Based Psychiatry says on their web site: "Psychiatric diagnostic manuals such as the DSM and ICD (chapter 5) are not works of objective science, but rather works of culture since they have largely been developed through clinical consensus and voting. Their validity and clinical utility is therefore highly questionable, yet their influence has contributed to an expansive medicalisation of human experience." Apart from a taxonomy of mental disorders that was not originally founded on scientific observation, a perhaps even deeper problem is the concept of limiting the input for making psychiatric diagnoses to the most subjective of all sources (i.e., reliance on the patient's self-report of mental and emotional states). Carrying this over to custody evaluations, there is very little scientific basis, or even a non-scientific basis, for correlating diagnoses of mental disorders with parental termination, child custody, or possessory determinations. The DSM-5 has a one-page "Cautionary Statement for Forensic Use of DSM-5," where the Manual recognizes that using the DSM-5 in the courtroom presents a "risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5, p. 25 (American Psychiatric Publishing, 2013). Another difficulty is that most of the diagnoses in DSM require the concurrence of several diagnostic criteria before a diagnoses of a specific mental disorder can be made, and many litigants meet some but not enough of the diagnostic criteria of a mental disorder to justify making a diagnosis. In that situation, the clinician can give a diagnostic label with the phrase "other specified disorder," or can diagnose an "unspecified [type] disorder." DSM-5 at 15. Many people exhibit behaviors that are problematic, but are not manifested in enough different ways to meet the required number of diagnostic criteria to establish a mental disorder. The use of a diagnostic label in those situations may be scientifically weak. Regardless of the reservations that may exist for the DSM framework, if you want to talk in concrete terms about mental disorders, DSM is the only game in town. But there is nothing in the DSM about translating the DSM categories to parental termination or custody recommendations. Regardless of the lack of confirmation of the validity of the DSM approach to diagnosing mental disorders, due to general acceptance of the DSM it is likely fruitless for a litigant to attack the DSM framework on *Daubert* reliability grounds, but there is much room still to attack any conclusions that draw on a DSM diagnosis to make a termination or custody recommendation.

The Legislature was alert to the possibility that undiagnosed mental disorders might surface in a child custody evaluation. TFC § 107.1101(c) says that, if a custody evaluator observes a potentially undiagnosed "serious mental illness," as that terms is defined in Section 1355.001, of the Texas Insurance Code, then"[t]he child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations." Insurance Code Section 1355.001 describes "serious mental illness" as a specified list of mental disorders as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM). This is a legislative endorsement of the DSM-5.

TFC § 107.1101, Effect of Potentially Undiagnosed Serious Mental Illness, provides:

> (a) In this section, "serious mental illness" has the meaning assigned by Section 1355.001, Insurance Code.

> (b) If a child custody evaluator identifies the presence of a potentially undiagnosed serious mental illness experienced by an individual who is a subject of the child custody evaluation and the evaluator is not qualified by the evaluator's licensure, experience, and training to assess a serious mental illness, the evaluator shall make one or more appropriate referrals for a mental examination of the individual and may request additional orders from the court.
>
> (c) The child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations.

Tex. Insurance Code § 1355.001, Definitions, says:

> In this subchapter:
>
> (1) "Serious mental illness" means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):
>
> (A) bipolar disorders (hypomanic, manic, depressive, and mixed);
> (B) depression in childhood and adolescence;
> (C) major depressive disorders (single episode or recurrent);
> (D) obsessive-compulsive disorders;
> (E) paranoid and other psychotic disorders;
> (F) schizo-affective disorders (bipolar or depressive); and
> (G) schizophrenia.

The Legislature thus has impliedly determined that these seven mental disorders are valid constructs for legal purposes.

In *Clark v. Arizona*, 548 US 735 (2006), the U.S. Supreme Court declined to correlate a mental disorder in the DSM with a legal insanity defense. The first reason was that "the diagnosis may mask vigorous debate within the profession about the very contours of the mental disease itself." *Id.* at 774. The second reason was that ongoing research and subsequent clinical experience casts doubt on the continuing validity of the DSM after its initial publication date. *Id.* The third reason was that "[e]vidence of mental disease, then, can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form mens rea, whereas that doubt may not be justified. And of course, in the cases mentioned before, in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do." *Id.* at 776. The American Psychiatric Association, American Psychological Association, and American Academy of Psychiatry and the Law, filed a joint amicus curiae brief in *Clark v. Arizona* advocating that the 14th Amendment required the admission of psychological testimony of "diminished capacity" due to schizophrenia, to no avail.

The court in *In Interest of E.R.*, 555 S.W.3d 796, 807–08 (Tex. App.–Houston [14th Dist.] 2018, no

pet.), said: "A mental illness or deficiency of a parent is not, in and of itself, grounds for termination of the parent-child relationship. *In re B.J.C.*, 495 S.W.3d 29, 36 (Tex. App.--Houston [14th Dist.] 2016, no pet.); *Liu v. Dep't of Family & Protective Servs.*, 273 S.W.3d 785, 791 (Tex. App.--Houston [1st Dist.] 2008, no pet.). Evidence must support a determination that a parent's mental illness or deficiency prevents her from providing for her children now and in the future." This point goes to a central question when considering the admissibility of a diagnosis of a mental disorder: what is the "fit" or relevance of this psychiatric/psychological testimony to the question involved in the case? What is the social science support for connecting a DSM-V diagnosis with parenting abilities? How will the diagnosis be helpful to the fact finder? Does the danger of unfair prejudice, confusing the issues, or misleading the jury outweigh the probative value of the diagnosis?

The issue is even more problematic when the diagnosis is a close call, or the professional is considering using an "unspecified disorder" diagnosis because the diagnostic criteria for an established diagnosis have not been met.

An article by Allen Frances, who was intimately involved in the DSM-IV project, discusses *14 Tips for the Diagnostic Interview of Mental Disorders*.

<https://pro.psychcentral.com/14-tips-for-the-diagnostic-interview-of-mental-disorders>[2-26-2020].

Very important for our present purposes is Dr. Frances' warning against making a diagnosis in a "tossup situation": "In tossup situations, weigh the pluses and minuses of giving the diagnosis. The basic question boils down to 'Is this diagnosis more likely to help or more likely to hurt?' All else being equal when decisions could go either way, it makes sense to make a diagnosis when it has a recommended treatment that has been proven safe and effective — but to withhold a questionable diagnosis if there is no proven treatment or if the available treatment has potentially dangerous side effects." While Dr. Frances's comments address the use of diagnosis in a clinical context, his concerns relate to the very question the court must address as gatekeeper when determining whether under TRE 702 a DSM-V diagnosis will "help the trier of fact to understand the evidence or to determine a fact in issue," or in determining whether under TRE 403 the probative value of admitting evidence of the diagnosis is outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.

F. SYNDROMES. There are mental health constructs that have not been included as mental disorders in the DSM-V, which proponents call "syndromes." Robert P. Mosteller, in *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 467 (1996), wrote:

> "Syndrome" is an elastic term as used in the social sciences, and as used in criminal litigation it has little, if any, specialized meaning. The general definition of "syndrome" found in Webster's dictionary is: "a group of symptoms or signs typical of a disease, disturbance, condition, or lesion in animals or plants."[17] Even in medicine, where the term originated and has been much more carefully developed, the concept is relatively amorphous.[18] In that field, syndromes are contrasted with diseases with respect to causation; the causes of syndromes are generally more obscure.[19] This obscurity of causes for syndromes serves as a useful starting point in highlighting an important distinction between syndromes, or perhaps more properly between true syndromes, on the one hand, and more

> generalized group character evidence on the other.

Id. at 467. Mosteller suggests:

> One use of group character and syndrome evidence is to determine whether criminal conduct occurred, that is, to diagnose.[7] Another is to establish the reasonableness of conduct according to a legal standard. A third is to support credibility by showing that apparently aberrational conduct was normal for individuals who have had certain experiences. Rarely will the scientific basis of syndrome evidence be sufficient to sustain its most aggressive uses. A syndrome--particularly a psychological syndrome--can almost never successfully diagnose the causes of criminal conduct or determine whether that conduct occurred. On the contrary, a syndrome will rarely have enough specific meaning to give it any greater power in proving conduct than a more general social framework or group character evidence. Thus, ambitious claims for syndrome evidence are generally unsupported.
> * * *
> The investigation of the above concerns does not lead to the conclusion that all or even most of what is currently termed "syndrome evidence" should be excluded. The generalized form of such evidence, particularly when used for less aggressive purposes, provides important assistance to the jury in evaluating evidence. My argument is principally that the term "syndrome" should not be used when it has no special meaning, and that the social sciences have not, except in rare instances, sufficiently defined syndromes to provide that term with a special meaning and particular evidentiary power.

Id. at 463-65. Syndromes that Mosteller mentioned specifically are the Child Sexual Abuse Accommodation Syndrome, the Battered Child Syndrome, and the Battered Woman Syndrome.

In *People v. Masters*, 33 P.3d 1191, 1203 (Colo. App. 2001), *aff'd*, 58 P.3d 979 (Colo. 2002), the court wrote: "The use of psychological theories, syndromes, profiles, and comparative expert testimony in criminal cases has been significantly debated. Opinions of commentators vary as to when and how such evidence should be used. ... Courts have likewise reached differing conclusions." The Opinion lists authors and cases for and against admissability.

G. BEHAVIOR "CONSISTENT WITH" THAT OF OTHER VICTIMS. Often an expert, who will not or is not allowed to say whether s/he believes that an event occurred, will testify that the victim's behavior in the case is "consistent with" the reported behavior of other victims of such behavior. The probative value of such testimony could be high or low, depending on how frequently the behavior in question occurs among non-victims. This testimony could also be unfairly prejudicial in certain instances. In *State v. Moran*, 728 P.2d 248, 254 (Ariz. 1986), the court ruled "consistent with" testimony to be inadmissible because "the inference offered the jury is that because this victim's personality and behavior are consistent with a molest having occurred, the crime must have been committed.... This type of particularized testimony permits the expert to indicate how he or she views the credibility of a particular witness. Once the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation, we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred."

Another reason to exclude "consistent with" testimony is that it violates the rules of logical reasoning. In logic, a premise is "p"; a conclusion is "q; and a valid implication is "→." In logic, the fact that p → q does not support the inference that q → p. There may be several p's that imply q, and you can't tell from q alone which of the p's is true.

Example: The jury must determine whether the subject is human or a horse. The expert testifies that the subject has a head, which is consistent with being human. But having a head is also consistent with being a horse. This testimony is not helpful to the jury. So having a particular feature or meeting certain criteria is helpful to the jury only if the feature or criteria is unique or nearly unique to the class being identified. If instead the expert testifies that the subject is capable of adding 2+2, which is consistent with being human, the testimony is helpful to the jury, because horses cannot do arithmetic.

If the feature in question is a frequent characteristic of a certain class of persons, and infrequent in all other classes of persons, then having that characteristic is more likely to be helpful to the jury. The fact that a young child delayed in reporting abuse and then recanted is helpful in proving abuse only if it is established that other children of that age don't generally delay in reporting or don't recant an earlier report of a significant event.

H. EXPLAINING DELAY OR RECANTATION OF OUTCRY. In *State v. Moran*, 728 P.2d 248, 253 (Ariz. 1986), the court wrote:

> Most of the prosecution's expert testimony was aimed at explaining that the daughter's behavior, particularly her recantation, was not inconsistent with abuse having occurred. Several experts explained that anger is a typical response to sexual molestation and that even the daughter's problems at school may have been caused by abuse. Similarly, experts explained factors that could lead a victim to recant and attempt to return home.[5]
>
> This type of expert testimony was properly admitted.
> * * *
> Other jurisdictions, recognizing the usefulness of expert testimony in child sexual abuse cases, also allow experts to explain general behavioral characteristics of child victims. *E.g.*, *People v. Dunnahoo*, 152 Cal. App.3d 561, 577, 199 Cal. Rptr. 796, 804 (Cal.Ct.App. 1984) (testimony explaining delay in reporting); *Smith v. State*, 100 Nev. 570, 571-72, 688 P.2d 326, 326-27 (1984) (same); *People v. Benjamin R.*, 103 A.D.2d 663, 668-69, 481 N.Y.S.2d 827, 831-32 (N.Y. App. Div. 1984) (same); *State v. Middleton*, 294 Or. 427, 436-37, 657 P.2d 1215, 1220 (1983) (recantation, truancy, and tendency to run away from home); *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 372-73, 502 A.2d 253, 255 (Pa. Super. Ct. 1985) (reporting delays and inconsistent versions of abuse); *State v. Petrich*, 101 Wash.2d 566, 575-76, 683 P.2d 173, 179-80 (1984) (delay in reporting). Oregon Supreme Court Justice Roberts explained the rationale for allowing this type of expert testimony:
>
> > While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates

> the routine indicia of witness reliability — consistency, willingness to aid the prosecution, straight forward rendition of the facts — may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Middleton, 294 Or. at 440, 657 P.2d at 1222 (Roberts, J., concurring).

> We agree with Justice Roberts's analysis. "Jurors, most of whom are unfamiliar with the behavioral sciences, may benefit from expert testimony" explaining behavior they might otherwise "attribute to inaccuracy or prevarication." *Lindsey*, 149 Ariz. at 474, 720 P.2d at 75; *accord State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (allowing expert testimony explaining "puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of [the victim's] credibility"). Such evidence may harm defendant's interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility. *See State v. Chapple*, *supra*.

I. EXPERT OPINION ON TRUTH-TELLING. TRE 607 permits any party to attack the credibility of any witness. Under TRE 608, a witness's credibility may be attacked or supported with other witnesses' opinions about the witness's reputation of having a character of truthfulness or untruthfulness. TRE 608. Evidence of truthfulness ("bolstering") is allowed only after the witness's character for truthfulness has been attacked. TRE 608(a). Extrinsic evidence of specific instances of conduct are not admissible to attack credibility, other than proof of a conviction under TRE 609. TRE 608. If impeaching a witness based on a prior inconsistent statement, certain procedures are specified in TRE 613(a). When attempting to show bias or interest, the attorney must first tell the witness the circumstances or statements tending to show bias or interest. Under TRE 613(e), prior consistent statements are not admissible to enhance the witness's credibility. No TRE expressly prohibits one witness from saying whether s/he believes or disbelieves the statements of another person or witness.

1. The Common Law Prohibition Against Experts on Truth. There is a long tradition against allowing any expert witness to testify that another witness is lying or telling the truth. "[T]he jury is the lie detector in the courtroom...." *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973). In *United States v. Azure*, 801 F. 2d 336, 339-41 (8th Cir. 1986), the trial court allowed a pediatrician to testify that a child was believable and that he could "see no reason why she would not be telling the truth in this matter...." The appellate court reversed, writing:

> The government ... contends that child sexual abuse cases present special circumstances where ordinary jurors need help in assessing the credibility of a child witness. *See State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982). The government argues that an expert with knowledge of how children, and in particular sexually abused children, think and act can aid jurors in a matter which is beyond their common knowledge and ordinary experience. Since Dr. ten Bensel has handled around one thousand child abuse cases and two hundred child sexual abuse cases, the government argues that he was qualified to give an opinion on the believability of Wendy and thereby aid the jurors in assessing her credibility.

> We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far in present circumstances. Dr. ten Bensel might have aided the jurors without usurping their exclusive function by generally testifying about a child's ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent with Wendy's story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in Wendy's story. However, by going further and putting his stamp of believability on Wendy's entire story, Dr. ten Bensel essentially told the jury that Wendy was truthful in saying that Azure was the person who sexually abused her. No reliable test for truthfulness exists and Dr. ten Bensel was not qualified to judge the truthfulness of that part of Wendy's story. The jury may well have relied on his opinion and "surrender[ed] their own common sense in weighing testimony...."

In this instance, the expert crossed the boundary between legislative facts and adjudicative facts, which was not permissible.

2. Texas Courts Adhere to the Rule There Are No Experts on the Truth-Telling. Texas courts have ruled that an expert cannot testify about another person's propensity to tell the truth. *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App.–San Antonio 1990, writ denied) ("Credibility of witnesses is within the exclusive province of the jury"). In *Yount v. State*, 872 S.W.2d 706, 710 (Tex. Crim. App. 1993), the Court of Criminal Appeals said:

> While a witness may possess "scientific, technical, or other specialized knowledge" concerning sexually abused children, we seriously question whether any such person also possesses "scientific, technical or other specialized knowledge," beyond the realm of the jury, regarding the truthfulness of those children. As stated by one court, "Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility." *State v. Moran*, 151 Ariz. 378, 728 P.2d 248, 255 (1986); see also *United States v. Azure*, 801 F.2d 336, 340 (8th Cir.1986) ("[n]o reliable test for truthfulness exists and [the expert on child abuse] was not qualified to judge the truthfulness of that part of [the child complainant's] story").

Along these lines, John E.B. Meyers et al., in *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 121 (1989), wrote: "Experts on child sexual abuse are not human lie detectors. Nor are they clairvoyant. Nothing in the literature suggests that experts can or should replace the jury as the ultimate arbiters of credibility."

Since the adoption of TRE 702, many Texas court have come to rely less on the common law exclusion and have instead chosen to address this issue in the context of helpfulness to the jury. In *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997), the court wrote:

> Expert testimony assists the trier of fact when the jury is not qualified to "the best possible degree" to determine intelligently the particular issue without the help of the testimony. *Duckett*, 797 S.W.2d at 914. But, the expert testimony must aid—not supplant—the jury's

> decision. *Id*. Expert testimony does not assist the jury if it constitutes "a direct opinion on the truthfulness" of a child complainant's allegations. *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993).

The Court in *Schutz* also said:

> Our rejection of expert testimony on truthfulness is based in part on a belief that psychology is not an exact science but involves much uncertainty and is often subjective. This uncertainty manifests itself in the kinds of situations that arise in the present case, in which experts attempt to assess the accuracy of a child's statements. According to one recent article, there is significant disagreement among legal scholars and psychologists about what factors can be applied to guarantee the reliability of children's testimony. *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements*, 19 LAW & PSYCH. REV. 203, 210 (1995).
>
> Even so, psychologists and others in the mental health profession have much expertise in the area of human behavior that can be of assistance to a fact-finder. For instance, we have recognized expert knowledge concerning the behavioral characteristics typically exhibited by sexual abuse victims. *Cohn v. State*, 849 S.W.2d 817 (Tex. Crim. App. 1993). But, "[o]nce an `expert' imparts his scientific, technical or specialized knowledge to the jury concerning the area of his expertise, jurors are just as capable as the expert in drawing conclusions concerning the credibility of the parties in issue." *Yount*, 872 S.W.2d at 710 (bracketed material substituted for original). And credibility issues involving specialized expert knowledge will often also involve unspecialized knowledge within the purview of lay jurors. In determining whether a complainant's allegations have been fantasized, for instance, a jury may look not only to psychiatric and psychological information about mental illness and human behavior but also to the commonsense knowledge of lay persons about how people think and react. We should be cautious about permitting experts to draw conclusions that rest on both expert and lay knowledge.
>
> Likewise, we recognize that experts may have specialized knowledge concerning signs of coaching, coercion, and suggestion. Whether a child exhibits signs of manipulation seems similar to the question about whether a child exhibits signs of sexual abuse. Both involve behavioral manifestations of external influences or events acting upon the child. However, while expert testimony may be relevant, whether a child has in fact been manipulated also involves matters within the knowledge of lay persons. Once the expert has imparted his specialized knowledge to the jury, the jury can use that knowledge, along with its own lay knowledge of human nature, to arrive at its own conclusion. Moreover, while testimony about symptoms commonly exhibited by child victims only indirectly bolsters a child's credibility by circumstantially corroborating the child's story, testimony about manipulation comments directly on the accuracy of the story itself. *See State v. Charboneau*, 323 Or. 38, 913 P.2d 308, 313-314 (1996) (Citing previous *Keller* decision and distinguishing evidence that directly comments upon credibility from corroborating evidence that has the indirect effect of bolstering credibility).

In *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993), the Court addressed whether an

expert should be allowed to testify to the truthfulness of a class of persons, and said:

> An expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case as well. This is not "expert" testimony of the kind which will assist the jury under Rule 702.

In *In re G.M.P.*, 909 S.W.2d 198, 206 (Tex. App.--Houston [14th Dist.]1995, no pet.), the court said that "[a] determination of who is telling the truth is the sole province of the jury," and reversed an adjudication of juvenile delinquency for allowing a police officer to testify that a child who reported being the victim of sexual assault was telling the truth.

However, "expert testimony that a child did not exhibit indications of coaching or manipulation does not constitute a direct opinion on the child's truthfulness." *Gonzales v. State*, Nos. 03-13-00333-CR, 03-13-00334-CR (Tex. App.–Austin 2015, no. pet.) (memo. op.), citing *Schutz*, 957 S.W.2d at 73.

3. Indirect Comments on Truth-Telling. A fine line can be drawn between testimony about principles of human psychology and an endorsement of a child's truthfulness. For example, in *State v. Moran*, 728 P.2d 248, 254 (Ariz. 1986), the court approved allowing experts to testify why a child victim of sexual abuse might recant an outcry. However, the court ruled one expert went too far when he told the jury that he believed that the child had understated her sexual assault and that he referred the child to child protective services "to help this young lady deal with *the fact that she had been molested* ...." *Id.* at 254 (emphasis in the original). The court wrote:

> Obviously, this testimony was intended to tell the jury that the experts believed the daughter's earlier version of the abuse and that she had been molested. This type of testimony is prohibited by *Lindsey*. Experts called to testify about behavioral characteristics that may affect an alleged victim's credibility may not give an opinion of the credibility of a particular witness. Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility.

Id. at 254. In *State v. Batangan*, 799 P.2d 48, 51-52 (Hawaii 1990), a pre-*Daubert* decision, the Hawaii Supreme Court said:

> The common experience of a jury, in most cases, provides a sufficient basis for assessment of a witness' credibility. Thus, expert testimony on a witness' credibility is inappropriate.... However, sexual abuse of children "is a particularly mysterious phenomenon, ... and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse...."
> * * *
> Child victims of sexual abuse have exhibited some patterns of behavior which are seemingly inconsistent with behavioral norms of other victims of assault. Two such types of behavior are delayed reporting of the offenses and recantation of allegations of abuse. Normally, such behavior would be attributed to inaccuracy or prevarication....In these situations it is helpful for the jury to know that many child victims of sexual abuse behave in the same manner. Expert testimony "[e]xposing jurors to the unique interpersonal dynamics involved in

> prosecutions for intrafamily child sexual abuse, ... may play a particularly useful role by disabusing the jury of some widely held misconceptions ... so that it may evaluate the evidence free of the constraints of popular myths....”
>
> We recognize that even this type of expert testimony carries the potential of bolstering the credibility of one witness and conversely refuting the credibility of another. Much expert testimony on any subject will tend to do this. Such testimony, by itself, does not render the evidence inadmissible.... The pertinent consideration is whether the expert testimony will assist the jury without unduly prejudicing the defendant.
>
> Thus, while expert testimony explaining “seemingly bizarre” behavior of child sex abuse victims is helpful to the jury and should be admitted, conclusory opinions that abuse did occur and that the child victim’s report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted. Such testimony is precluded by HRE Rule 702. [Citations omitted.]

J. MENTAL HEALTH EXPERTS TESTIFYING ABOUT PAST EVENTS. One of the problems with mental heath experts testifying about the likelihood of past events based on a psychological assessment is the fact that psychiatry and psychology as disciplines focus more on diagnosis (the present) and prognosis (the future) than on verifying past events. In obtaining and recording a patient’s history, a professional writes what s/he is told, without expressing doubts or challenging the patient’s report. When a therapy relationship exists, the therapist often avoids strongly challenging a patient’s statements about the past, since the therapist must maintain a trusting relationship with the patient in order for therapy to continue. And in questioning a young child about abuse, the therapist must be very careful not to inadvertently implant memories or suggest perceptions that are not based on past events.

Notwithstanding the high esteem given to the theories of Sigmund Freud in the first 2/3 of the 20th Century, there is so little agreement on the causes of psychiatric illness that the DSM-III, DSM-IV, and DSM-V confined themselves to agreement on symptoms of various disorders without commenting on the causes of mental disorders.

K. “RECOVERED” MEMORY. In the 1990s, there was a spate of claims of child sex abuse based on memories that proponents claimed had been repressed and then recovered during adulthood through therapy. The litigation has somewhat died down, but the controversy over recovered memory has not completely died. In *S.V. v. R.V.*, 933 S.W.2d 1, 19-20 (Tex. 1996), the Supreme Court held that recovered memory testimony was not sufficiently reliable to meet the “objective verifiability” requirement for applying the discovery rule relating to the statute of limitations. After a lengthy review of pros and cons, the Court wrote: “In sum, the literature on repression and recovered memory syndrome establishes that fundamental theoretical and practical issues remain to be resolved. These issues include the extent to which experimental psychological theories of amnesia apply to psychotherapy, the effect of repression on memory, the effect of screening devices in recall, the effect of suggestibility, the difference between forensic and therapeutic truth, and the extent to which memory restoration techniques lead to credible memories or confabulations. Opinions in this area simply cannot meet the ‘objective verifiability’ element for extending the discovery rule.” The False Memory Syndrome Foundation has published information and written amicus briefs

challenging the validity of recovered memory testimony.

In *State v. Hungeford*, 697 A.2d 916 (N.H. 1997), the Supreme Court of New Hampshire rejected expert testimony on repressed memories based on lack of reliability. Recovered memories were rejected on reliability grounds in *Franklin v. Stevenson*, 987 P.2d 22 (Utah 1999). However, in Constance Dahlengerg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 TRAUMA, VIOLENCE, & ABUSE 274-310 (2006), the author asserted that "[r]esearch during the past two decades has firmly established the reliability of the phenomenon of recovered memory. This review first highlights the strongest evidence for the phenomenon itself and discusses the survey, experimental, and biological evidence for the varying mechanisms that may underlie the phenomenon." *Id.* at 274. The author concludes that "[t]he phenomenon of recovered memory does meet the *Daubert* standard" and that "[t]here should be no negative assumption as to the accuracy of the recovered memory victim (as compared to the alleged continuous memory victim) in courts of law. Both should be subject to the same standards of proof for their allegations." *Id.* at 303. This is a bold assertion.

A defendant's review of the legal status of recovered memory as an exception to the statute of limitations is contained in the Reply Brief of Archdiocese of St. Paul and Minneapolis and Diocese of Winona, filed in the Supreme Court of Minnesota in 2011.

<http://mn.gov/law-library-stat/briefs/pdfs/a101951scar.pdf > [2-26-2020].

In that case the Supreme Court of Minnesota ruled against the admission of recovered memory as being unreliable under Rule 702. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150 (Minn. 2012).

IV. THE CLINICAL INTERVIEW. It is a widely-held view that a mental health professional must personally interact with an individual before making a psychological assessment of that individual. The preferred interaction is called a "diagnostic clinical interview." As noted by Peter R. Lichstein in CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 3d ed. Butterworth 1990), speaking of medicine: "Most clinicians rate the patient's medical history as having greater diagnostic value than either the physical examination or results of laboratory investigations (Rich, 1987). The clinical adage that about two-thirds of diagnoses can be made on the basis of the history alone has retained its validity despite the technological advances of the modern hospital. An accurate history also provides focus to the physical examination, making it more productive and time efficient. Clinical hypotheses generated during the interview provide the basis for a cost-effective utilization of the clinical laboratory and other diagnostic modalities."

<https://www.ncbi.nlm.nih.gov/books/NBK349> [2-26-2020].

The American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* provides:

> 9.01 Bases for Assessments
>
> (a) Psychologists base the opinions contained in their recommendations, reports, and

> diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)
>
> (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations.
>
> (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

The Texas Administrative Code Rule § 465.18(b)(3) governing licensed psychologists provides that "[a] licensee shall not render a written or oral opinion about the psychological characteristics of an individual without conducting an examination of the individual unless the opinion contains a statement that the licensee did not conduct an examination of the individual."

A. STRUCTURED VS. UNSTRUCTURED INTERVIEWS. The clinical interview is "structured" if the mental health professional adheres to a predetermined series of questions. A clinical interview can be unstructured, in which event the questioning is guided by the professional on the fly. A structured interview lends itself to diagnosis of a mental disorder, which requires a minimum number of reported conditions before the diagnosis can be made. See THE STRUCTURED CLINICAL INTERVIEW FOR DSM-5 (American Psychiatric Ass'n Publishing 2018) ("SCID-5"). There is an under-appreciated danger that a structured interview that feeds into a taxonomic framework like the DSM suffers from "confirmation bias," where the clinician or researcher tends to ask questions that validate a hypothesis. The SC1D-5 may not be biased in favor of confirming a particular diagnosis, but it is biased in favor of accepting the DSM framework as the main way (or only way) to gather information that is relevant to mental disorders.

B. INTERVIEWING A CHILD. Special problems are encountered in conducting interviews with young children who are suspected victims of child abuse. In *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984), the Supreme Court expressed skepticism about a video recording of an interview in which "the child merely responded to ... leading questions and imaginative use of dolls representing the child and his father." In *Ochs v. Martinez*, 789 S.W.2d 949, 955-56 (Tex. App.--San Antonio 1990, writ denied), the court of appeals reversed a judge for allowing the jury to view a videotape of an interview with a child under age 12 where the examiner asked leading questions. The ruling was based on the then-effective TFC § 11.21, which permitted a video recording of a child's statements to be introduced into evidence provided there were no leading questions.

The current TFC § 104.002 governs the playing of video recordings of a child under age 12 in child abuse litigation. It also contains standards that could be applied to conducting an interview of a child

in any situation, recorded or not recorded. Section 104.002 says:

> Section 104.002. If a child 12 years of age or younger is alleged in a suit under this title to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:
>
> (1) no attorney for a party was present when the statement was made;
>
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
>
> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
>
> (5) each voice on the recording is identified;
>
> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
>
> (7) each party is afforded an opportunity to view the recording before it is offered into evidence.

The bar against using leading questions in a sound and video recording is an indication that other forms of hearsay statements of a child (such as repetition by an investigator or evaluator or guardian ad litem or therapist, or inclusion in a medical record, business record, or public record) should be prohibited if tainted (or possibly tainted) by leading questions.

TFC § 261.302 governs the conduct of investigations of abuse or neglect of a child, and requires the DFPS to audiotape or videotape an interview with a child discussing the allegations under current investigation, unless the equipment malfunctions, or the child is unwilling to be recorded, or due to departmental lack of equipment. If an agency other than DFPS is conducting the interview, it must be audiotaped or videotaped except for good cause, explained in the statute. TFC § 261.310 provides that the DFPS executive commissioner must promulgate standards for child abuse investigations that–

> (1) recommend that videotaped and audiotaped interviews be uninterrupted;
>
> (2) recommend a maximum number of interviews with and examinations of a suspected victim;
>
> (3) provide procedures to preserve evidence, including the original recordings of the intake telephone calls, original notes, videotapes, and audiotapes, for one year; and

> (4) provide that an investigator of suspected child abuse or neglect make a reasonable effort to locate and inform each parent of a child of any report of abuse or neglect relating to the child.

TFC § 104.006 prescribes when hearsay statements of a suspected child abuse victim can be admitted into evidence, notwithstanding the hearsay rule. The court must conduct a hearing outside the presence of the jury, and find "that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and: (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child." The statute does not offer indicators of when the time, content, and circumstances of the statement provide sufficient indications of reliability, but the requirements of TFC § 104.002 are a good model. Remembering that TRE 703 says that an expert cannot rely on inadmissible hearsay unless experts in the particular field would reasonably rely on those kinds of facts or data, it would seem that the Section 104.002 and Section 261.302 standards for admissibility of a audio or video recording of a child, and the Section 104.006 standards for admissibility of an out-of-court statement of a child, should be applied to expert opinions under TRE 703.

A question arises about what a court should do when an adult witness, or investigator, or therapist, did not record or keep a written record of the questions asked, so that the court can determine whether or not leading questions were asked. In *In re E.A.K.*, No. 192 S.W.3d 133, 147 (Tex. App.--Houston [14th Dist.] 2006, pet. den'd), the court addressed the admissibility of adult reportings of a child's outcry statements presented through a case worker's report. (The business record exception to the hearsay rule is discussed in Section VIII.A below.) Focusing on the child's statements themselves, Chief Justice Hedges' Majority Opinion held that the adult's reports of the child's statements were not admissible because they did "not demonstrate sufficient indicia of reliability." The adult's reports did not "provide any of the questions or comments made during the interview by the interviewer," and further did "not indicate whether a predicate was laid for whether J.J. understood the difference between truth and lies." *Id*. at 147. The take-away is that the record of the child's statements should itself reflect the indicia of reliability, and if it does not, and unless reliability is established by an eye witness to the statement, it is inadmissible.

Howe and Knott, in *The Fallibility of Memory in Judicial Processes: Lessons From the Past and Their Modern Consequences*, 23 MEMORY 633–656 (2015), wrote this about questioning children about child abuse:

> Because of the frequent absence of physical evidence, forensic investigators rely on children's memory reports from (police, social worker) interviews as evidence in such cases. Although researchers in this field uphold the statement that most cases that end up in the legal system involve true claims of sexual abuse, a number of sensationalized "day care abuse" cases from the 1980s and 1990s led to fundamental concerns regarding the reliability of children's testimony and the interview techniques and strategies used to elicit information from children in forensic situations. As we will see below, fantastical claims of ritualistic abuse, pornography, cults and long-term abuse of multiple victims were reported in instances where little medical evidence could be found, and where no adult eyewitnesses could corroborate. Nevertheless, such claims were believed by health professionals, police,

> prosecutors, and the family and friends of those involved. At the time, the prosecutors made the argument that the children would not lie about sexual abuse, whereas the defense argued that the claims and reports made about the abuse were a result of repeated suggestive interviewing by not only the police, but the children's parents, social workers and therapists who were in contact with the children. Although we now have scientific evidence to support this claim, at the time there was little direct evidence to suggest this could be the case. As Ceci and Bruck (1995) stated, because of this lack of evidence and common belief that the children would not be able to invent stories of sexual abuse, many of these cases ended in convictions.
>
> Today we know, of course, that eliciting such evidence from children can be controversial and that the reliability of this memory evidence depends not only on the style of questioning but also on the types of questions children are asked. Because of these concerns, memory development researchers took a special interest in the interviewing techniques used to elicit children's memory reports and, ultimately, how children's reports can be moulded by suggestions implanted by adult interviewers (for a review, see Ceci & Bruck, 1995). Experimental exploration of these techniques has led to important insights regarding child suggestibility and forensic interview techniques for children (Ceci & Bruck, 1993, 1995; Poole & Lamb, 1998). The culmination of this research resulted in a considerable revision of what constituted appropriate questioning of child witnesses (Ceci & Friedman, 2000). Today, the preferred interviewing strategy with children is the one developed by the National Institute of Child Health and Human Development (NICHD; see Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007). Here, there is not just a specific structure to the timing and sequence of how a child should be interviewed, but also recommendations for what not to do.

In *The NICHD Protocol: A Review of an Internationally-Used Evidence-Based Tool for Training Child Forensic Interviewers*, 1 J. OF CRIMINOLOGICAL RESEARCH, POLICY AND PRACTICE 76-89 (2015), authors Rooy, Brubacker, Aromäki-Stratos, Cyr, Hershkowitz, Korkman, Myklebust, Naka, Peixoto, Roberts, Stewart, and Lamb wrote: "Central to the development of interview guidelines has been knowledge of how memory works, children's developmental capabilities, and the conditions that improve children's ability to discuss their abuse experiences. After many decades of experimental and applied memory research, conducted primarily by psychologists, we have come to understand the strengths, weaknesses, and features of children's memory very well, and this knowledge has shaped many professional recommendations about interviewing children." *Id*. at 3. The article is available at

<https://scholars.wlu.ca/cgi/viewcontent.cgi?article=1070&context=psyc_faculty> [2-26-2020].

The article lists the following "important characteristics of memory development":

- Very young children can remember and report their experiences.[6]

[6] "[W]hile children can have impressive and accurate memories for their experiences, these memories can be fragile and thus vulnerable to contamination, which we discuss in the next section. For that reason, the 'best' interviewing techniques impose as minimally as possible on children's accounts." *Id.* at 6.

- Children's accounts can become contaminated when they are interviewed inappropriately.[7]
- The importance of using 'open prompts'.[8]

The authors state: "Even though open-ended prompts have been shown to be most effective in eliciting longer, more detailed, and more accurate responses, researchers have repeatedly shown that the recommendation to elicit information from children using open-prompts is routinely not followed by forensic interviewers when they do not have a structured protocol to follow." *Id.* at 10. They continue:

> What is alarming from a service perspective is that, in many studies, considerable expense and effort was directed to training interviewers, the interviewers seem to be well-aware of the recommended practices, and often believed that they were adhering to those recommendations. Research has thus revealed a disturbing dichotomy between 'knowledge about desirable practices' and 'the actual behavior of forensic investigators' (Lamb, Hershkowitz, Orbach, & Esplin, 2008). In sum, interviewers often 'know' what they should do in theory, but are unable to translate the theory into practice.

Id. at 11. The articles goes on to discuss the NICHD Protocol, which the publishers say was "developed with reference to child development issues, including linguistic capabilities, memory, suggestibility, forensic needs, interviewer behaviour, and the effects of stress and trauma." The introduction in an article written by Michael E. Lamb and others about the NICHD Protocol is quoted at length because this topic is so important:

> Whereas Kempe and his colleagues (1962) helped launch scholarly interest in physical child abuse with their landmark paper nearly 50 years ago, professional (and popular) interest in child sexual abuse came much later. It was prompted in part by dramatic increases in the numbers of reported cases, and by awareness that many cases of abuse might go unrecognized because the victims were the only possible sources of information and were seldom given the appropriate opportunities to describe their experiences to those who might have been able to help them. Indeed, because alleged victims are often the only available sources of information, considerable efforts have been made to understand how children's testimony can be made as useful and accurate as possible. Since 1990, furthermore, highly publicized cases in the United States (California, Massachusetts, New Jersey, North Carolina, and Florida), Norway (Bergen), New Zealand (Christchurch), and the UK (Cleveland, Newcastle), among others, have drawn attention to the counterproductive ways in which alleged victims of sexual abuse are sometimes interviewed. In many such cases, inappropriate interview techniques appear to have

[7] "Nowadays it may seem obvious that the ways children are interviewed can foster false allegations, but in the past, widely-held but erroneous beliefs about children's memories were fueled by social hysteria and untested diagnostic therapies that seemed to 'prove' the 'widespread' nature of the problem...." *Id.* at 6.

[8] "Research suggests that children will be much more accurate when information is 'elicited' from free-recall memory (see Orbach & Pipe, 2011). Free recall memories are accessed in conditions where there is no specific memory cue provided for the child to respond to. For example, the open-ended prompt 'tell me what happened' does not constrain the memory search to a particular topic, but rather allows the child to retrieve memories that are most accessible." *Id.* at 8.

compromised and contaminated the children's testimony, rendering it flawed and inaccurate (Bruck, 1999; Ceci & Bruck, 1995). The goals of this paper are 1) to summarize research designed to translate findings regarding children's memory, communicative skills, and social understanding and tendencies into specific interview strategies and techniques that should help prevent such notorious errors and problems in the future, and 2) to review studies demonstrating that the use of such techniques in over 40,000 interviews has dramatically improved the quality of investigative interviewing in a number of locations already.

Prompted in part by widespread publicity about the infamous cases mentioned earlier, many researchers have studied children's capacities to provide accurate information about their past experiences, while others have paid special attention to their suggestibility (see reviews in the last decade by Jones, 2003; Lamb, Orbach, Warren, Esplin, & Hershkowitz, 2006; Memon & Bull, 1999; Pipe, Lamb, Orbach, & Esplin, 2004; Poole & Lamb, 1998). Initially, most researchers conducted controlled studies in the laboratory, but their ecological validity was often questioned (Doris, 1991; Lamb & Thierry, 2005). Later studies conducted in both field and laboratory circumstances focused more narrowly on issues of particular relevance to forensic application and helped generate a remarkable consensus about children's limitations and competencies.

In brief, the research showed that, although children clearly can remember incidents they have experienced, the relationship between age and memory is complex, with a variety of factors influencing the quality of information provided. For our present purposes, perhaps the most important of these factors pertains to the interviewer's ability to elicit information and the child's willingness and ability to express it, rather than the child's ability to remember it. Like adults, children can be informative witnesses, and a variety of professional groups and experts have recognized this, offering recommendations regarding the most effective ways of conducting forensic or investigative interviews with children (e.g., American Professional Society on the Abuse of Children (APSAC), 1990, 1997; Jones, 2003; Lamb 1994; Lamb, Sternberg, & Esplin, 1998; Home Office, 1992, 2002; Orbach, Hershkowitz, Lamb, Sternberg, Esplin, & Horowitz, 2000; Poole & Lamb, 1998; Sattler, 1998; Warren & McGough, 1996). As Poole and Lamb (1998) pointed out, these books and articles reveal a substantial degree of consensus regarding the ways in which investigative interviews should be conducted, and a remarkable convergence with the conclusions suggested by a close review of the experimental and empirical literature. Clearly, it is often possible to obtain valuable information from children, but doing so requires careful investigative procedures, as well as a realistic awareness of their capacities and tendencies.

Expert professional groups agree that children should be interviewed as soon as possible after the alleged offences by interviewers who themselves introduce as little information as possible while encouraging children to provide as much information as possible in the form of narratives elicited using open-ended prompts ("Tell me what happened."). Before substantive issues are discussed, interviewers are typically urged to explain their roles, the purpose of the interview, and the "ground rules" (for example, ask children to limit themselves to descriptions of events "that really happened" to them and to correct the

interviewer, request explanations or clarification, and acknowledge ignorance, as necessary). Investigators are consistently urged to give priority to open-ended recall prompts and use recognition prompts ("Did he touch you?") as late in the interview as possible and only when needed to elicit undisclosed forensically relevant information.

The universal emphasis on the value of narrative responses elicited using open-ended prompts is rooted in the oft-replicated results of laboratory analogue studies demonstrating that information elicited using such prompts is much more likely to be accurate than information elicited using more focused recognition prompts (Dale, Loftus, & Rathbun, 1978; Dent, 1982, 1986; Dent & Stephenson, 1979; Goodman & Aman, 1990; Goodman, Bottoms, Schwartz-Kenney, & Rudy, 1991; Hutcheson, Baxter, Telfer, & Warden, 1995; Oates & Shrimpton, 1991; Ornstein, Gordon, & Larus, 1992) probably because open-ended questions force the respondent to recall information from memory, whereas more focused prompts often require the respondent to recognize one or more options suggested by the interviewer. Accuracy is much more difficult to establish in the field than in laboratory analog contexts, of course, because forensic interviewers seldom know what really happened, but the results of field studies in which accuracy was assessed confirm that, as in the laboratory, responses to open-ended questions posed by forensic interviewers are more likely to be accurate than responses to more focused prompts which are, in turn, more likely to be erroneous (Lamb, Orbach, Hershkowitz, Horowitz, & Abbott, in press; Lamb & Fauchier, 2001; Orbach & Lamb, 1999, 2001). Interviewers are also routinely advised to avoid the 'yes/no' questions which are especially likely to elicit erroneous information from young children, the misleading questions that may lead children to respond affirmatively to questions about non-experienced events (e.g., "Did it hurt when he forced himself on you?"), or the suggestive questions to which children often acquiesce (e.g., Brady, Poole, Warren, & Jones, 1999; Bruck, Ceci, Francouer, & Renick, 1995; Cassel, Roebers, & Bjorklund, 1996; Ceci & Bruck, 1995; Ceci & Huffman, 1997; Dent & Stephenson, 1979; Goodman & Aman, 1990; Oates & Shrimpton, 1991; Poole & Lindsay, 1998; Robinson & Briggs, 1997; Walker, Lunning, & Eilts, 1996). The cited studies showed that the risky recognition questions were even riskier when addressed to children aged 6 and under, and thus that forensic investigators needed to make special efforts to maximize the amounts of information elicited from such children using open-ended prompts. The emphasis on the value of open-ended prompts was also supported by evidence that, in forensic contexts, responses to individual free-recall prompts are three to five times more informative than responses to more focused prompts (e.g., Lamb, Hershkowitz, Sternberg, Esplin et al., 1996; Sternberg, Lamb, Hershkowitz, Esplin, Redlich, & Sunshine, 1996; Sternberg, Lamb, Davies, & Westcott, 2001).

Unfortunately, researchers have repeatedly shown that these research-based and expert-endorsed recommendations are widely proclaimed but seldom followed. Descriptive studies of forensic interviews in various parts of the United States, United Kingdom, Canada, Sweden, Finland, and Israel consistently show that forensic interviewers use open-ended prompts quite rarely, even though such prompts reliably elicit more information than more focused prompts do (e.g., Cederborg, Orbach, Sternberg, & Lamb, 2000; Craig, Scheibe, Kircher, Raskin, & Dodd, 1999; Cyr, Lamb, Pelletier, Leduc, & Perron, 2006; Davies, Westcott, & Horan, 2000; Korkman, Santila, & Sandnabba, 2005; Lamb,

> Hershkowitz, Sternberg, Esplin, et al., 1996; Lamb, Sternberg, & Esplin, 2000; Lamb, Sternberg, Orbach, Aldridge, Bowler, Pearson, & Esplin, 2006; Sternberg, Lamb, Davies, & Westcott, 2001; Thoresen, LØnnum, Melinder, Stridbeck, & Magnussen, 2006; Walker & Hunt, 1998; Walker & Warren, 1995). To the distress of trainers and administrators, furthermore, such deviations from 'best practice' were evident even when the interviewers had been trained extensively, were well-aware of the recommended practices, and often believed that they were adhering to those recommendations!
>
> The latter findings were consistent with the results of studies showing that both intensive and brief training programs for investigative interviewers may impart knowledge about desirable practices but have little if any effect on the actual behavior of forensic investigators (Aldridge, 1992; Aldridge & Cameron, 1999; Freeman & Morris, 1999; Stevenson, Leung, & Cheung, 1992; Warren, Woodall, Thomas, Nunno, Keeney, Larson, & Stadfeld, 1999).
>
> Because forensic interviewers often have difficulty adhering to recommended interview practices in the field, our group of researchers at the National Institute of Child Health and Human Development (NICHD) developed a structured interview protocol designed to translate professional recommendations into operational guidelines (Orbach et al., 2000). The structured NICHD protocol, the 2007 version of which is included in the appendix, guides interviewers through all phases of the investigative interview, illustrating free-recall prompts and techniques to maximize the amount of information elicited from free recall memory.

Lamb, Orbach, Hershkowitz, Esplin, and Horowitz, *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE NEGL. 1201-1231 (2008). The author manuscript is at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2180422/pdf/nihms35447.pdf> [2-26-2020]. This article is important to read if you are involved in a case where the interview of a child about possible sexual abuse is an issue.

V. INVESTIGATING ALL PARTIES TO THE SUIT. As noted in Section IV above, many professionals and professional organizations believe that they should not make clinical judgments about persons they haven't personally interviewed. What if the professional makes a recommendation about child placement without even assessing the parents? In *Aguilar v. Foy*, No. 03-10-00678-CV (Tex. App.--Austin March 1, 2012, no pet.) (mem. op.), the appellate court ruled that the trial court did not abuse its discretion by admitting the testimony of the children's treating psychologist that adoption of two children would be in their best interest, despite the fact that the psychologist did not interview the father or investigating his home. The psychologist admitted that he would be better equipped to render an opinion about adoption if he had interviewed the father. The appellate court said:

> The admissibility of an opinion regarding the children's best interest is subject to wider discretion than opinions based on "hard" science. *See Id*. Texas Rule of Evidence 702 provides that a witness who qualifies as an expert because of knowledge, skill, experience, training, or education may testify as an expert if scientific, technical, or other specialized

> knowledge will assist the trier of fact to understand the evidence or resolve an issue of fact. *Id.* The basis of opinions regarding the children's best interest will vary from case to case because the relevant facts vary among cases. *Id.* (citing *Chacon v. Chacon*, 978 S.W.2d 633, 637-38 (Tex. App.--EL Paso 1998, no pet.)). The *Chacon* court, reviewing a custody decision after a divorce, opined that a social study is designed to be comparative in nature regarding the parenting abilities of litigants. 978 S.W.2d at 638.
> * * *
> We cannot say that [the psychologist's] analysis was unreliable and inadmissible because he did not interview the birth parents. He determined that the primary factor in promoting these children's best interests was stability in their environment and described why. His opinion that termination of [the father's] parental rights served the children's best interest is consistent with his emphasis on the stability of the children's placement with the [adoptive parents]. [The father] pointed out through cross-examination potential flaws with [the psychologist's] fact-gathering and analysis. Such weaknesses of [the psychologist's] opinion, if any, go to the weight accorded it by the court as factfinder and adjudicator. The court did not abuse its discretion by admitting the opinion and evaluating its merit alongside other evidence.

This Author respectfully suggests that the expert testimony in *Aguilar v. Fay* was inadmissible under TRE 703, and that the Court of Appeals actually engaged in harm analysis, which is used to determine whether the error in admitting evidence was harmful error, and thus reversible error.

In 2015, the Legislature adopted Tex. Fam. Code § 107.109(c), setting out the basic elements of a child custody evaluation, including (c)(1) "a personal interview of each party to the suit seeking conservatorship of, possession of, or access to the child ..., and (c)(3) "observation of each child who is the subject of the suit ... in the presence of each party to the suit ...." This statutory standard would preclude the opinion testimony that was admitted in *Aguilar v. Foy*.

VI. COURT-APPOINTED PARTICIPANTS. The Texas Family Code gives courts the ability appoint persons in various capacities in SAPCRs. Some of these participants are potential expert witnesses.

A. CHILD CUSTODY EVALUATOR. Under TFC ch. 107, subch. D, the court can order a child custody evaluation. TFC § 107.113 requires that the evaluator prepare a report which must be filed with the court and served on the parties. TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence."

1. Qualifications of a Custody Evaluator. The Legislature has given us some criteria by which to gauge the qualifications of an expert *on child custody, possession, and access*. TFC § 107.104, Child Custody Evaluator: Minimum Standards, requires an expert who is to perform a child custody evaluation to have: a master's degree; license as a social worker, professional counselor, marriage and family therapist, psychologist, or board certified MD psychiatrist; 2 years of supervised experience evaluating physical, intellectual, social, and psychological functioning and needs; at least 10 court-ordered child custody evaluations made under the supervision; or a doctoral degree licensed in a human services field with course work and practical experience in child custody evaluations;

plus 8 hours of family violence training. Compliance with these standards is mandatory. TFC § 107.105 adds that the evaluator "must demonstrate, if requested, appropriate knowledge and competence in custody evaluation services consistent with the professional models, standards and guidelines." A statutory exception to these minimum standards is allowed for counties with population under 500,000. TFC § 107.106.

The Texas Administrative Code sets out qualifications for a licensed psychologist to conduct a child custody evaluation. Title 22, Tex. Admin. Code § 465.18, says:

> Notwithstanding any other grounds for qualification, the Board has determined that a licensed psychologist is qualified to conduct child custody evaluations if the licensee:
>
> > (i) has obtained a minimum of 8 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and is board certified in forensic psychology by the American Board of Professional Psychology (ABPP); or
> >
> > (ii) has obtained a minimum of 40 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and has conducted at least three child custody evaluations under the supervision of a qualified licensee.

Title 22, Tex. Admin. Code § 465.18.

TFC § 104.008(a) says that "[a] person may not offer an expert opinion or recommendation relating to conservatorship of or possession of or access to a child at issue in a suit unless the person has conducted a child custody evaluation relating to the child under Subchapter D, Chapter 107." TFC § 104.008(c) says: "This section does not apply to a suit in which the Department of Family and Protective Services is a party.' However, the fact that a custody evaluation is not statutorily required, before a witness can make a custody, possession, or access recommendation in a DFPS proceeding, does not mean that the criteria for custody evaluators and custody evaluations have no application. They are perfectly fine criteria for the court to use in performing its gatekeeping function regarding the reliability of an expert's data and methodology. And the exemption for suits in which the DFPS is a party does not supplant the provision in 22 Tex. Admin. Code § 465.18, saying that a licensed psychologist cannot make a recommendation on conservatorship, possession, or access without first conducting a child custody evaluation.

A recommendation on conservatorship, possession, or access is not necessarily the same thing as a recommendation that the parent-child relationship be terminated. This raises the question of whether the child-custody-related provisions of TFC Chapter 107 and Administrative Code § 465.18 can or should be applied to an expert who is recommending that the parent-child relationship be terminated by a court that is assessing reliabiltiy under TRE 702..

The problem with drawing a hard line between a child custody evaluation and a parental termination evaluation is that the distinction collapses in the individual cases. Under a strict interpretation, a witness in a DFPS case could be permitted to recommend for or against permanent termination of

the parent-child relationship, but not be permitted to recommend custodial placement with the parents or within the family or with the DFPS. A recommendation for termination inherently involves rejecting custody arrangements that fall short of permanent termination, and a recommendation against termination inherently favors existing or alternative custodial arrangements. A better and more practical approach would be to use the TFC and Administrative Code standards for custody evaluations as a model for termination recommendations, but requiring that the mental health professional have continuing professional education regarding parental termination and alternative arrangements, and have conducted the required number of supervised evaluations of parental termination disputes.

2. Underlying Data and Methodology. TFC § 107.109 sets out the "basic elements" of a child custody evaluation. They include (i) a personal interview with the parties seeking court-ordered relationship with the child; (ii) interviews with the children; (iii) observation of the children with each party; (iv) observation and interview with another child who lives on a full-time basis in the home but is not subject to the suit; (v) information from collateral sources; (vi) criminal history of residents of the household; and (vii) an assessment of the relationship between each child and each party seeking a court-ordered relationship. If any of these basic elements is missing, the evaluator must disclose what and why, and discuss the effect of its omission. TFC § 107.109(b). The Court can order psychometric testing. TFC § 107.110. These are suitable criteria for a court to evaluate whether the underlying facts or data provide a sufficient basis for an expert's opinion as required by TRE 705(c).

B. FAMILY COUNSELOR. TFC § 153.010 authorizes a court to order a party to participate in counseling with a mental health professional who (i) has a background in family therapy; (ii) has a mental health license that requires as a minimum a master's degree; and (iii) has training in domestic violence if the court determines that the training is relevant to the type of counseling needed. If no one in the county can meet the foregoing criteria, the court can appoint a person whom the court believes is qualified to conduct the counseling. A referral to counseling must be predicated on a determination that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child. The statutory role does not contemplate the family counselor making forensic recommendations, but nothing seems to preclude the family counselor from testifying as a lay witness to facts, or to lay opinions rationally based on personal knowledge, as long as the counselor does not rely on specialized knowledge governed by TRE 702.

C. GUARDIAN AD LITEM. A "guardian ad litem" ("GAL") is defined in TFC §107.001(5) as "a person appointed to represent the best interests of a child. The term includes:

> (A) a volunteer advocate from a charitable organization described by Subchapter C who is appointed by the court as the child's guardian ad litem;
>
> (B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;
>
> (C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or

(D) an attorney ad litem appointed to serve in the dual role."

These loose standards address qualifications, but not methodology. TFC § 107.011 requires the court to appoint a GAL for a child in a suit filed by a governmental agency seeking termination or conservatorship. TFC § 107.011. "A GAL's representation is limited to matters related to the suit for which he was appointed." *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980).

The powers and duties of a GAL are described in TFC § 107.002. The GAL *may* "conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child." TFC § 107.002(a)(1). The fact that the Legislature did not use the defined term "child custody evaluation," and the fact that the "investigation" is only to the extent that the GAL considers necessary, suggests that the investigation does not need to meet the requirements of TFC § 107.109 for child custody evaluations. Duties of a GAL include the duty to interview the child if age 4 or older, to interview each person with significant knowledge of the child's history and condition, to interview the parties to the suit, and to consider the child's desires without being bound by them. (Query: does this legislative truncation of sources of data preclude the court from applying prevailing social science standards of data acquisition?) The GAL is not bound to advocate the desires of the child. The GAL can be called as a witness. TFC § 107.002(d), (e) & (f). The GAL can testify and submit a report, but the testimony is subject to the TRE, TFC § 107.002(e), and disclosure of the contents of the report to the jury is subject to the Texas Rules of Evidence. TFC § 107.002(e) & (h). The Family Code does not make clear whether a GAL's custody recommendations must meet the criteria of TFC § 107.109 for custody evaluations. However, the Rules of Evidence include TRE 602, 701, 702, 703, 704, and 705, including the requirement of helpfulness and the associated concerns about the underlying data and the reliability of methodology. TRE 403, which requires the court to exclude relevant evidence where the probative value is outweighed by the danger of unfair prejudice, confusing the issue, or misleading the jury, would also apply. TFC § 107.002(c)(4) & (6) provide that a GAL is entitled to attend all legal proceedings in a case and testify in court regarding the GAL's recommendation. The court in *In re K.C.P.*, 142 S.W.3d 574, 585 (Tex. App.--Texarkana 2004, no pet.), held that a GAL is exempt from TRE 614, the rule of exclusion of witnesses, and is therefore allowed to hear the testimony of other witnesses. In this Author's opinion, the Court's decision is subject to question, especially considering that the GAL is clothed in the mantle of being court appointed and neutral.

Dual Role. An attorney can be appointed either solely as a guardian ad litem, or solely as an attorney ad litem, or s/he can be appointed in a "dual role." TFC §§ 107.001(4) & 107.011(b)(3) & (d). An attorney appointed solely as a GAL, may take only actions that a non-attorney can take, and specifically cannot perform legal services, engage in discovery (other than as a witness), make opening and closing arguments, or examine witnesses. TFC § 107.011(d). In a termination or conservatorship case filed by a governmental agency, the court must appoint an attorney ad litem. TFC § 107.012. The court can fulfill this requirement by appointing an attorney in dual role, as guardian ad litem and as attorney ad litem. TFC § 107.0125. A GAL is not allowed to call or question witnesses unless the GAL is an attorney appointed in a dual role. TFC § 107.002(c)(4). TFC § 107.007(a)(4) provides that an attorney serving in a dual role may not "testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct," Lawyer as Witness, and may not submit a report into evidence.

D. ATTORNEY AD LITEM. "The role of an attorney ad litem is, like every attorney, to pursue, protect, and defend the interests of his or her client." *Harris Cty. Children's Protective Servs. v. Olvera*, 77 S.W.3d 336, 341 (Tex. App.--Houston [14th Dist.] 2002, pet. denied). An "attorney ad litem" is defined in TFC §107.001(2) as "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." The duties of an attorney ad litem are set out in TFC § 107.003. These duties include interviewing the child if age 4 or older, interviewing "each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. The attorney ad litem "must be trained in child advocacy or have experience determined by the court to be equivalent to that training." TFC § 107.003(a)(2). Additionally, the attorney ad litem must investigate the medical care for the child, and if the child is age 16 or older, be sure the child has a birth certificate, social security card, driver's license, and other document determined by DFPS to be appropriate. TFC § 107.003(b). Additionally, the attorney ad litem must advise the child, represent the child's "expressed objectives of representation," and be familiar with the American Bar Association's standards of practice for attorneys representing children. TFC § 107.004. The attorney ad litem must complete at least three hours of continuing legal education in representing children in child protection. TFC § 107.004(b). Additional responsibilities are spelled out in TFC §107.004.

1. Can the Attorney Ad Litem Testify? TFC § 107.007(a)(4) provides that an attorney ad litem, or an attorney serving in a dual role, or serving as an amicus attorney, cannot "testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct," Lawyer as Witness. Section 107.007(a)(3) also says that a report by the attorney ad litem or dual role attorney may not submit a report into evidence.

2. Can the Attorney Ad Litem Make a Recommendation? While a lawyer can make arguments to the jury based on the evidence, the common perception that an attorney ad litem is a court-appointed "neutral" between warring parties could give the attorney ad litem's "recommendation," delivered in closing argument, undeserved weight with a jury. The court should consider restricting the attorney ad litem's argument to recounting the facts favorable and unfavorable to each litigant, and not advocating an outcome.

E. AMICUS ATTORNEY. An "amicus attorney" is defined in TFC §107.001(1) as "an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." The duties of an amicus attorney are set out in TFC § 107.003, and overlap those of an attorney ad litem as to interviewing the child if age 4 or older, interviewing "each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. Additional duties are spelled out in TFC § 107.005.

1. Can an Amicus Attorney Testify? TFC § 107.007(a)(4) provides that an amicus attorney cannot "testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct," Lawyer as Witness.

2. Can an Amicus Attorney Make a Recommendation? If an amicus attorney is allowed to participate in the trial, the prospect that the attorney's closing argument would be given unwarranted weight by the jury suggests that the court should allow the amicus attorney to testify to facts for and against the parties but not to make a recommendation in closing argument as to the outcome.

F. PHYSICAL OR MENTAL EXAMINER. TRCP 204 permits a court, upon motion and notice, to order a party (or a person in a party's custody or control) to submit to a physical or mental examination by a physician or psychologist. Good cause must be shown, meaning either the mental or physical condition is in controversy, or where the party in question has designated a psychologist as a testifying expert or disclosed a psychologists's records for possible use at trial. TRCP 204.1 (a) & (c). The party examined can require the evaluator to prepare a report. TRCP 204.2. TRCP 204.3 permits the court, in a SAPCR, to order one or more psychologists or psychiatrists to examine the children or other parties. The normal rules of evidence apply to the expert's report and testimony, including TRE 701, 702, 703, 704, 705, and 803(8).

G. PARENTING COORDINATOR. A "parenting coordinator" is an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described by Section 153.606 in a suit; and (B) who: (i) is appointed under this subchapter by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures; and (ii) is not appointed under another statute or a rule of civil procedure. TFC § 153.601(3). The court cannot appoint a parenting coordinator except upon a finding that the case is a "high-conflict case" or there is good cause and the appointment would be in the child's best interest. TFC § 153.605(b). The parenting coordinator cannot act as amicus attorney, guardian ad litem, or child custody evaluator, friend of the court, or parenting facilitator. There is a list of duties of parenting coordinators in TFC § 153.606, such as identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for problem solving, etc. The parenting coordinator "shall" submit a written report to the court and parties as often as the court orders. However, the report is limited to a statement of whether the parenting coordinator should continue. TFC § 153.608. Given the statutory limitations on the parenting coordinator's report, it is doubtful that a parenting coordinator could testify to recommendations in hearings or at trial. But there is no obvious barrier to a parenting coordinator testifying to facts and lay opinions based on personal knowledge.

H. PARENTING FACILITATOR. A "parenting facilitator" is "an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described by Section 153.6061 in a SAPCR; and (B) who: (i) is appointed by the court under subchapter of Chapter 153 on its own motion or on a motion or agreement of the parties, to assist parties in resolving parenting issues through procedures that are not confidential; and (ii) is not appointed under another statute or a rule of civil procedure." TFC § 153.601(4). The parenting facilitator has the same duties as listed for parenting coordinators, plus monitoring compliance with court orders. TFC § 153.6061. The parenting facilitator "shall" submit a written report to the court and parties as often as the court orders. The report may contain a recommendation of settlement, and other matters specified by the court, but may not include recommendations as to conservatorship, possession, or access. TFC § 153.6081. However, it is clear that a parenting facilitator cannot testify to recommendations as to the merits of the case. The statute does not preclude a parenting facilitator from testifying as a fact witness.

I. REPORT OF JOINT PROPOSAL OR JOINT STATEMENT. If the court orders parties to work with a parenting coordinator or parenting facilitator to settle parenting issues, the coordinator or facilitator "shall" submit a written report describing a joint proposal or statement of the parties. This written report does not constitute an agreement unless it is prepared by the parties' attorneys in the form of a Rule 11 agreement, an MSA, a collaborative law agreement, or a settlement agreement under Tex. Civ. Prac. & Rem. Code § 154.071; TFC § 153.6082. The report clearly would not be admissible in a contested hearing or trial except to prove the existence of an agreement under TRCP 11.

VII. ALCOHOL AND DRUG EXPERTS. Alcohol and drug testing fall into the category of toxicology. Because alcohol and drug testing is chemistry-based and biology-based, the scientific rigour of *Daubert*, *Robinson*, and *Kelly v. State* apply.

A. GENERAL PRINCIPLES IN TESTING FOR ALCOHOL AND DRUGS. [In this discussion, alcohol and drugs are sometimes included under the term "drug testing."] Drug testing is a chemical analysis of a sample (urine, sweat, blood, hair, breath) to determine the presence of a drug, and sometimes the concentration of a drug, in the sample. Sometimes the drug is detected by detecting or measuring the drug itself, and sometimes it is measured indirectly, by measuring a different chemical that has a known correlation to the drug.

1. Sample Integrity. Sample integrity is crucial to accurate drug testing. If the sample is inadvertently contaminated, the test results may be invalid, and certainly are not reliable proof in a court proceeding. The person being tested can also adulterate the sample. An example would be introducing someone else's urine into the cup, or pouring bleach into the sample. Or a person might try to dilute a urine-based test reading by drinking copious amounts of water to dilute the urine.[9] Adulteration of a blood sample by the testee is not feasible, because the blood draw is performed by a medical technician or professional. There can be practical problems with sample integrity with breathalyzers. Belching or vomiting shortly before taking the breathe sample can destroy the assumed correlation between alcohol in the breath and alcohol in the brain. Certain mouthwashes contain alcohol which could invalidate a test result that is based on the assumption that all alcohol in the breath has been metabolized by the body. A similar issue can arise when a lawfully prescribed drug causes a testee to test positive for an illicit drug. Sample integrity should be part of reliability analysis of a drug test result in every case

2. Sample Identification. Sample identification is a crucial part of the drug-testing process. Often the sample is shipped to a lab for testing, sometimes weeks or even months after the sample is taken. Criminal courts absolutely require chain-of-custody evidence to give assurance that the sample tested was taken from the defendant, or probationer in question. Civil court should, as well. Some courts deem uncertainties in the chain-of-custody as fatal to admissibility, while other courts let it go to the weight of the evidence. Sample identity should be part of a reliability analysis of a drug test result in every case.

3. Testing and Analysis. Another crucial part of drug testing is the testing or analysis of the

[9] Efforts to dilute urine can be spotted by measuring the concentration of creatinine in the urine. A creatinine reading below normal indicates dilution of the urine in the body before the test.

sample. For financial and practical reasons, much testing and analysis is done by technicians without a deep educational foundation in chemistry, biology, or machine mechanics. Reliability of the results is enhanced by tightly-scripted protocols, adequate training, and safeguards. Some testing is as simple as inserting the sample, pushing a button, and reading a digital number. But even with semi-automated testing, there are concerns about calibrating the test equipment, before and after each test, or before and after every ten, hundred or thousand tests. Protocols have been established by the Department of Labor, the Department of Transportation, and law enforcement agencies like the Department of Public Safety, and sometimes the Legislature. The adherence to these protocols is something that must be established in every case.

Drug testing is often done in two stages: an initial screening followed by a confirmatory test. CLINICAL DRUG TESTING IN PRIMARY CARE p. 9 (U.S. Department of Health and Human Services 2012) ("Drug Testing In Primary Care"). The book explains:

> Screening tests (the initial tests) indicate the presence or absence of a substance or its metabolite, but also can indicate the presence of a cross-reacting, chemically similar substance. These are qualitative analyses – the drug (or drug metabolite) is either present or absent. The tests generally do not measure the quantity of the drug or alcohol or its metabolite present in the specimen (a quantitative analysis). Screening tests can be done in a laboratory or onsite (point-of-care test [POCT]) and usually use an immunoassay technique. Laboratory immunoassay screening tests are inexpensive, are easily automated, and produce results quickly. Screening POCT immunoassay testing devices are available for urine and oral fluids (saliva). Most screening tests use antigen–antibody interactions (using enzymes, microparticles, or fluorescent compounds as markers) to compare the specimen with a calibrated quantity of the substance being tested for (Center for Substance Abuse Treatment, 2006). Confirmatory tests either verify or refute the result of the screening assay. With recent improvements in confirmation technology, some laboratories may bypass screening tests and submit all specimens for analysis by confirmatory tests. It is the second analytical procedure performed on a different aliquot, or on part, of the original specimen to identify and quantify the presence of a specific drug or drug metabolite (Substance Abuse and Mental Health Services Administration [SAMHSA], 2008). Confirmatory tests use a more specific, and usually more sensitive, method than do screening tests and are usually performed in a laboratory.

Id. at 9. "Most commonly, immunoassay testing technology is used to perform the initial screening test.... The most common technologies used to perform the confirmatory test are gas chromatography/ mass spectrometry, liquid chromatography/mass spectrometry, and various forms of tandem mass spectrometry." *Id.* at 10. Screening is often considered a preliminary assessment to determine which sample to test further. However, there are instances where it is the presence of drugs and not the quantity of drugs that counts (like violating the terms of probation), and screening tests without confirmation are sometimes held to be sufficient evidence to make a legal determination.

Drug test reliability is measured by sensitivity and specificity, which are statistical measures.

> The *sensitivity* indicates the proportion of positive results that a testing method or device

> correctly identifies. For drug testing, it is the test's ability to reliably detect the presence of a drug or metabolite at or above the designated cutoff concentration (the true-positive rate). *Specificity* is the test's ability to exclude substances other than the analyte of interest or its ability not to detect the analyte of interest when it is below the cutoff concentration (the true-negative rate). It indicates the proportion of negative results that a testing method or device correctly identifies.

Id. at 10.

4. Interpretation. Interpretation of test results is the final important step in drug testing. When revoking probation, the goal is to determine whether a drug is present in the sample. In a DWI prosecution, the goal is to determine whether the quantity of alcohol in the sample is above a certain level (0.08% blood alcohol content (BAC) or more). Sometimes in a DWI prosecution, if the sample is drawn after a certain length of time, it is necessary to use "retrograde extrapolation" to project the BAC at the time of testing back to the time of the arrest, minutes or hours before the sample is drawn. *See Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2000) (establishing criteria for admitting retrograde analysis opinions); *Veliz v. State*, 474 S.W.3d 354 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd) (rejecting retrograde extrapolation testimony, partly due to the expert's inability to apply the science and explain it with clarity). All drug testing has a "cut-off" level of drug presence in the sample, below which the test results cannot be considered significant enough to draw a conclusion about the presence of the drug in the sample. Any result that is at or slightly above the cut-off creates uncertainty about the reliability of any conclusions drawn from the indicated presence of the drug in the sample. In *Layton v. State*, 280 S.W.3d 235, 2412-42 (Tex. Crim. App. 2009), the Court ruled that testimony of the defendant having taken Xanax and Valium more than 12 hours before his arrest for driving while intoxicated on alcohol was not relevant to the prosecution, because of a lack of scientific evidence regarding the drugs' affect on the defendant at the time of his arrest.

5. Timing. The timing of taking the sample can be an important factor in determining whether a testee has violated prohibitions. Persons who are practiced in the art of deception can and do educate themselves on the period of time a drug remains in the urine, saliva, or blood, and they can modulate their drug-taking so that the results of a test will be negative or inconclusive by the time of a scheduled sample-taking. Some element of unpredictability on when a sample may be taken (i.e. random testing) is used to thwart this kind of evasive behavior.

6. Screening Versus Confirmation Testing. Drug tests are divided between screening and confirmation tests. Less sophisticated tests can indicate the presence of a drug in the sample (screening), but the screening test is sometimes not considered sufficiently reliable for use in criminal cases. Samples that fail the screening test (typically an immunoassay analysis) can be subjected to confirmation tests (typically a chromatography test). Robinson & Jones, *Drug Testing in a Drug Court Environment: Common Issues to Addres*s p. 4 (U.S. Dep't of Justice OJP May 2000) ("OJP").

7. Qualifications. Qualifications for experts testifying to drug testing results were discussed in *Woods v. Wills*, No. 1:03-CV-105 CAS (U.S. Dist. Ct., E.D. Missouri, October 27, 2005):

> The Federal Judicial Center's Reference Manual on Scientific Evidence , Second Edition

(2000), in the chapter titled "Reference Guide on Toxicology," discusses the expert qualifications of a toxicologist and notes that "no single academic degree, research speciality, or career path qualifies an individual as an expert in toxicology" because toxicology is a "heterogenous field." *Id.*, § II at 415. Nonetheless, "[a] proposed expert should be able to demonstrate an understanding of the discipline of toxicology, including statistics, toxicological research methods, and disease processes." *Id.* at 416. The Reference Manual offers suggested "indicia of expertise" which are relevant to both the admissibility and weight of a proffered expert opinion, including: (1) whether the proposed expert has an advanced degree in toxicology, pharmacology or a related field, and if the expert is a physician, is he board certified in a field such as occupational medicine; (2) whether the proposed expert has been certified by the American Board of Toxicology, or does he belong to a professional organization such as the Academy of Toxicological Sciences or the Society of Toxicology; and (3) what other criteria does the proposed expert meet, such as quality and number of peer-reviewed publications, service on scientific advisory panels, and university appointments. *Id.* at 415-18.

B. HGN TEST. "Horizontal gaze nystagmus" is a non-chemical "field test" for alcohol intoxication based on nystagmus, the inability of the eyes to follow smoothly an object moving horizontally across the field of vision, particularly when the object is held at a forty-five degree (or more) angle to the side. *Neale v. State*, 525 S.W.3d 800, 809 (Tex. App.–Houston [14th Dist.] 2017, no pet.). Consumption of alcohol exaggerates nystagmus to the degree that it can be observed by the naked eye, which has led to the HGN "test." *Id.* A trained observer (i.e., a peace officer) can conduct the test on the roadside and based on the test arrest an individual for intoxication. The arrestee may or may not be subjected to confirmation testing. The Court of Criminal Appeals held in *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001), that the science underlying the HGN test is scientifically valid, and that a person can be convicted of driving while intoxicated on the basis of the HGN test alone, without a breathalyzer reading or a blood test, if the expert demonstrates an understanding of the underlying science and can explain it clearly. In arriving at this conclusion, the Court of Criminal Appeals took judicial notice of information not presented by either party at trial or on appeal. In evaluation a breath test taken two hours after arrest, the Court researched the issue of "retrograde extrapolation" of blood alcohol content and found much disagreement. The Court looked for rulings by other courts, but found only two decisions, neither supportive. The Court concluded that retrograde extrapolation evidence is admissible only if certain criteria are met:

> We believe that the science of retrograde extrapolation can be reliable in a given case. The expert's ability to apply the science and explain it with clarity to the court is a paramount consideration. In addition, the expert must demonstrate some understanding of the difficulties associated with a retrograde extrapolation. He must demonstrate an awareness of the subtleties of the science and the risks inherent in any extrapolation. Finally, he must be able to clearly and consistently apply the science.
>
> The court evaluating the reliability of a retrograde extrapolation should also consider (a) the length of time between the offense and the test(s) administered; (b) the number of tests given and the length of time between each test; and (c) whether, and if so, to what extent, any individual characteristics of the defendant were known to the expert in providing his extrapolation. These characteristics and behaviors might include, but are not limited to, the

> person's weight and gender, the person's typical drinking pattern and tolerance for alcohol, how much the person had to drink on the day or night in question, what the person drank, the duration of the drinking spree, the time of the last drink, and how much and what the person had to eat either before, during, or after the drinking.

Id. at 916. The rigour of the Court's analysis as it examined articles and court opinions was well below what an expert might be required to say in testimony supporting the reliability of the HGN Texas, but the Court of Criminal Appeals, is the court of last resort in Texas prosecutions, so its decision settles the question.[10]

The National Highway Traffic Safety Administration has endorsed three field sobriety tests to detect alcohol impairment: the HGN, the walk-and-turn (W&T), and the one-leg stand (OLS). Celeste, *A Judicial Perspective on Expert Testimony in Marijuana Driving Cases,* 13 *J. Med. Toxicol.* 117-123 (Mar. 2017). An article by Rubenzer, *The Standardized Field Sobriety Tests: A Review of Scientific and Legal Issues*, 32 LAW AND HUMAN BEHAVIOR 293-313 (Aug. 2008), was highly critical of the science behind standardized field sobriety tests (SFST). After reviewing the issues, the author concludes:

> HGN has repeatedly demonstrated higher correlations with BAC than the psychomotor tests, with some of the supportive findings published in peer-reviewed journals by authors not associated with NHTSA. However, the SFSTs cannot be used to estimate BAC in court and lack specificity for alcohol. The limited reliability data suggest that variations in administration or scoring from one police officer to another will be a substantial source of error, regardless whether BAC or behavioral impairment is the criterion. The SFSTs were introduced into widespread use before thorough testing was completed and the results independently replicated. Even more than 20 years later, many basic questions concerning their use have not been answered. The effects of many variables, including medical conditions, fatigue, and fear, have not been examined. Further research is needed to justify their widespread use and to establish whether, in light of the current legal environment, the current SFST battery is the best available, or good enough, for distinguishing those who are impaired from those who are not.

Id. at 307. The article can be reviewed at

<http://home.trafficresourcecenter.org/~/media/Microsites/Files/traffic-safety/The%20Standardized%20Field%20Sobriety%20Tests%20A%20Review%20of%20Scientific%20and%20Legal%20Issues.ashx> [3-10-2020]

C. URINE. Urinalysis is the norm in employment-related drug testing. Urine tests require no expensive equipment to take the sample, and collecting urine in a vial is not invasive compared to a blood draw, and the results of urine testing are quick. A urine sample normally is tested using an

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[10] "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 334 U.S. 443, 540 (1953) (Justice Jackson, concurring).

immunoassay technique that screens for the presence of a drug. This is accepted for employment-related and transportation-related testing, but not for criminal prosecutions. "Waterloading" occurs when a testee dilutes his/her urine by drinking copious amounts of water in order to reduce the concentration of the drug in the urine. Waterloading can be detected by noting the clear color of the urine, and by measuring the level of creatinine (a natural bodily waste product) in the urine. The analyst can determine the ratio between the drug and creatinine level ("normalization value"), but drawing conclusions about the level of drugs absent dilution based on the normalization value should be subjected to *Daubert* scrutiny. The safe conclusion to draw from diluted urine that the testee probably tried to "beat" the drug test. Nevertheless, if the drug concentration is near or below the cut-off for the test, then the test results do not support inferences about drug-taking. At the present time, Federal workplace drug testing standards only permit urine testing. An informative booklet on Federal standards for drug testing of urine is the *Medical Review Officer Guidance Manual for Federal Workplace Drug Testing Programs* (Dep't of HHS Oct. 2017):

<https://www.samhsa.gov/sites/default/files/workplace/mro-guidance-manual-oct2017_2.pdf> [3-10-2020]

D. SWEAT. Sweat can be collected by a skin patch and then analyzed for drug content. The patch allows 24/7 monitoring for extended periods. There are limited collection devices and testing laboratories. There is a potential risk of contamination during use. Cary, *The Fundamentals of Drug Testing*, DRUG COURT JUDICIAL BENCHBOOK § 6.4, p. 117 Table 1 (National Drug Court Institute 2011). The status of courts' acceptance of sweat patches in 2007 was summarized in *United States v. Meyer*, 483 F.3d 865 (8th Cir. 2007):

> Courts that have weighed in on this question, however, have concluded that the sweat patch is a generally reliable device. The United States Court of Appeals for the Tenth Circuit, for instance, found sweat patches reliable in monitoring drug usage where an offender did not offer evidence to counter positive sweat patch results. *See United States v. Gatewood*, 370 F.3d 1055, 1060-62 (10th Cir. 2004), vacated on other grounds, 543 U.S. 1109 ... (2005). Federal district courts, both within the Eighth Circuit and in other jurisdictions, have also deemed sweat patches to be generally reliable. *See Bentham*, 414 F.Supp.2d at 473 (concluding that sweat patch results "may sometimes be fallible, but probably not in this case"); *Snyder*, 187 F.Supp.2d at 59 ("[T]he sweat patch is generally reliable for drug testing purposes."); *United States v. Zubeck*, 248 F.Supp.2d 895, 898-99 (W.D. Mo.2002) (revoking defendant's supervised release on the basis of sweat patch results where Kadehjian offered expert testimony about the technology); *United States v. Stumpf*, 54 F.Supp.2d 972, 974 (D. Nev. 1999) ("[T]his Court finds by a preponderance of the evidence that the PharmChem sweat patch drug testing device is a reliable scientific method for testing for the presence of controlled substances."). These courts have further noted, however, that there could be some instances where positive sweat patch results might be deemed unreliable. *See*, *e.g.*, *Snyder*, 187 F.Supp.2d at 60 ("[A]lthough the sweat patch is generally reliable, it cannot be relied upon in situations where it is shown that the possibility of exterior contamination exists due to exposure to a basic solution containing drugs.").
>
> Today, we join the other courts that have previously determined that sweat patch results are a generally reliable method of determining whether an offender has violated a condition of his or her probation. It is important to note that the Food and Drug Administration cleared

> the Pharm-Chem sweat patch technology back in 1990. Today, the sweat patch is a widely used method for drug testing that is authorized by the Administrative Office of the United States Courts. We also place weight on the expertise of Dr. Kadehjian, who vouched for the general reliability of sweat patch results. And while sweat patches have not been exhaustively studied by scholars, the peer-reviewed academic studies that have been conducted generally support the device's reliability. *See Bentham*, 414 F.Supp.2d at 473.
>
> That is not to say, of course, that positive sweat patch results are invariably a reliable indicator of drug usage. There may well be certain instances where offenders offer compelling reasons to believe that positive test results from sweat patches are erroneous. District courts should make such determinations on a case-by-case basis.

Id. at 868-69. The court in *United States v. Thomas*, No. 16-3952 (8th Cir. Feb. 28, 2018) (unpublished), cited *United States v. Meyer* for the proposition that sweat patches were reliable.

E. SALIVA. The mechanics of oral fluid (saliva) drug testing are explained in an article written by Edward J. Cone, Ph.D., FTCB, of Johns Hopkins School of Medicine, Baltimore, MD, for the National Association of Drug Court Professionals and published online by Bexar County, Texas. See *Oral Fluid drug Testing Foils Cheaters* (Feb. 2011)

<https://www.bexar.org/DocumentCenter/View/11703/Oral-Fluid-Drug-Testing-Foils-Cheaters-PDF> [3-10-2020]

The article is generally favorable about the reliability of saliva drug testing. An article by Fatah & Cohn, *Saliva as an Alternate To Urine and Blood*, 65 CORRECTIONS TODAY (Oct. 2003), noted problems with saliva-testing and suggested that saliva testing should be used only for screening for confirmatory testing. Bosker & Huestis, *Oral Fluid Testing for Drugs of Abuse*, 55 CLINICAL CHEMISTRY 1910-1931 (Sep. 2009), said that the technology of saliva collection devices and laboratory testing "has greatly advanced in the last 5 years," however the successful development of a collection device "that performs acceptably for all drug classes is a challenge." The Drug Court Judicial Benchbook says that the "detection window" for oral fluid testing is approximately 24 hours, limiting the usefulness of this test. DRUG COURT BENCHBOOK p. 120.

F. BLOOD. Blood testing permits both qualitative and quantitative analysis, the latter being important for DUI prosecutions. However, taking the blood sample is invasive, and there is no equipment for on-site testing. There is a high potential for false negative results, because many abused substances are detectable in the blood for only a matter of hours. DRUG COURT JUDICIAL BENCHBOOK, p. 118 &120. However, a blood test is used as a confirmation test in many DWI prosecutions.

G. HAIR. In *United States v. Bush*, 44 M.J. 646 (A.F. Ct. Crim. App. 1996), *affd*, 47 M.J. 305 (C.A.A.F.1997), *cert. denied*, 522 U.S. 1114 (1998), the U.S. Air Force Court of Criminal Appeals held that GC/MS hair analysis was admissible in a court-martial for use of cocaine. Applying Military Rule of Evidence 702 and *Daubert*, the Court found that mass spectrometer analysis of hair samples was accepted as scientifically reliable in the relevant community of forensic chemistry, had been subjected to peer review, and was the subject of a growing body of professional publications and studies. *Id.* at 651-52. In *United States. v. Medina*, 749 F. Supp. 59 (E.D. New York 1990) (a

pre-*Daubert* case), the court listed a substantial group of publications supporting the scientific validity of radioimmunoassay (RIA) hair analysis to detect drugs, and found that the technique was admissible under FRE 702. RIA hair analysis was held valid in *Bass v. Florida Dep't of Law Enforcement*, 627 So.2d 1321, 1322 (Fla. Ct. App.1993) (concluding that RIA analysis of hair is generally accepted in the scientific community); *In re Adoption of Baby Boy L*, 157 Misc.2d 353, 596 N.Y.S.2d 997, 1000 (N. Y. Fam. Ct.1993) (RIA testing in human hair, when used in conjunction with GC/MS confirmatory testing, "has been accepted by the scientific community as a reliable and accurate method of ascertaining and measuring the use of cocaine by human subjects"). An informative article on the subject of hair analysis to detect drug usage is Flannery, Jones, Farst, & Worley, *The Use of Hair Analysis to Test Children for Exposure to Methamphetamine*, 10 MSU J. OF MEDICINE & LAW 143 (2006). Also look at Arthur McBay, *Legal Challenges to Testing Hair For Drugs: A Review*, 1 INT'L J. OF DRUG TESTING.

H. BREATH. Testing for alcohol by analyzing breath samples has a long history. Many criminal prosecutions have been based on an intoxilyzer result showing a BAC of more than 0.08%. An article critical of the reliability of breath alcohol breath testing is Okorocha & Strandmark, *Alcohol breath testing: is there reasonable doubt,* SYRACUSE J. SCI. & TECH. L. 27, 124 (2012).

1. Law Enforcement Standards. The Court of Criminal Appeals ruled that the Legislature has determined that the science underlying the intoxilyzer is valid, and that the technique applying it is valid if administered by individuals certified by and using the rules of the Texas Department of Public Safety. *Reynolds v. State*, 204 SW 3d 386, 390 (Tex. Crim. App. 2006). *See* Tx. Trans. Code § 724.064, Admissibility in Criminal Proceeding of Specimen Analysis. Note that the statute applies only to prosecution for DUI or DWI, and not civil litigation. The DPS has an explanatory booklet *Texas Alchohol Testing Program* at--

<https://www.dps.texas.gov/CrimeLaboratory/documents/BATOperatorManualRvsd.pdf>

An analysis of admissibility of the Intoxilyzer 5000 and Intoxilyzer 8000 is contained in *Schultz v. State*, 457 S.W.3d 94,107-15 (Tex. App.–Houston [1st Dist.] 2014, no pet.) (Brown, J., concurring and dissenting).

2. Soberlink. SOBERLINK is a popular portable breathalyzer that uses cellular transmission to immediately send blood alcohol content sample analysis to Soberlink's cloud-based alcohol recovery management software. From there, the results are emailed to specified individuals. The portable apparatus for taking the breath sample has a camera and facial recognition software to verify the identity of the person blowing into the apparatus. In *Cox v. State*, 446 S.W.3d 605 (Tex. App.--Texarkana 2014, pet ref'd), the appellate court reversed a decision to revoke a defendant's community supervision imposed after a felony conviction for driving while intoxicated. The proof supporting revocation was testimony from an employee of Recovery Healthcare Corporation (offering SOBERLINK) who presented records showing that the defendant had submitted breath samples containing alcoholic content. The witness was not an expert on how the SOBERLINK device worked. The State offered no evidence "to explain how the SOBERLINK machine operated, how it measured breath-alcohol content, how it generated or recorded the test results, or how the reliability of these test results could be measured." *Id.* at 609. The appellate court "found" nothing to establish that the science behind SOBERLINK "has been widely accepted in a sufficient number

of trial courts through adversarial gatekeeping hearings," citing *Somers v. State*, 368 S.W.3d 528, 545 (Tex. Crim. App 2012) (court held that the EMIT screening test is reliable scientific evidence, even without a confirmation test). *Id.* A "Consensus Statement" by a group of physicians discusses the use of SOBERLINK in a clinical context. See Gordon, Jarre, McLellan, Richardson, Skipper, Sucher, Tirado & Urschel, *How Should Remote Clinical Monitoring Be Used to Treat Alcohol Use Disorders?: Initial Findings From an Expert Round Table Discussion*, 11 J. OF ADDICTION MEDICINE 145-153 (2017). An article written by two retired judges and an attorney in December of 2018 presented arguments for why the Soberlink device meets *Daubert* standards in family law cases. See Hora, Wallace, MacKenzie, *The Admissibility of Alcohol Test Results From the Soberlink Device in Family Law Cases*, Justice Speakers Institute (Dec. 2018), at

<http://justicespeakersinstitute.com/wp-content/uploads/2018/12/Soberlink-Final.pdf>

In that article the authors conclude:

> The technology underlying the Soberlink device has gained acceptance in the field of research on alcohol use detection. The results from its fuel cell sensor is accepted in impaired driving and juvenile dependency cases with courts ruling that it is admissible under *Frye* and *Daubert* standards. Soberlink is increasingly accepted for use in family courts in contested custody cases. The reliability of the accuracy fuel cell breathalyzer technology used by Soberlink has been established through repeated testing and publication in peer reviewed journals.[92] Reported error rates are within an acceptable +/- .005 range.[93] Published research by forensic experts supports evidentiary use of fuel cell breathalyzers.[94] Soberlink is a reliable measurement instrument admissible under both *Frye* and *Daubert* standards that can accurately detect the presence of alcohol so long as the proper foundation is established.

Id. at p. 8.

SOBERLINK is a practical compromise when imposing safeguards to protect children from an intoxicated parent about to exercise a period of possession. Concerns about the reliability of SOBERLINK are diminished where the parent's addiction to alcohol is admitted or clearly established by reliable evidence. But the use of SOBERLINK results is problematic when used in hearings, and especially problematic when used in final trials, and doubly-especially problematic when used in parental termination final trials. It is this Author's opinion that, at this point in time, SOBERLINK results should be put through the TRE 702 reliability analysis in each case, both as to the underlying science and as to interpretation of readings that are at or near the cut-off level. Serious, if not insurmountable, reliability issues exist for samples taken after a period of possession has ended and "retrograde analysis" is used to infer BAC at an earlier time.

The Author could find no appellate authority on the scientific reliability of SOBERLINK information. In *In re K.L.M.*, No. 13-19-00057-CV (Tex. App.–Corpus Christi Jan. 23, 2020, no. pet.) (mem. op.), the evidence recounted by the appellate court indicated that the father tested positive for alcohol on a SOBERLINK device, then completed a mandatory test which confirmed 0% BAC. This was a false positive.

VIII. EXPERT OPINIONS CONTAINED IN OR BASED ON RECORDS. The question can arise as to whether expert opinions contained in government (public) records and business records can be admitted into evidence under those exceptions to the hearsay rule, without a TRE 702-related reliability assessment. A second issue is experts relying on information contained in reports where the underlying information is not in evidence or has not been subjected to *Daubert*, *Robinson*, *Gammill* reliability standards. A third issue involves business records containing expert opinions that were prepared in connection with litigation.

A. BUSINESS RECORDS. Under TRE 803(6), an exception to the hearsay rule, exists for records of a regularly conducted activity (i.e., business records) that record an act, event, condition, opinion, or diagnosis, provided that (A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge; (B) the record was kept in the course of a regularly conducted business activity; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and (E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

A pre-*Daubert* article addressing the admissibility of laboratory reports that is still well-worth reading is Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L. J. 671 (1988). On the subject of reliability, Giannelli expressed concern that many lab reports contained only the conclusions of testing or analysis, without revealing the bases for the findings. *Id*. at 693. This was problematic where there could be questions about the reliability of underlying scientific principles that are not subjected to cross-examination when an expert opinion is admitted in a report with no supporting testimony. *Id*. at 693-94. Giannelli's second concern was the inability to determine whether a valid procedure was followed, and whether there were gaps in the chain-of-custody. *Id*. at 694. Giannelli's third concern was the typical report's lack of information about the qualifications of the expert who performed the tasks and rendered the opinions in question. Giannelli concluded: "[M]ost reports are not 'competent.' … In effect, the report masks critical reliability issues." *Id*. at 695.

1. Personal Knowledge or Based on Another Person's Personal Knowledge. TRE 803(b) requires that the business record be based upon personal knowledge, or on information provided by someone with personal knowledge. In *U.S. v. Noria*, 945 F.3d 847, 854 (5th Cir. 2019), the court ruled that a U.S. Immigration Department Form I-213 was an admissible as a business record, in that it was typed by an immigration officer based upon information provided by the defendant.

2. Admitting Test Results as Business Records. In *State v. Matulewicz*, 101 N.J. 27, 499 A.2d 1363 (1985), the New Jersey Supreme Court held that a forensic chemist's drug screening report that was positive for marijuana was not admissible under that state's business record exception to the hearsay rule. In this pre-*Daubert* case, the court focused on the predicates for meeting the business record exception: (i) made in the regular course of business; (ii) prepared within a short time of the act, condition, or event described; and (iii) the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. *Id.* at 1364. Regarding the third category, the court applied the standard of "showing that the scientific technique has gained general acceptance within the scientific community." *Id.* at 1365. Proof should be offered

"to reflect the relative degrees of objectivity and subjectivity involved in the procedure; the regularity with which these analyses are done; the routine quality of each analysis; the presence of any motive to single out a specific analysis for the purpose of rendering an untrustworthy report, and the responsibility of each State Police chemist to make accurate and reliable analyses." Since that predicate was missing, the court held the test results inadmissible. The court applied a reliability standard to the trustworthiness prong of the business record exception to the hearsay rule.

3. Expert Opinions Contained in Business Records. The question arises as to whether an expert opinion contained in an otherwise admissible business record should be subjected to reliability analysis. The cases are varied.

- ***Gutierrez v. Excel Corporation***, 106 F.3d 683, 689 (5th Cir. 1997) (opinions in medical records did not support causation in reasonable medical probability, and therefore did not establish causation for cumulative trauma disorder).

- ***Fowler v. Carrollton Public Library***, 799 F.2d 976 (5th Cir. 1986) (medical records from hospital stay with no accompanying expert explanation of their significance or testimony on causation were inadmissible as they could have led only to unwarranted speculation by the jury, inferences in favor of claimant, and a prejudicial impact outweighing the benefit of these records).

- ***Clark v. City of Los Angeles***, 650 F.2d 1033 (9th Cir. 1981) (pre-*Daubert*) (expressions of opinion or conclusions in business record are admissible only if subject matter calls for expert or professional opinion and is given by one with required competence).

- ***Kohl v. Tirado***, 569 S.E.2d 576 (Ga. App. 2002) (medical record containing diagnostic opinions and conclusions may be admitted into evidence if a proper foundation is laid; i.e., the person who entered the diagnostic opinions and conclusions in the record must qualify as an expert and relate facts upon which the entry was based).

- ***Brooks v. Friedman***, 769 N.E.2d 696 (Ind. App. 2002) (medical opinions and diagnoses in hospital records must meet the requirements for expert opinions in order to be admitted into evidence).

- ***Cabinet for Human Resources v. E.S.***, 730 S.W.2d 929 (Ky. 1987) (social worker's opinions and conclusions entered in the case record were expert testimony and, since no evidence was offered to establish her qualifications to express those opinions and conclusions, they were inadmissible without regard to whether other requirements for admission under the business records exception to the hearsay rule were met).

- ***Lindsey v. Miami Development Corp.***, 689 S.W.2d 856 (Tenn. 1985) (expert opinions contained in medical records must meet the same requirements for admissibility as though the physician offered testimony identical to the information contained in the records).

- ***Keating v. Eng***, 377 N.Y.S.2d 928 (N.Y.A.D. 2 Dept. 1975) (even complete hospital records alone, without expert opinion and explanatory testimony, would require too much speculation by the jury to permit their introduction, in trial limited to issue of liability for personal injuries).

• ***Burroughs Wellcome Company v. Crye***, 907 S.W.2d 497 (Tex. 1995) (as hospital admission records indicated that admitting diagnosis was merely recitation of medical history or opinion as to causation provided by other records, patient herself, or her treating physician, and records did not reveal independent expert opinion concerning causation, they were no evidence that plaintiff's use of the spray caused a frostbite injury).

• ***Luxton v. State***, 941 S.W.2d 339, 342 (Tex. App.–Fort Worth 1997, no pet.) (TRE 705 does not allow a party to conduct voir dire of an expert whose observations, diagnoses, or opinions are offered as part of a business record).

Some cases have held that, notwithstanding the business record exception to the hearsay rule, expert opinions recorded in business records by a declarant who is not available for cross-examination may be excluded as substantive proof if the opinions relate to diagnoses of complex medical conditions difficult to determine or substantiate. *Lazorick v. Brown*, 480 A.2d 223 (N.J. Super. A.D. 1984); *Duquesne Light Co. v. Woodland Hills School Dist.*, 700 A.2d 1038 (Pa. Cmwlth. App. 1997); *Ganster v. Western Pennsylvania Water Co.*, 504 A.2d 186 (Pa. Super. 1985).

• ***McCable v. R.A. Manning Construction Company, Inc.***, 674 P.2d 699 (Wyo. 1983) (where a business record contains opinions, it is subject to rules governing expert opinion testimony).

4. Expert Opinions Relying on Business Records. Under TRE 703, an expert may rely on information that is not based on the expert's personal knowledge. What rule applies when an expert relies on information in a business record.

• ***Pack v. Crossroads, Inc.***, 53 S.W.3d 492 (Tex. App.–Fort Worth 2001, pet. denied) (because the doctor had no information how long the decedent had stayed at nursing home, what conditions he suffered from before he entered nursing home, or the physician's orders while decedent was at the nursing home, there was no evidence upon which the doctor could testify as to causation; therefore, hospital records and doctor's testimony as to causation were speculative, inflammatory and not admissible).

• ***March v. Victoria Lloyds Insurance Company***, 773 S.W.2d 785, 789 (Tex. App.--Fort Worth 1989, writ denied) (BAC report was admissible without analysis under TRE 701-703 because no expert interpretation of the results was needed to understand that it was evidence that there was alcohol in March's bloodstream at the time of the accident).

• ***Kohn v. La Manufacture Française Des Pneumatiques Michelin***, 476 N.W.2d 184 (Minn. App. 1991) (in tire design defect case, results from tests conducted by a university research institute were admissible as business records, where the expert testified that he was familiar with the results of the tests and how they were conducted, the tests were existing documents not prepared for the litigation, and it was the function of the institute to conduct tests and prepare reports directly related to transportation research).

5. Hearsay Within Hearsay. TRE 805 prohibits the admission of hearsay within hearsay, unless the second level of hearsay meets an exception to the hearsay rule. In *U.S. v. Davis*, 571 F.2d 1354, 1360 (5th Cir. 1978), the court said that FRE 803(6), the business record exception to the hearsay

rule, was not intended to authorize the reception of "rank hearsay."

In *Almarez v. Burke*, 827 S.W.2d 80, 82-83 (Tex. App.--Fort Worth 1992, writ denied), the court admitted an excited utterance within an excited utterance. Another example would be medical records, proved up by the hospital's custodian of the records under TRE 803(6). The medical records may meet the business-record exception to the hearsay rule, but hearsay contained in the medical records must meet an exception to the hearsay rule, or that hearsay must be redacted from the records. For medical records the hearsay exception would typically be statements made by the patient for purposes of medical diagnosis or treatment, which are exempted from the hearsay rule by TRE 803(4). *Lumsden v. State*, 564 S.W.3d 858, 888 (Tex. App.--Ft. Worth 2018, pet. ref'd), held that the medical-diagnosis-or-treatment exception to the hearsay rule made statements made by a sexual abuse victim to a interviewing nurse admissible. The same issue can arise with any public records or business records that contain statements of fact offered to prove the matter asserted. If the public record or business record, relates hearsay, that hearsay is not admissible unless if meets an exception to the hearsay rule. See the discussion of child custody evaluation reports in Section VIII.C.5 of this Article. Note that a hearsay exception to hearsay in a business or public record may differ from the requirement of personal knowledge or information provided by a person with personal knowledge.

B. PUBLIC RECORDS. Under TRE 803(8), a public record meets this exception to the hearsay rule if it is "[a] record or statement of a public office" and "(A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness."

The reader is again referred to Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L. J. 671 (1988), discussed in the previous section.

There are a number of cases dealing with the use of public records to prove facts recited in the records.

See Cowan v. State, 840 S.W.2d 435 (Tex. Crim. App. 1992) (the requirements for admissibility under "public records and reports" exception to the hearsay rule may be met by circumstantial evidence from the face of the offered document); *Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (letter from assistant U.S. attorney to Podiatry Board was not a government record of U.S. Attorney's office, because it was not generated as a document pursuant to the attorney's duties as an assistant U.S. attorney; it was not a record of the State Podiatry Board because it was a third party communication that happened to appear in the records of the Podiatry Board); *Texas v. Williams*, 932 S.W.2d 546 (Tex. App.--Tyler 1995), *writ denied*, 940 S.W.2d 583 (Tex. 1996) (disapproving lower court opinion on other grounds), held that a certified copy of a DPS trooper's accident report was properly admitted under the TRE 803(8) exception to the hearsay rule. A proponent cannot circumvent the restrictions of TRE 803(8)(A)(ii) & (iii) by offering the government record as a business record under TRE 803(6). *See Cole v. State*,

839 S.W.2d 798, 804-806 (Tex. Crim. App. 1990); *Perry v. State*, 957 S.W.2d 894, 897 (Tex. App.--Texarkana 1997, pet. ref'd); *Nevarez v. State*, 832 S.W.2d 82, 85 (Tex. App.--Waco 1992, pet. ref'd).

C. EXPERT REPORTS PREPARED FOR LITIGATION. Are the written reports of testifying experts admissible into evidence, to be carried by the jury into the jury room?

1. Reports Are Hearsay. Hearsay is defined as "a statement, that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TRE 801(d). As such, it appears that reports prepared by experts meet this definition and should be excluded. However, the issue is more complex than this.

2. Treating an Expert Report as a Business Record. The operative language in TRE 803(6) when determining the admissibility of expert reports under the business records exception to the hearsay rule is: "...kept in the course of a regularly conducted business activity, [and] making the record was a regular practice of that activity...." If expert reports are made specifically for litigation, unlike invoices, contracts, records, etc. made in the regular course of business, they do not come within the ambit of TRE 803(6). *See United States v. Stone,* 604 F.2d 922, 925 (5th Cir. 1979) (the public record "hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation"); *State v. Tomah*, 736 A.2d 1047 (Maine 1999) (forensic report of expert on blood spatter patterns, prepared specifically for trial, was not admissible in murder prosecution under business records exception to hearsay rule); *People v. Huyser*, 561 N.W.2d 481 (Mich. App. 1997) (report generated by prosecution's medical expert was not admissible under business records exception to hearsay rule, where medical expert did not treat child but examined her solely for litigation, and where expert's findings could not be duplicated in subsequent medical examination); *Kundi v. Wayne*, 806 S.W.2d 745 (Mo. App. E.D. 1991) (written reports of evaluations by expert witness were not admissible as business records); *Powell v. International Paper Company*, 1997 WL 137418 (Tex. App. – Beaumont 1997, writ denied) (expert reports prepared specifically for litigation are inadmissible under business records exception to the hearsay rule). In *U.S. v. Stone*, cited above, the remedy was to strike out the portions of the public record that were not admissible. *Id.* at 926.

3. Treating an Expert Report as a Pubic Record. Under TRE 803(8), public records are an exception to the hearsay rule. To be a public record, the document must be a record or statement of a public office, setting out the office's activity, or a matter observed while under a legal duty to report, or in a civil case, factual findings from a legally authorized investigation. A child custody evaluation by a court-appointed expert, filed with the clerk of the court, could constitute "factual findings" from a legally authorized investigation. Are the factual findings limited to lay opinions, or can they include expert opinions?

4. Parentage Testing Report. Parentage testing reports are admissible without regard to the business records exception in TRE 803(6) under TFC §160.109(b) which provides: "[a] verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matter it contains." There is no need to lay the business records predicate; all the offering party need offer is a report that is verified, in writing, and made by a paternity testing expert. *See In the Matter of J.A.M.*, 945 S.W.2d 320, 322 (Tex. App.--San Antonio 1997, no pet.); *De La Garza v. Salazar*,

851 S.W.2d 380, 382 (Tex. App.--San Antonio 1993, no writ). Upon objection, there would need to be proof regarding the qualifications of the paternity expert under TRE 702. It is unclear whether there must be evidence, in the report itself or otherwise, about the integrity of the sample, the chain-of-custody, and compliance with testing and interpretive protocols. If TFC § 160.109(b) is taken to have thrown Rule 702 reliability determinations "out the window," there could be due-process-of-law concerns, which must be objected to or they are waived. DNA testing is so precise that a confirmation of paternity may establish its own reliability. Not so with a finding of non-paternity.

5 . Court-Ordered Child Custody Evaluation Reports. The admissibility of what used to be called "social studies" and are now called "child custody evaluation reports" is problematic. Years ago, one court of appeals said simply that "[court-ordered social studies] are generally inadmissible hearsay." *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App.--Houston [1st Dist.] 1990, no writ). The issue is more complicated than that nowadays.

TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence." The reference to "disclosure to the court" is somewhat odd, since the court must judge which portions of the report are admissible into evidence and which portions are not, and in the process of doing so the court will by necessity look at all portions of the report. (However, on appeal it is presumed that the trial courts ignored inadmissible evidence. *Tolbert v. State*, 743 S.W.3d 631, 635 (Tex. Crim. App. 1988). In *Green v. Remling*, 608 S.W.2d 905 608 S.W.2d 905, 907-8 (Tex. 1980), the Supreme Court ruled it was proper for a trial court to consider a social study in an adoption proceeding, even though the social study was not introduced into evidence. The version of the Texas Family Code then in effect, Section 11.12(c), provided that where a social study has been prepared as part of a SAPCR "[t]he report shall be made a part of the record; however, the disclosure of its contents to the jury is subject to the rules of evidence." The Supreme Court concluded that "only those portions of the study which are admissible under the rules of evidence may be disclosed to the jury." *Id*. at 909-910. It thus appears that the Legislature intended for custody evaluation reports to be admitted into evidence, provided that the Rules of Evidence are applied to the contents of the report.

Turning then to a jury trial, we should consider what rules of evidence apply to the admission of a child custody evaluation report.

Many child custody evaluation reports consist of three parts: (i) a general description of the parties and children; (ii) information gathered in the process of conducting the evaluation, and (iii) specific findings and recommendations of the evaluator. A trial court could logically justify letting in category (iii) findings and recommendations, but not (i) or (ii). A trial court could logically justify letting in category (i) and (iii), but not category (ii). Category (i) information will likely be in evidence through the testimony of other lay witnesses. Category (iii) testimony will be subject to *Nenno* reliability standards. What about the admission of category (ii), information gathered in conducting the evaluation?

One could ask whether a court-ordered custody valuation report constitutes a public record under TRE 803(8), because it is filed with the court clerk and contain factual findings resulting from a legally authorized investigation. A court-ordered report, filed with the clerk of the court, would seem to fit the description of a public record, making the factual findings contained in the report (but not

other parts of the report) admissible under the public record exception to the hearsay rule. However, TFC § 107.114 seems to independently establish that the report is admissible, and it is the admissibility of particular contents of the report that is subject to question. TRE 803(8) by its terms applies to factual *findings*. Is information in the report that does not constitute "findings" still admissible?

Parts of the information gathered may be admissible under an exception to the hearsay rule, such as the state-of-mind exception, or statements made for medical diagnosis or treatment, or reputation concerning character, or statements against interest. Or they could be excluded from the hearsay rule as an opposing party's statement under TRE 801(e)(2). See *All Saints Episcopal Hosp. v. M.S.*, 791 S.W.2d 321, 322 (Tex. App.--Fort Worth 1990) (although report by DHS social worker met the public records hearsay exception of TRE 803(8), parts of report containing third party hearsay was not admissible), *vacated pursuant to settlement*, 801 S.W.2d 528 (Tex. 1991); *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 71 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.) (portions of officer's accident report not admissible since they were hearsay descriptions of the accident by occupants of two vehicles involved in the accident).

Even where hearsay in a child custody evaluation report does not meet an exception to the hearsay rule, the evidence may be admissible under TRE 705(d), if the information constitutes facts or data underlying the expert's opinion that are reasonably relied upon by experts in the field, and their probative value is not outweighed by their prejudicial effect.

Similar issues arise in connection with a report by a guardian ad litem, the disclosure of which to the jury is subject to the TRE. TFC § 107.002(h). See Section VI.C of this Article.

IX. PRESERVING ERROR ON A *DAUBERT* COMPLAINT.

A. OPPOSING *DAUBERT* EVIDENCE. A party wishing to exclude evidence offered by another party must make a timely objection and secure a ruling reflected in the appellate record. Otherwise the evidence will be admitted at trial and no right to complain on appeal has been preserved. *See* TRE 103; TRAP 33. A *Daubert* challenge can attack different levels: at the highest level are the underlying principles; beneath that is the methodology employed to utilize those principles; beneath that is the quality of the data; and beneath that is the conclusion reached by the expert in applying the principles through the methodology to the facts. Collectively all this must also be relevant to an issue in the case. *See Hollie v. State*, No. 06-17-00177-CR (Tex. App.–Texarkana June 14, 2018, pet. ref'd) (mem. op.) (not error to excluding global positioning satellite evidence when the trial court found the underlying scientific theory to be valid but there was no proof that the technique was properly applied in the case).

B. PROPOSING *DAUBERT* EVIDENCE. Once a *Daubert* objection has been raised, the burden is on the proponent of expert testimony to establish that TRE 702, 703, and 705 standards have been met. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998) If the trial court excludes tendered evidence, the party who wishes to complain on appeal about the exclusion must make an offer of proof, so that the appellate record reflects the evidence that was excluded. TRE 103(a)(2). The offering party must make its offer of proof outside the presence of the jury, as soon as practical, but in any event *before the court's charge is read to the jury*. TRE 103(b). (TRE 103(b)

does give the deadline in a non-jury trial. The logical deadline is before the trial court renders judgment.) The trial court can 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 offer can be in the form of the attorney summarizing the proposed evidence in a concise statement, but at the request of a party the offer must be in question and answer form. TRE 103(b). No further offer need be made. *Mosley v. Employer Cas. Co.*, 873 S.W.2d 715, 718 (Tex. App.--Dallas 1993, writ denied) (in order to complain on appeal about the refusal to admit evidence, the proponent must make an offer of proof or bill of exceptions to give the appellate court something to review); *Palmer v Miller Brewing Co.*, 852 S.W.2d 57, 63 (Tex. App.--Fort Worth 1993, writ denied) (party complaining that trial court would not permit a party to pose a particular question on cross-examination failed to preserve error, because the proponent did not elicit from the witness, on bill of exception, what his answer to the question would have been).

C. QUANTUM OF PROOF NECESSARY TO ESTABLISH RELIABILITY. What is the quantum of proof necessary to establish the reliability of an expert's methodology?

The U.S. Supreme Court has ruled that preliminary determinations of admissibility are made by the trial court on a preponderance of the evidence standard, as opposed to a prima facie showing, or in a criminal case, proof beyond a reasonable doubt. *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987). The preponderance standard was applied to expert reliability in *Daubert*, 509 U.S. at 592, n.10.

The Texas Court of Criminal Appeals held in *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992), that the preliminary showing of reliability of the State's expert testimony must be made by clear and convincing evidence. In *State v. Medrano*, 127 S.W.3d 781 (Tex. Crim. App. 2004), four judges on the Court of Criminal Appeals wrote that they supported a preponderance of the evidence test for expert testimony. See the Concurring Opinions of Judge Womack and Judge Cochran. This clear-and-convincing standard is unique to expert testimony. For example, the quantum of proof necessary to establish an exception to the hearsay rule in a preponderance of the evidence. *Meador v. State*, 812 S.W.2d 330, 331 (Tex. Crim. App. 1991).

The Author could find no Texas civil case describing the burden of persuasion that applies to establishing the admissibility of expert testimony. Presumably the preponderance-of-the-evidence would apply. But a parental termination case requires clear and convincing evidence. Does that elevated burden apply to establishing the admissibility of expert testimony?

In some instances, the trial court may take judicial notice of matters going to the reliability of an expert's technique. This occurs when any fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Emerson v. State*, 880 S.W.2d 759, 764 (Tex. Crim. App. 1994). When an expert methodology has been established in a sufficient number of other cases, the Court of Criminal Appeals will consider the reliability decided. The same can be said where a number of courts have ruled against reliability. See the discussion of judicial notice in Section XI below.

If the court takes judicial notice of some component of the reliability requirement, the proponent of the evidence is relieved of the burden to prove the judicially noticed fact. *Id*. at 764. A judicially-noticed fact cannot be attacked by the opposing party.

D. DETERMINATIONS MADE UNDER TRE 104. TRE 104 provides that the court shall determine preliminary questions concerning the qualification of a person to be a witness, or the admissibility of evidence. In making its determination, the trial court is not bound by the rules of evidence other than with respect to privileges. TRE 104(a). (This suggests that affidavits should be admissible.) Such a preliminary proceeding must be conducted out of the hearing of the jury, "when the interests of justice so require." TRE 104(c).

Although trial courts often conduct pre-trial *Daubert* hearings without reference to the specific procedural rule they are relying upon, the procedure for pretrial determination of the admissibility of evidence is TRE 104. The *Daubert* case itself says this. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) ("[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue"). The Third Circuit has specifically suggested that a Rule 104 hearing be the vehicle to determine a *Daubert* objection. *U.S. v. Downing*, 753 F.2d 1224, 1241 (3rd Cir. 1985). And the Third Circuit points out that the obligation of the trial court to offer the parties an adequate opportunity to be heard may require a hearing at which the proper showing can be made, if possible. See *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 417-18 (3rd Cir. 1999) (reversing a summary judgment that was granted because the plaintiff's expert did not meet *Daubert* criteria, saying that the trial court should have conducted a FRE 104 hearing, with an opportunity for the plaintiff to develop a record).

E. MOTION IN LIMINE. In a Texas court, a motion in limine standing alone does not preserve the right to complain on appeal regarding a *Daubert* ruling. Texas appellate cases have made it clear that a ruling on a motion in limine cannot itself be reversible error. In *Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963), the Supreme Court said:

> If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal . . . .

Id. at 335. Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions, did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or comment of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is prerequisite to raising a complaint on appeal at the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, complaint on appeal can be premised on the denial. If the instruction is granted, it will cure harm, except for incurable argument, such as an appeal to racial prejudice. In criminal cases, the aggrieved party who timely objects and receives a

curative instruction, but who is still not satisfied, must push further and secure an adverse ruling on a motion for a mistrial, in order to preserve appellate complaint. Immediately pushing for a mistrial should not be necessary in a civil proceeding, for the following reason. If the harm is curable, then by necessity a curative instruction will cure the harm. If the harm is incurable, then an instruction will not cure the harm, and the only relief is a new trial. However, a new trial is not necessary if the aggrieved party wins. Judicial economy suggests that the aggrieved party should be able to raise incurable error after the results of the trial are known, rather than having civil litigants moving for mistrial in a case that they otherwise might have won. TRCP 324(b)(5) specifically permits incurable jury argument to be raised by motion for new trial, even if it was not objected to at the time the argument was made. *See generally In re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App.--Houston [1st Dist.] 1991, no writ) (insinuation that cervical cancer was caused by immoral conduct was incurable error). Counsel's violation of a motion in limine exposes the lawyer to a contempt citation.

Thus, if a motion in limine is used to bring a *Daubert* challenge, and the challenge is upheld, the proposing party will have to approach the court during trial and indicate a desire to offer the evidence, and if that request is denied, then an offer of proof must be made outside the presence of the jury. It is possible, but not guaranteed, that any proof offered at the motion in limine hearing could suffice as an offer of proof for appellate purposes. But if all that is offered at the hearing on motion in limine is attorney argument, that is likely inadequate. You can ask the Court to agree that the pre-trial hearing evidence constitutes an offer of proof for the exclusion during trial.) If the motion in limine based on *Daubert* is overruled, the party opposing admission must object when the evidence is offered during trial in order to preserve the right to complain or appeal.

In Federal courts, in the Fifth Circuit, a motion in limine alone does not preserve error for admitting evidence. *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir. 1997) (general rule in Fifth Circuit is that an overruled motion in limine does not preserve error on appeal–an objection at trial is required). Some Federal courts recognize an exception to this rule when "the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *U.S. v. Nichols*, 169 F.3d 1255 (10th Cir. 1999); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993). The Fifth Circuit has said:

> Generally speaking, "this circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial." *Stockstill v. Shell Oil Co.*, 3 F.3d 868, 872 (5th Cir. 1993); *United States v. 873 Winkle*, 587 F.2d 705, 710 (5th Cir.), cert. denied, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). While a formal proffer is not essential, the proponent of the evidence "must show in some fashion the substance of the proposed testimony." *Id*.

Seatrax Inc. v. Sonbeck International, Inc., 200 F.3d 359 (5th Cir. 2000).

F. RULING OUTSIDE PRESENCE OF JURY. TRE 103(b) provides that "[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."

The distinction between a motion in limine an objection to evidence outside the presence of the jury was considered in *Rawlings v. State*, 874 S.W.2d 740, 742-43 (Tex. App.--Fort Worth 1994, no pet.), in connection with old TRAP 52(b), now TRE 103(b). In determining whether counsel's objection was a motion in limine or an objection outside the presence of a jury, the appellate court disregarded the label used by counsel and the trial judge, and looked instead to the substance of the objection or motion. The court made the following observations:

> [A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it. Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.
>
> In contrast, Rule 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

The court concluded that in that case the request was a motion in limine that did not preserve error.

See K-Mart No. 4195 v. Judge, 515 S.W.2d 148, 152 (Tex. Civ. App.--Beaumont 1974, writ dism'd) (even if trial objection was seen as incorporating objections set out in motion in limine, still the objection was a general objection). Restating the objection made outside the presence of the jury was held not to be necessary in *Klekar v. Southern Pacific Transp. Co.*, 874 S.W.2d 818, 824-25 (Tex. App.--Houston [1st Dist.] 1994, no writ).

G. OBJECTIONS IN SUMMARY JUDGMENT PROCEEDINGS. Evidentiary objections, such as a hearsay objection, or lack of personal knowledge, etc. must be made in the summary judgment response or reply in order to keep the trial court and the appellate court from relying upon the inadmissible evidence in connection with the summary judgment. *Washington v. McMillan*, 898 S.W.2d 392, 397 (Tex. App.--San Antonio 1995, no writ); *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 365 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). The trial court's ruling sustaining an objection to summary judgment evidence must be either reduced to writing, filed, and included in the clerk's record, or reflected in the reporter's record, to permit complaint on appeal. *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.--Dallas 1987, writ denied). This can be done by having the trial court sign a written order ruling on the objection, or by including a ruling on the objection in the summary judgment order, or by causing the objection and ruling to be reflected in the court reporter's records, or, if all else fails, you can use a formal bill of exception under TRAP 33.2. Formal bills must be filed no later than 30 days after the filing party's notice of appeal is filed. TRAP 33.2(e)(1) (in civil cases).

The Third Circuit Court of Appeals pointed out that the obligation of the trial court to offer the parties an adequate opportunity to be heard may require a hearing at which the proper showing can be made, if possible. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 417-18 (3rd Cir. 1999) (reversing a summary judgment granted on the ground that the plaintiff's expert did not meet

Daubert criteria, saying that the trial court should have conducted a FRE 104 hearing, with an opportunity for the plaintiff to develop a record).

H. OBJECTION DURING TRIAL. It is proper and sufficient to preserve error by making a *Daubert* objection during trial. However, a court could adopt a local rule or issue a scheduling order in a particular case requiring that *Daubert* objections must be raised before trial or they are precluded. In *Scherl v. State*, 7 SW3d 650 (Tex. App.--Texarkana 1999, pet. ref'd), the appellate court ruled that objection to "reliability" was not a sufficiently precise objection to preserve appellate complaint. The court said:

> Scherl objected to the intoxilyzer evidence when it was offered at trial on the basis that it was inadmissible under Rule 702, *Daubert*, *Kelly*, and *Hartman*. However, to preserve error an objection to the admission of evidence must state the specific grounds for the objection, if the specific grounds are not apparent from the context. Tex. R. Evid. 103(a); Tex. R. App. P. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App.1985). An objection to an improper predicate that fails to inform the trial court exactly how the predicate is deficient will not preserve error. *Bird*, 692 S.W.2d at 70; *Mutz v. State*, 862 S.W.2d 24, 30 (Tex. App.--Beaumont 1993, pet. ref'd). Rule 702, *Daubert*, *Kelly*, and *Hartman* cover numerous requirements and guidelines for the admission of expert testimony. An objection based on Rule 702 and these cases alone is effectively a general objection to an improper predicate and is by no means specific. [FN3] Scherl's objection, without more specificity, did not adequately inform the trial court of any complaint upon which it might rule. Therefore, we conclude that no specific complaint about the reliability of the evidence was preserved for appellate review.
>
> [FN 3] Based on the objection made, how was the trial judge to know if Scherl was objecting because: (1) the judge failed to conduct a hearing outside the presence of the jury, or (2) the witness was not "qualified as an expert by knowledge, skill, experience, training, or education," or (3) the witness's testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue" and therefore was not relevant, or (4) the witness's testimony was not reliable because (a) the underlying scientific theory is not valid, or (b) the technique applying the theory is not valid, or (c) the technique was not properly applied on the occasion in question? See Texas Rule of Evidence 702, *Daubert*, *Kelly*, and *Hartman*.

I. TRE 403, EXCLUDING RELEVANT EVIDENCE. A party objecting based on *Daubert*/*Robinson* should also consider objecting based on TRE 403, arguing that probative value of the evidence is outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. This is an independent basis to exclude relevant evidence. See Section II.G above.

J. REPEATED OFFER OF INADMISSIBLE EVIDENCE. The case of *Marling v. Maillard*, 826 S.W.2d 735, 739 (Tex. App.--Houston [14th Dist.] 1992, no writ), stands for the proposition that where evidence is admitted over objection, and the proponent later offers the same evidence again, the opponent must renew the original objection or the right to complain about the erroneous admission of the original testimony is waived. *Accord*, *Badger v. Symon*, 661 S.W.2d 164-65 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.) (and cases cited therein); *see also Commercial Union Ins. v. La Villa Sch. D.*, 779 S.W.2d 102, 109-110 (Tex. App.--Corpus Christi 1989, no writ) (party cannot complain on appeal of improper admission of evidence where that party has introduced

evidence of a similar character). The Texas Supreme Court has said that where evidence is admitted over objection one time in a trial, and the same evidence is later admitted without objection in the trial, that the admission of the evidence the second time renders harmless any error in the first admission of the evidence. *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984). To quote the Court:

> The general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.

On the other hand, Texas courts have held that in some circumstances, a party is not required to constantly repeat an objection. One such circumstance is when the objection would be futile because the court has just overruled a valid objection to the same testimony. *Graham v. State*, 710 S.W.2d 588, 591 (Tex. Crim. App. 1986); *D.L.N. v. State*, 590 S.W.2d 820, 823 (Tex. Civ. App.--Dallas 1979, no writ).

In *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.--Corpus Christi 1994, writ denied), the court of appeals noted the two opposing lines of authority and said:

> We conclude that the determination of whether a prior objection is sufficient to cover a subsequent offer of similar evidence depends upon a case-by-case analysis, based on such considerations as the proximity of the objection to the subsequent testimony, which party has solicited the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony has been elicited from the same witness, whether a running objection was requested or granted, and any other circumstances which might suggest why the objection should not have to be reurged.

K. RUNNING OBJECTIONS. A "running objection" is a request to the court to permit a party to object to a line of questioning without the necessity of objecting to each individual question. Customarily this requires the attorney to obtain the court's permission to have a "running objection" to all testimony from a particular witness on a particular subject.

The utility of a running objection was recognized by the Texas Court of Criminal Appeals. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) ("This Court has held on prior occasions that a continuing or running objection has properly preserved error"). In *Sattiewhite v. State*, 786 S.W.2d 271, 283-84 n. 4 (Tex. Crim. App. 1989), the Court stated:

> In promulgating these rules [Rules of Appellate Procedure and specifically Rule 52(a)], we took no "pot shots" at running objections because in certain situations they have a legitimate function. A running objection, in some instances, will actually promote the orderly progression of the trial. When an attorney has an objection to a line of testimony from a witness, it is often disruptive for the trial judge to force him to make the same objection after each question of opposing counsel just so that the attorney can receive the same ruling from the trial judge to preserve error. As long as Rule 52 is satisfied, that is, as long as the running objection constituted a timely objection, stating the specific grounds for the ruling,

> the movement desired the court to make (if the specific grounds were not apparent from the context of the running objection) then the error should be deemed preserved by an appellate court.

Running objections have been recognized in civil cases such as *Leaird's, Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690-91 (Tex. App.--Waco 2000, pet. denied), where the court said:

> If a trial court permits a running objection as to a particular witness's testimony on a specific issue, the objecting party "may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection." *Commerce, Crowdus & Canton*, 776 S.W.2d at 620; *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied); *accord Atkinson Gas*, 878 S.W.2d at 242; *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ).

Ordinarily, in jury trials running objections apply only to similar testimony by the same witness. *Commerce, Crowdus & Canton v. DKS Const.*, 776 S.W.2d 615 (Tex. App.--Dallas 1989, no writ); *Leaird's Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690 (Tex. App.--Waco 2000, pet. denied); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied). The extent to which a running objection covers testimony of subsequent witnesses depends on several factors: (1) the nature and similarity of the subsequent testimony to the prior testimony; (2) the proximity of the objection to the subsequent testimony; (3) whether the subsequent testimony is from a different witness; (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be reurged. *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518-19 (Tex. App.--Corpus Christi 1997, no writ).

The effect of running objections in a non-jury trial was considered in *Commerce, Crowdus & Canton, Ltd. v. DKS Const., Inc.*, 776 S.W.2d 615, 620-21 (Tex. App.--Dallas 1989, no writ):

> In considering the effectiveness of a running objection, it is widely considered that a party making a proper objection to the introduction of testimony of a witness, which objection is overruled, may assume that the judge will make a similar ruling as to other offers of similar evidence and is not required to repeat the objection. *See Bunnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 295 (Tex. Civ. App.--Amarillo 1979, no writ); *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.--Houston 1960, no writ). Some courts, though, have held that a running objection is primarily limited to those instances where the similar evidence is elicited from the same witness. *See City of Fort Worth v. Holland*, 748 S.W.2d 112, 113 (Tex. App.--Fort Worth 1988, writ denied); *City of Houston v. Riggins*, 568 S.W.2d 188, 190 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). In these cases, however, the trial was to the jury. In our case, the trial was to the court. We hold that a running objection is an effective objection to all evidence sought to be excluded where trial is to the court and an objection is clearly made to the judge. Therefore, appellant's running objection to any evidence admitted for the purpose of proving alter-ego was an effective objection, and the issue was not tried by consent.

It is important that the basis for the running objection be clearly stated in the reporter's record. *See Anderson Development Co., Inc. v. Producers Grain Corp.*, 558 S.W.2d 924, 927 (Tex. Civ.

App.--Eastland 1977, writ ref'd n.r.e.) ("'The same objection on that question' and a 'running objection' are general objections where several objections have been made"). It is necessary that the request and granting of a running objection be reflected in the reporter's record. *See Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

X. SUFFICIENCY OF THE EVIDENCE CHALLENGE ON APPEAL. In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), the Court unanimously held that, where a federal district court admitted expert testimony over objection, and the federal court of appeals determined that the evidence was not admissible under *Daubert*, the appellate court can, if it finds the remaining evidence insufficient to support a favorable verdict, reverse and render judgment for the opposing party, or the appellate court can reverse and remand for a new trial, or the appellate court can send the case back to the trial court to determine whether to enter judgment for the opposing party or to order a new trial. A party in a Texas civil proceeding can attack the sufficiency of the evidence on appeal, on the ground that the expert testimony admitted into evidence did not meet the necessary standards of reliability and relevance. *Merrill Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998). However, this complaint cannot be raised for the first time after trial. In *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998), *cert. denied*, 525 U.S. 1017, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998), the Texas Supreme Court said:

> Under *Havner*, a party may complain on appeal that scientific evidence is unreliable and thus, no evidence to support a judgment. See *Havner*, 953 S.W.2d 706. *Havner* recognizes that a no evidence complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or 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 that a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *See Havner*, 953 S.W.2d at 711 (citing Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L.REV. 361, 362-63 (1960)). Here, like in *Havner*, *Maritime* contends that because Ellis's scientific evidence "is not reliable, it is not evidence," and the court of appeals and this Court are "barred by rules of law or of evidence from giving weight" to Ellis's experts' testimony. *See Havner*, 953 S.W.2d at 711, 713.
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> 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. *See Robinson*, 923 S.W.2d at 557; *see also Havner*, 953 S.W.2d at 713 ("If the expert's scientific testimony is not reliable, it is not evidence."). 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. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996), *cert. denied*, 519 U.S. 1108; *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir.1983). 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. *Babbitt*, 83 F.3d at 1067. To hold otherwise is simply "unfair." *Babbitt*, 83 F.3d at 1067. As the *Babbitt* court explained:

> [P]ermitting [a party] to challenge on appeal the reliability of [the opposing party's] scientific evidence under *Daubert*, in the guise of an insufficiency-of-the-evidence argument, would give [appellant] an unfair advantage. [Appellant] would be 'free to gamble on a favorable judgment before the trial court, knowing that [it could] seek reversal on appeal [despite its] failure to [object at trial].'
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> *Babbitt*, 83 F.3d at 1067 (citations omitted). Thus, to prevent trial or appeal by ambush, we hold that the complaining party must object to the reliability of scientific evidence before trial or when the evidence is offered.

Ellis, 971 S.W.2d at 409-10.

Accord, *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App.–Tyler 1998, pet. denied) (party, who did not object to admission of expert testimony on *Daubert* grounds until after plaintiff rested and in connection with motion for instructed verdict, waived *Daubert* attack).

However, in *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004), the Supreme Court held that "when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record (for example, when expert testimony is speculative or conclusory on its face) then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility."

XI. JUDICIAL NOTICE. Under TRE 201, a court may take judicial notice of an adjudicative fact that is not subject to reasonable dispute when it is generally known in the territorial jurisdiction, or it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. TRE 201(b). The court may take judicial notice on its own motion, TRE 201(c)(1), and the court must take judicial notice if requested by a party and supplied with the necessary information, TRE 201(c)(2). The opposing party is entitled to be heard in opposition to the taking of judicial notice. TRE 201(e). Upon taking judicial notice, the Court should instruct the jury to accept as conclusive any fact judicially noticed. A court can take judicial notice of agency rules published in the Texas Administrative Code. TRE 204.

TRE 201 applies only to adjudicative facts, and not legislative facts. What is this distinction? It is reported that the term "adjudicative facts" was coined by Professor Kenneth Davis, who defined "adjudicative facts" as those "concerning the immediate parties – who did what, where, when, how, and with what motive or intent," while legislative facts are "[w]hen an agency wrestles with a question of law or or policy ... the [more general] facts which inform its legislative judgment." Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VA. L. REV. 1933, 1962, 1975 n. 213 (2001). In *Emerson v. State*, 880 S.W.2d 759, 765 (Tex. Crim. App. 1994), the Court of Criminal Appeals said that "[a]djudicative facts are "facts about the particular event which gave rise to the lawsuit and, like all adjudicative facts,... [help] explain who did what, when, where, how, and with what motive and intent" (citing McCormick on

Evidence at § 328). In *Emerson*, the Court of Criminal Appeals stepped beyond TRE 201, saying that"[j]udicial notice, both of adjudicative and legislative facts, may be taken on appeal." *Id.* at 765. In *Emerson*, the Court of Criminal Appeals relied on judicially-noticed information in determining the general validity of the HGN test for alcohol intoxication. In *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001), the Court took judicial notice of information not presented by either party at trial or on appeal, including scientific papers and rulings of other courts.

"Legislative facts are 'established truths, facts or pronouncements that do not change from case to case but [are applied] universally, while adjudicative facts are those developed in a particular case ....' "Care must be taken that Rule 201 not be used as a substitute for more rigorous evidentiary requirements and careful factfinding." *Korematsu v. U.S.*, 584 F. Supp. 1406, 1414–15 (N.D. Cal. 1984).

A cautionary note was sounded about taking judicial notice of legislative facts:

> It is familiar doctrine that a case is decided by applying the law, as determined by the court, to the facts, as determined by the trier of fact. The facts contemplated are the adjudicative facts of the particular case as developed by the conventional process of producing evidence at the trial or as judicially noticed within the rather limited categories previously discussed. Another way in which facts enter most significantly into the judicial process is in the formulation of the rules of law themselves by the courts. Many rules of law are predicated upon factual foundations. These factual foundations are commonly constructed by the process of judicial notice. Often they consist of patterns of human behavior, assumed to exist on the basis of casual observation, experience, and anecdote, but without systematic or statistical observation. No judicial counterpart even of the legislative hearing exists. These assumptions are thus wide ranging and far reaching, without the cautious insistence upon certainty and opportunity to be heard which characterizes judicial notice of adjudicative facts. For example, the husband-wife privilege, Standard 505, is supported by the notion that adverse testimony by a spouse of an accused in a criminal prosecution is likely to destroy a marriage; that the incentive to invent supplied by the patent law will not work in organized research because it destroys team work and cooperation; and that the test of insanity then in use was out of step with the view of society. [Footnotes omitted.]

Michael H. Graham, 2 HANDBOOK OF FED. EVID. § 201:5 (8th ed.). In *Hernandez v. State*, 116. S.W.3d 26, 31-32 (Tex. Crim. App. 2003), the Court wrote:

> In his brief to this Court, the State Prosecuting Attorney presents a plethora of cites to scientific articles and learned treatises, as well as to some cases from other jurisdictions concerning this general area of scientific endeavor. This is swell stuff. The trial court should have been given this material, and appellant should have been allowed an opportunity to crossexamine any witnesses who sponsored it. The trial court hearing is the main event for *Daubert*/*Kelly* gatekeeping hearings; it is not a try-out on the road to an appellate scientific seminar.
> * *
> Although appellate courts may take judicial notice of other appellate opinions concerning a specific scientific theory or methodology in evaluating a trial judge's *Daubert*/*Kelly*

"gatekeeping" decision, judicial notice on appeal cannot serve as the sole source of support for a bare trial court record concerning scientific reliability

Viewing *Daubert* from the perspective of legislative versus adjudicative facts, there is a high level of abstraction (legislative facts) where an expert is testifying to general principles of science, or engineering, or social science, etc. Then there is the intersection of these principles with the specifics of the case (adjudicative facts), Where the expert witness applies general principles to the facts of the case. Often there is another step, which is drawing conclusions from the application of the general principles to the facts of the case. *Daubert* said to focus on the general principles, not the expert's conclusions, but it is in translating from general principles to the specific questions in the case where reliability is most needed. This is particularly true because under TRE 704 experts can testify to their opinions about the ultimate issue in the case.

XII. COURT-APPOINTED EXPERT. FRE 706 permits the court to appoint an expert witness to assist the court. It may be done on motion of a party, or on its own initiative. The witness must advise the parties of his or her findings, and the expert's deposition may be taken by any party. The expert can be called to testify by any party or the court. The expert is entitled to reasonable compensation set by the court, and in ordinary civil litigation that expense can be imposed on the parties in a proportion set by the court. There is no counterpart to FRE 706 in the TRE.

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