

STRATEGIES IN MAKING A DAUBERT ATTACK

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CHAPTER 7

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TABLE OF CONTENTS

I. DISCOVERY OF EXPERTS.	1
A. WHAT’S DISCOVERABLE?	1
B. MANNER OF DISCOVERING EXPERTS	1
III. PREDICATES FOR EXPERT TESTIMONY.	3
A. EXPERT QUALIFICATIONS.	3
B. RELIABILITY OF EXPERT’S METHODOLOGY.	4
1. Federal.	4
2. Texas Civil Proceedings.	4
3. Texas Criminal Proceedings.	5
C. RELEVANCE.	5
D. ASSISTING THE TRIER OF FACT.	5
E. UNDERLYING DATA.	6
III. MAKING AND PRESERVING A DAUBERT COMPLAINT.	7
A. OPPOSING DAUBERT EVIDENCE.	7
B. PROPOSING DAUBERT EVIDENCE.	7
IV. PRELIMINARY QUESTIONS OF ADMISSIBILITY.	7
V. DETERMINATIONS MADE UNDER TRE 104.	7
VI. MOTION IN LIMINE.	8
VII. RULING OUTSIDE PRESENCE OF JURY.	9
VII. EVIDENTIARY OBJECTIONS IN SUMMARY JUDGMENT PROCEEDINGS.	9
VIII. OBJECTION DURING TRIAL.	10
IX. TRE 403–EXCLUDING RELEVANT EVIDENCE.	11
X. REPEATED OFFER OF INADMISSIBLE EVIDENCE.	11
XI. RUNNING OBJECTIONS	11
XII. “NO EVIDENCE” CHALLENGE.	13
XIII. JUDICIAL NOTICE.	14
XIV. COURT-APPOINTED EXPERTS.	14
XV. FRE 702 & 703, AS AMENDED.	14

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by

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I. DISCOVERY OF EXPERTS.

A. WHAT'S DISCOVERABLE? Under TRCP 192.3, the following information is discoverable regarding experts:

192.3(e) Testifying and Consulting Experts.

The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which a testifying expert will testify;

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in

anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.

B. MANNER OF DISCOVERING EXPERTS. The following methods of discovery relating to experts are available.

194.2. Content

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

195.1. Permissible Discovery Tools

A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule.

195.2. Schedule for Designating Experts

Unless otherwise ordered by the court, a party must designate experts--that is, furnish information requested under Rule 194.2(f)--by the later of the following two dates: 30 days after the request is served, or--

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

(b) with regard to all other experts, 60 days before the end of the discovery period.

195.3. Scheduling Depositions

A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

(1) If no report furnished. If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

(2) If report furnished. If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

(b) Other Experts. A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

195.4. Oral Deposition

In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.

195.5. Court-Ordered Reports

If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

195.6. Amendment and Supplementation

A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.

195.7. Cost of Expert Witnesses

When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.

COMMENT--1999

1. This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. See Rule 192.3(e).

Information concerning purely consulting experts, of course, is not discoverable.

2. This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.

3. In scheduling the designations and depositions of expert witnesses, the rule attempts to minimize unfair surprise and undue expense. A party seeking affirmative relief must either produce an expert's report or tender the expert for deposition before an opposing party is required to designate experts. A party who does not wish to incur the expense of a report may simply tender the expert for deposition, but a party who wishes an expert to have the benefit of an opposing party's expert's opinions before being deposed may trigger designation by providing a report. Rule 191.1 permits a trial court, for good cause, to modify the order or deadlines for designating and deposing experts and the allocation of fees and expenses.

III. PREDICATES FOR EXPERT TESTIMONY.

The predicates for expert testimony are (1) the expert's qualifications; (2) the expert's methodology; (3) the relevance of the expert's opinion to the facts at issue in the case; (4) whether the opinions will assist the trier of fact; and (5) the legitimacy of facts or data underlying the expert's opinions.

A. EXPERT QUALIFICATIONS. Under TRE 702, a person may testify as an expert only if (s)he has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case. *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). This involves the expert's "qualifications." The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702. *Broders v. Heise*, 924 S.W.2d at 151. The decision of whether an expert witness is qualified to testify is within the trial court's discretion, and will be reviewed 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. *Broders v. Heise*, 924 S.W.2d at 151.

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case.

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. *Broders v. Heise*, 924 S.W.2d at 153.

The second prong, assisting the trier of fact, 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, 112 S. Ct. 1280, 117 L.Ed.2d 506 (1992). The test then for qualifications is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on the particular subject. *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 give 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].

B. RELIABILITY OF EXPERT'S METHODOLOGY.

1. Federal. In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court held that FRE 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. See *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for scientific expert

testimony). Under Rule 702, the expert's opinion must be based on "scientific knowledge," which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Court used the word "reliability" to describe this necessary quality.

In *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 11 S. Ct. 1167, 143 L.Ed.2d 238 (1999) (ruling below: 131 F.3d 1433 (11th Cir. 1997)), 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 test the expert's reliability. *Id.*

2. Texas Civil Proceedings. 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 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. 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*). The burden is on the party offering the evidence to establish the reliability underlying such scientific evidence. *Robinson* at 557.

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, 972 S.W.2d 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.

The Court said:

[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, 972 S.W.2d at 724.

3. Texas Criminal Proceedings. The Texas Court of Criminal Appeals, which established a reliability requirement even before the U.S. Supreme Court decided *Daubert* (see *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)), has extended reliability requirements to *all* scientific testimony, not just novel science. See *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (applying *Kelly*-reliability standards to DWI intoxilyzer). In the case of *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the Court extended the *Kelly*-reliability standards to mental health experts, but indicated that the *Daubert* 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*, 970 S.W.2d at 561.

C. RELEVANCE. *Daubert* and *Robinson* contain a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams*, 972 S.W.2d 713, 720 (Tex.1998):

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.

Some courts and commentators call this connection the “fit” between the evidence and the issues involved in the case.

D. ASSISTING THE TRIER OF FACT. Rule 702 requires that the expert’s testimony “assist the trier of fact.” 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.”) As noted in *Assiter v. State*, 58 S.W.3d 743, 751-52 (Tex. App.--Amarillo 2000, n.p.h.):

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).

E. UNDERLYING DATA. TRE 705 reads as follows. Pay particular attention to TRE 705(c), new to Texas civil litigation, 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) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert’s reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
- (b) **Voir dire.** Prior to the expert giving the expert’s opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
- (c) **Admissibility of opinion.** If the court determines that the *underlying facts or data do not provide a sufficient basis for the expert’s opinion under Rule 702 or 703*, the opinion is inadmissible. [Emphasis added]
- (d) **Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert’s opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be

given upon request.

Notes and Comments

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

It can be seen that new TRE 705(b) offers a right to *voir dire* the expert about the underlying facts or data outside the presence of the jury. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient basis for his opinion. And 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.

III. MAKING AND PRESERVING A DAUBERT COMPLAINT.

A. OPPOSING DAUBERT EVIDENCE. A party wishing to exclude evidence offered by another party must make a timely objection. Otherwise the evidence is admitted and no right to complain on appeal has been preserved. *See* TRE 103; TRAP 33.

B. PROPOSING DAUBERT EVIDENCE. 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 statement of facts 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). 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 counsel 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 granted) (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).

IV. PRELIMINARY QUESTIONS OF ADMISSIBILITY. What is the quantum of proof necessary to establish an expert's qualifications, the reliability of his methodology, and the reliability of the underlying data?

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. *See Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987).

The Texas Court of Criminal Appeals held that, in a criminal case, in *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992), the preliminary showing of reliability of expert testimony must be made by clear and convincing evidence.

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). If the court takes judicial notice or 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.

V. DETERMINATIONS MADE UNDER TRE 104.

FRE 104 and TRE 104 provide 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. FRE 104(a), TRE 104(a). Such a preliminary proceeding must be conducted out of the hearing of the jury, “when the interests of justice so require.” FRE 104(c), 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 Rule of Evidence 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 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).

VI. MOTION IN LIMINE. In a Texas court, a motion in limine alone is not an adequate vehicle to preserve error regarding a *Daubert* challenge. 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 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 or bill of exception 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.) If the motion in limine based on *Daubert* is overruled, the opposing party will have to assert an objection when the evidence is offered during trial.

In federal court, 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 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).

As to excluding evidence pursuant to a motion in limine, 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.*

Seatrac Inc. v. Sonbeck International, Inc., 200 F.3d 359 (5th Cir. 2000). Thus, when a motion in limine is granted, the aggrieved party must make an offer of proof at trial in order to complain on appeal.

VII. 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." *Accord*, FRE 103(b). If the objection is made in connection with presenting a motion in limine, does Rule 103(b) obviate the need to object in the presence of the jury?

This question 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 Rule 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 dismissed) (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).

VII. EVIDENTIARY 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 stop 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 reduced to writing, filed, and included in the transcript, to be given effect 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, if all else fails, you can use a formal bill of exception under new TRAP 33.2. Formal bills must be filed no later than 30 days after the filing party's notice of appeal is filed.

The Third Circuit Court of Appeals 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 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).

VIII. OBJECTION DURING TRIAL. It is proper and sufficient to make a *Daubert* objection during trial. However, a court could adopt a local rule or scheduling order in a particular case requiring that *Daubert* objections be raised before trial or they are precluded. In *Scherl v. State*, 7 SW3d 650 (Tex. App.--Texarkana 1999, pet. ref'd), the Texas appellate court ruled that reliability objection 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.

Litigators are cautioned to consider how detailed they should be in asserting a *Daubert* or *Robinson* objection.

IX. TRE 403-EXCLUDING RELEVANT EVIDENCE. A party objecting based on *Daubert* should also object based on Rule of Evidence 403, arguing that probative value is outweighed by the danger of prejudice or confusion. This is an independent basis to exclude the evidence.

X. 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 once 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.

XI. 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 counsel obtaining permission from the court to have a "running objection" to all testimony from a particular witness on a particular subject.

The utility of a running objection has been 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 were recognized as effective in civil cases in 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, Crowds & 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, Crowds & 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, Crowds & 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/Smalwood & 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 statement of facts. 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"). And it is necessary that the request

and granting of a running objection be reflected in the statement of facts. See *Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

XII. "NO EVIDENCE" CHALLENGE. In *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000). In that case 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, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). However, this complaint cannot be raised for the first time after trial. In the case of *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex.), *cert. denied*, ___ U.S. ___, 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 than 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.

* * *

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, ___ U.S. ___, 117 S.Ct. 942, 136 L.Ed.2d 831 (1997); *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].'

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).

XIII. JUDICIAL NOTICE. A court may take judicial notice on its own motion. A party who requests judicial notice should supply the court with necessary information. The opposing party is entitled to be heard on opposing the taking of judicial notice. Upon taking judicial notice, the Court should instruct the jury to accept as conclusive any fact judicially noticed. TRE 201: "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned.

XIV. COURT-APPOINTED EXPERTS. Federal Rule of Evidence 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.

XV. FRE 702 & 703, AS AMENDED. On December 1, 2000, amendments to the Federal Rules of Evidence became effective. FRE 702 was modified to read as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods

FRE was modified, as of December 1, 2000, to read as follows:

Rule 703. Bases of Opinion Testimony by Experts

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

or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.