RECENT DEVELOPMENTS IN THE *DAUBERT* SWAMP

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CHAPTER 12

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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-present); 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-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-1997, 1999-2001, 2003-2006) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, 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

Professional Activities and Honors:

Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
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 *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA (1987-to date)
2004 Listed in Texas' Top 100 Lawyers by Texas Monthly Superlawyers Survey

Continuing Legal Education and Administration:

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

Books and Journal Articles:

---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)

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); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003)

SBOT's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

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)

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)

SBOT's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!" (1997); The Lawyer as Master of Technology: Communication With Automation (1997); Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: 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); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003)

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APPLYING *DAUBERT*/*ROBINSON* TO CPAs

RECENT DEVELOPMENTS IN THE *DAUBERT* SWAMP©

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I. INTRODUCTION.

This Article discusses the rules relating to expert witnesses in Texas litigation: admissibility, preservation or error, sufficiency of the evidence, and standards of appellate review. It also discusses recent Texas Supreme Court decisions relating to expert evidence.

The Article also considers some lesser-known but troubling areas involving expert evidence: expert evidence contained in business and government records, affidavits regarding the cost and necessity of services, expert reports prepared during litigation. The Article also discusses expert opinions which involve legal concepts and legal standards.

Finally, the Article explores how the principles governing expert evidence apply to financial experts. In particular, the Article examines the "applicable professional standards outside the courtroom" that a court might use in determining whether accounting testimony is admissible and has probative value.

THE BASICS

II. THE BASIC RULES REGARDING EXPERT EVIDENCE.

In order to admit expert evidence, over objection, the proponent must show five things: (1) that the expert is qualified; (2) that the expert's methodology is reliable; (3) that the underlying data is reliable; (4) that the evidence is relevant; and (5) that the expert's opinion would assist the trier of fact.

A. The 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 assist the trier of fact in deciding an issue in the case. *See Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996). 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 148, 153 (Tex. 1996). *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"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993) [Westlaw cite 30 HOULR 797].

B. Reliability of the Expert's Methodology.

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. 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. The U.S. Supreme Court's opinion in *Daubert* applies in all federal court proceedings.

In *Daubert*, 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. In *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 11 S. Ct. 1167, 143 L.Ed.2d 238 (1999), 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. Kuhmo Tire* acknowledged that the list of factors in *Daubert* did not apply well to certain types of expertise, and that other factors would have to be considered by the court in such instances.

The Texas Supreme Court adopted the U.S. Supreme Court's *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable, in *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: (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.

As with the U.S. Supreme Court, the Texas Supreme Court was required to adapt the *Robinson* "hard science" criteria to other fields of expertise. In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance requirements of *Robinson* apply to all types of expert testimony. 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]

After *Gamill*, *Daubert/Robinson* challenges may involve two prongs: (1) establishing the "applicable professional standards outside the courtroom" and (2) establishing that these standards were met by the expert in this instance.

C. Reliability of Underlying Data.

Not much attention has been paid to the importance of proving the reliability of the underlying data as a basis for excluding expert evidence.

The requirement that the expert's underlying data be sufficient is explicitly stated in TRE 705(c). This provision requires the trial court to be a gatekeeper regarding the sufficiency of the data underlying an expert opinion.

> **TRE 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. <u>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.</u> [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.

D. Relevancy.

Daubert contains a relevancy requirement, for expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 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.

E. 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").

III. RECENT TEXAS SUPREME COURT CASES ON EXPERT WITNESSES.

Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001), the Court held that a plant scientist and consultant was qualified and his testimony reliable on the issue of suitability of grain sorghum seed for dry land farming and its susceptibility to charcoal rot disease.

Guadalupe-Blanco River Authority v. Kraft, 77 S.W.3d 805, 808 (Tex. 2002), the Supreme Court rejected the testimony of a real estate appraiser due to flawed methodology when the comparable sales used by the appraiser "were not comparable to the condemned easement as a matter of law." The Supreme Court also accepted as sufficient an objection that broadly complained of "the failure of this witnesses's methodology to meet the reliability standards as articulated by the Supreme Court in Gamill...."

Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623 (Tex. 2002), the Court ruled inadmissible real estate valuation testimony relating to a condemned parcel of land, where the expert calculated his value based on the condemnation project which, under the project-enhancement rule, is not a value for which a landowner may recover.

Rehabilitative Care Systems of America v. Davis, 73 S.W.3d 233, 234 (Tex. 2002), the Court issued a short per curiam opinion on denial of petition for review, indicating that expert testimony is required to establish the appropriate standard of care for a claim of negligent-supervision of a physical therapist.

Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004), the Supreme Court refined its position on when a party can attack the sufficiency of expert testimony to support the verdict when no *Daubert-Robinson* objection was made at the time the evidence was offered. 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."

Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004), the Court held that expert testimony was necessary to establish causation in a litigation-related legal malpractice case.

FFE Transportation Services, Inc. v. Fulgham, 154 S.W.3d 84 (Tex. 2004), the Court held that the trial court's decision, on whether expert testimony is required to establish negligence, is subject to de novo review, not abuse of discretion review.

Volkswagen of America Inc. v. Ramirez, 159 S.W.3d 897 (Tex. 2004), the Court ruled that an accident reconstruction expert's testimony constituted no evidence of causation.

General Motors v. Iracheta, 161 S.W.3d 462 (Tex. 2005), the Supreme Court held that an expert was not qualified to testify to causation of a fire after an auto collision, and further that the expert's "bare opinion" was no evidence of causation.

Romero v. KPH Consol., Inc., 48 Tex. Sup. Ct. J. 752 , 2005 WL 1252748 (Tex. May 27, 2005)–the Supreme Court held that expert testimony is required to support liability of a hospital for malicious credentialing of a surgeon. The Court also held that the unsupported opinion of a medical expert was legally insufficient to establish that the hospital was consciously indifferent to the risk of harm to the patient.

On July 2, 2004, the Supreme Court granted review in *Mack Trucks Inc. v. Tamez, et al.*, No. 03-0526, to address the issues of (1) whether the trial court erroneously excluded expert opinion that the petitioner claims used methodology that failed to account for other possible causes of a tanker-truck fire besides a fuel-system defect and (2) whether erred in refusing to hold a second hearing by way of a bill of exception to reconsider excluding the expert.

IV. PRESERVATION OF ERROR.

A. Opposing Expert Evidence.

A party wishing to exclude evidence offered by another party must make a timely objection and secure a ruling from the court. Absent an objection and ruling, no right to complain on appeal about the admission of the evidence has been preserved. *See* TRE 103.

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."

B. Proposing Expert 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 court reporter's record reflects the evidence that was excluded. TRE 103(a)(2). The offering party should make its offer of proof outside the presence of 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. *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.–Houston [14th Dist.] 2002, pet. denied). In Texas, 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. 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). 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 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).

One Louisiana court held that it is necessary to hold a "Daubert" hearing if a party requests it. *Caubarreaux v. E.I. Dupont de Nemours*, 714 So.2d 67, 71 (La. App. 1998) ("Because duPont requested a preliminary Daubert hearing and ruling prior to trial, the trial court no longer had the discretion to deny duPont's motion for a hearing and was required to give the parties a ruling applying Daubert"). However, this requirement of a hearing was identified as a "minority view" and was criticized by a Judge in the Court of Chancery of Delaware, in *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 845-46 (Del.Ch. 2000) ("A pretrial procedure of some sort is, however, required. The Judge must gather the necessary information and evaluate the reliability of the underlying principles, the methodology employed by the expert witness,... and the potential relevance of the proposed evidence. Standards and Procedures for Determining the Admissibility of Expert Evidence after Daubert, 157 F.R.D. 571, 580 (1994). The Court, in the normal course, should be supplied with the expert's report and the expert's deposition testimony, as well as any supporting affidavits, prior to making any determination as to whether a Daubert hearing is necessary. At that point, the Court should decide: 1) if a Daubert hearing should be held, and 2) on what issues. If, for special reasons, a

Daubert hearing is deemed necessary, the Court should try to narrow the issues prior to the evidentiary hearing. If allowed, the hearings should be brief and targeted to the specific questions of the Court. The Court, however, should normally be able to rule, as a matter of law, on the papers, as to whether a hearing should be allowed and whether an expert or set of experts is qualified to speak on a particular subject."). The U.S. Supreme Court, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167 (1999), said:

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable.

D. Motion in Limine.

In jury trials, lawyers will sometimes file a "motion in limine" asking the court to make the opponent approach the bench and get permission before mentioning to the jury a particular issue. These motions are taken up before the start of the jury trial. Federal courts are split on whether a ruling on a motion in limine will preserve error to complain on appeal. 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). The same rule applies in the Eight Circuit, where that court has said that "a motion in limine is not a substitute for an objection and does not alone preserve error for review." *United States v. Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987). However, the 3rd and 9th Circuit Courts of Appeals say that a motion in limine will preserve error, *American Home Assurance Co. v. Sunshine Supermarket*, Inc., 753 F.2d 321, 324 (3rd Cir.1985); *Sheehy v. Southern Pac. Trans. Co.*, 631 F.2d 649 (9th Cir. 1980). In the 7th Circuit, the answer is that "it depends." The 7th Circuit Court of Appeals has held that a definitive ruling in limine preserves an issue for appellate review, without the need for later objection--but this is just a presumption, subject to variation by the trial judge, who may indicate that further consideration is in order. Moreover, according to the 7th Circuit court of appeals, issues about how the evidence is used, as opposed to yes-or-no questions about admissibility, frequently require attention at trial, so that failure to object means forfeiture of the right to complain on appeal. *See Wilson v. Williams*, 182 F.3d 562, 563 (7th Cir.1999).

The 10th Circuit court of appeals recognizes an exception to the rule that motions in limine don't preserve error, 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.

Seatrax 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.

In Texas, 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 may be 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.

Thus, if a motion in limine is used to challenge the admissibility of expert testimony, 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 make an offer of proof 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 challenging expert testimony is overruled, the opposing party will have to assert an objection when the evidence is offered during trial.

E. Ruling Outside Presence of Jury.

TRE 103(b) provides that "[w]hen 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." If the objection is made in connection with presenting a motion in limine, does TRE 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 the Texas Rule of Appellate Procedure governing preservation of error in the trial court (old TRAP 52(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.

F. Evidentiary Objections in Summary Judgment Proceedings.

In Texas, 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.

If expert evidence is offered in support of, or opposition to, a motion for summary judgment, the adverse party should make a written *Daubert* objection. Affidavits and depositions of experts and published information may be brought to bear on the issue. In such a situation, the *Daubert* ruling would be based on the summary judgment record. If anyone wants a record based on live testimony, that party might prefer to have

a hearing with witnesses on a *Daubert* motion ancillary to the summary judgment record.

The U.S. Court of Appeals for 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). However, in *Hess v. McLean Feedyard, Inc.*, 59 S.W.3d 679, 686 (Tex. App.--Amarillo 2000, pet. denied), the appellate court sustained a trial court's decision to rule inadmissible an expert's affidavit filed in opposition to a motion for summary judgment.

G. 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.

There is a danger that a *Daubert* objection may be too general to preserve error for appeal. 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.

However, in *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 808 (Tex. 2002), the Supreme Court found the following objection sufficient to preserve a *Daubert* complaint:

> "I'm going to make an objection based upon the failure of this witness's methodology to meet the reliability standards as articulated by the Supreme Court in Gammill versus Jack William [s] Chevrolet as applying to all expert testimony." After voir dire, the trial court overruled the objection. The objection was timely, its basis was clear, and the Authority obtained a ruling. The Authority preserved its complaint for our review.

Although *Scherl* may not reflect the current state of the law on preserving a *Daubert* complaint, litigators are cautioned to consider how detailed they should be in asserting a *Daubert* or *Robinson* objection.

A party objecting based on *Daubert* should also object based on TRE 403, arguing that probative value is outweighed by the danger of prejudice or confusion. This is an independent basis to exclude otherwise admissible evidence.

The Texas Supreme Court has drawn a distinction "between no evidence challenges to the reliability of

expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face." *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004). The former challenge requires an objection no later than when the evidence is offered at trial; the latter challenge can be made by preserving a sufficiency of the evidence challenge. *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

H. 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.

Accord, Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004) (reiterating rule of *Richardson v. Green*). 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.

I. Running Objections.

A "running objection" or "continuing 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 5th Circuit court of appeals has recognized that a continuing objection granted by the court at trial will preserve error for appeal under FRE 103. *See Ward v. Freeman*, 854 F.2d 780 (5th Cir.1988), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989); *United States v. Marshall*, 762 F.2d 419 (5th Cir.1985).

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 have been recognized in Texas 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).

Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2005).

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 Texas Supreme Court recently made the following comment on a running objection to more than one witness in a jury trial:

> Because Volkswagen's initial objection to the evidence complied with Texas Rule of Appellate Procedure 33.1(a) and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate.

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 court reporter's record of the trial proceedings. *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 court reporter's record of the trial proceedings. *See Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

J. "No Evidence" Challenge.

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 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, ___ 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).

The Texas Supreme Court has drawn a distinction "between no evidence challenges to the reliability of

expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face." *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004). The former challenge requires an objection no later than when the evidence is offered at trial; the latter challenge can be made by preserving a sufficiency of the evidence challenge. *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

K. Judicial Notice.

In litigation, most facts are established through the introduction of evidence. However, under TRE 201, a court may take "judicial notice" of adjudicative facts. 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.

In *Marquardt Co. v. United States*, 822 F.2d 1573, 1578 (Fed. Cir.1987), and *Urbanek v. United States*, 731 F.2d 870, 873 n. 3 (Fed. Cir.), *cert. denied*, 469 U.S. 1034, 105 S.Ct. 508, 83 L.Ed.2d 398 (1984), the appellate courts took judicial notice of accounting texts.

V. STANDARDS OF APPELLATE REVIEW; DISPOSITION.

A. Preliminary Questions of Admissibility.

What is the quantum of proof necessary to establish an expert's qualifications, the reliability of his or her methodology, and the reliability of the underlying data?

The U.S. Supreme Court has ruled that in federal courts 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 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.

B. Complaints on Admissibility.

The trial court's decision to admit or reject expert testimony is reviewed on appeal by an abuse of discretion standard. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). This is true as to the expert's qualifications as well as reliability of the expert's methodology. *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996) (qualifications); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997) (reliability).

C. Whether Expert Testimony Is Necessary.

In FFE Transportation Services, Inc. v. Fulgham, 154 S.W.3d 84, 89 (Tex. 2004), the Court held that the question of whether expert testimony is required to support a claim is subject to de novo review, not abuse of discretion review.

D. Complaints on Sufficiency of the Evidence.

An appellate attack on the sufficiency of expert testimony to support the verdict is distinguished from an appellate attack claiming error in admitting expert testimony. The *Daubert* case focused on admissibility of expert testimony, but the same reliability requirements apply to a challenge to the sufficiency of the evidence. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997). As noted above, complaints of error in admission or exclusion of evidence, including expert testimony, are normally reviewed using an abuse of discretion standard. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). However, in *Missouri Pac. R.R. Co. v. Navarro*, 90 S.W.3d 747, 750 (Tex. App.--San Antonio 2002, no pet.), the court of appeals said:

> Where the trial court has admitted the expert testimony and the appellant challenges, on appeal, the expert testimony as constituting "no evidence," we consider whether the expert testimony is reliable under a de novo standard of review.

This rule was reiterated by the San Antonio Court of Appeals in *Goodyear Tire & Rubber Co. v. Rios*, 143 S.W.3d 107, 113 (Tex. App.--San Antonio 2004, pet. denied).

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 19979), the Supreme Court said:

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

The actual application of the "no evidence" standard is reflected in *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995), where the Court said that "[w]hen an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment." In *Hess v. McLean Feedyard, Inc.*, 59 S.W.3d 679, 686 (Tex. App.--Amarillo 2000, pet. denied), the court said that "an expert opinion regarding causation that is based completely upon speculation and surmise amounts to no evidence." In *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999), the Court said that "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness."

E. Disposition on Appeal.

In *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000), the U.S. Supreme 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. In a Texas trial, a properly preserved "no evidence" attack on expert testimony will support a reversal and rendition. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706(Tex. 1997).

DEEPER INTO THE SWAMP

VI. EXPERT OPINIONS CONTAINED IN BUSINESS RECORDS. [1]

TRE 803(6) includes, as a hearsay exception, "opinions or diagnoses" contained in business records.

A. Reasonable Medical Certainty or Probability.

Under the statute that preceded TRE 803(6), opinions and diagnoses in medical or hospital records were often excluded. *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966). In *Loper*, the Court held that medical opinions and diagnoses in business records were not admissible unless otherwise shown to be based upon a reasonable medical certainty. However, by adding "opinions" and "diagnoses" to the business records exception in TRE 803(6), the Texas Supreme Court eliminated *Loper's* "reasonable medical certainty" requirement. *See* comment to TRE 803(6), effective September 1, 1983.

B. Medical Causation.

A plaintiff must establish two distinct causal nexuses to recover damages in a personal injury case:

(1) a causal nexus between the conduct of the defendant and an event; and
(2) a causal nexus between the event and the plaintiff's injuries.

Blankenship v. Mirick, 984 S.W.2d 771, 775 (Tex. App.–Waco 1999, pet.. denied) (citing *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984)); *see also General Motors Corporation v. Harper*, 61 S.W.3d 118, 130 (Tex. App.–Eastland 2001, pet. filed) (to establish liability for a design defect, a plaintiff must prove that the defendant's conduct must have been a substantial factor in bringing about the injury and that the injury would not have occurred but for the defendant's conduct); *Cruz v. Paso Del Norte Health Foundation*, 44 S.W.3d 622, 629-630 (Tex. App.–El Paso 2001, pet. denied) (the causal link requirement in a medical malpractice action is satisfied when plaintiff presents proof that establishes a direct causal connection

[1]The author received assistance in preparing this Section from Kimberly P. Harris, Attorney at Law, of Uloth & Peavler, L.L.P.

between the damages awarded, the defendant's actions, and the injury suffered).

To constitute evidence of causation, an expert opinion, whether expressed in testimony or in a medical record, must rest in "reasonable medical probability." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995). This requirement helps avoid opinions based on speculation and conjecture. *Id.* "The term "reasonable medical probability" relates to the question of whether 'competent evidence' on the issue of causation has been shown and not to the standard by which an expert witness must testify." *Blankenship*, 984 S.W.2d at 775 (emphasis added); *see also Cruz*, 44 S.W.3d at 632 (the rule of "reasonable medical probability" relates to the showing that must be made to support an ultimate finding of fact and not to the standard by which the medical expert must testify). "Reasonable medical probability is determined by the substance and context of the opinion, and does not turn on semantics or on the use of a particular term or phrase." *Id.* (*citing Insurance Co. of North Am. v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966)). "The effect of the reasonable medical probability standard is to allow recovery only where the measure is 'something more than a fifty percent chance.'" *Marvelli, M.D. v. Alston*, 100 S.W.3d 460, 479 (Tex. App.–Fort Worth 2003, pet. denied).

A mere assertion by an expert that an opinion is based on reasonable medical probability does not meet the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995), and the Texas Rules of Evidence. *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120, 125-126 (Tex. App.–San Antonio 1999, rev. denied); *see also Black v. Food Lion, Inc.*, 171 F.3d 308, 310 (5th Cir. 1999) (in a slip and fall action, the plaintiff's burden under Texas law was to prove, based on a reasonable medical probability **and scientifically reliable evidence**, that her fall at the store caused her injuries).

The First Court of Appeals in Houston, in *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591 (Tex. App.–Houston [1st Dist.] 2002, pet. denied), discussed in detail the standard for expert testimony, including that found in medical records. In *Coastal*, the administratrix of a deceased's estate brought a personal injury action for unseaworthiness and negligence against the deceased's former employer alleging that the deceased contracted pneumonia while working as a crew member on the employer's ship. The court reviewed whether the trial court abused its discretion in finding the expert testimony reliable under TRE 702. The evidence of causation analyzed included expert testimony as well as physician statements in medical records. Coastal objected to the testimony of plaintiff's sole testifying expert witness and to the medical records to the extent they included opinions regarding medical causation.

The majority ultimately found that the expert testimony was not sufficient to meet the *Daubert/Robinson* requirements as it could not show general causation. Additionally, the court found that the medical records and other evidence of general causation, aside from the expert testimony, were not legally sufficient to support a verdict as that evidence to was not sufficient to meet the *Daubert/Robinson* inquiry as to general causation.

Justice Brister, in his concurring opinion, specifically references the admissibility of the medical records containing the expert opinions. Justice Brister noted that the primary issue the parties briefed and argued was whether, *even without* the physician's testimony, the references in the medical records and the product sheet about the disease were enough to establish causation. Justice Brister believed that the documents could NOT establish causation because they could not independently meet the *Daubert* and *Havner* factors that serve as a predicate for reliability. Justice Brister noted that none of the notations in the records indicated the methodology used, support from medical studies or general acceptance in the medical community, and only one record indicated how or why the author reached his conclusion. He listed three reasons why documents cannot replace an expert:

- First, none of the records are under oath. The Justice found it difficult to believe that sworn doctor's opinions would be required to support a trial continuance due to health problems, but not for a doctor's opinion on causation, the critical issue supporting a million-dollar verdict.
- Second, "it is too easy to reach the wrong conclusion by picking and choosing parts of a document and using them out of context."
- Third, because of the 'wisdom of the rule' that bars admission of 'learned treatises' in place of expert testimony.

The dissent, comprised of Justices Cohen, Mirabal and Smith, agreed with the majority's ruling as to the expert testimony; however, dissented from the findings with regard to the medical records and other evidence of causation. The Justices believed that Coastal did not sufficiently object under *Robinson* and *Daubert* to the medical records. Specifically, they argued that Coastal's general objection to the medical records 'to the extent

they include opinions regarding medical causation for the reasons that we have previously discussed' was too broad. The dissent found that the 'reasons previously discussed' related to plaintiff's testifying expert, not the physician whose opinions were contained in the medical records. Additionally, the dissent argued that Coastal should have objected specifically, noting the objectionable pages of the records. As the dissent believed that Coastal did not properly object, they found the records were some evidence of general causation.

C. Cases.

- *Gutierrez v. Excel Corporation*, 106 F.3d 683, 689 (5th Cir. 1997) (opinions in medical records do not support causation in reasonable medical probability, therefore, do 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).
- *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).
- *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App.–Fort Worth 2001, pet. denied) (because doctor had no information how long 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 doctor testify as to causation; therefore, hospital records and doctor's testimony as to causation were speculative, inflammatory and not admissible).
- *Glenn v. C & G Electric, Inc.*, 977 S.W.2d 686, 689 (Tex. App.–Fort Worth 1998, pet. overruled) (a challenge to business records as being testimony by undisclosed experts did not somehow trigger an automatic metamorphosis of the business records into the testimony of experts who are testifying at trial, thus requiring their disclosure pursuant to interrogatory requesting identification of each expert witness to testify at trial and each consulting expert).
- *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).
- *March v. Victoria Lloyds Insurance Company*, 773 S.W.2d 785, 789 (Tex. App.–Fort Worth 1989, writ denied) (blood alcohol content report 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).

Other jurisdictions have drawn similar conclusions – specifically, that opinions or diagnoses contained in medical records must meet admissibility standards of expert testimony:

- *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981) (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 proper foundation is laid; i.e. person who entered such diagnostic opinions and conclusions upon 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).
- *Kohn v. La manufacture Francaise Des Pheumatiques Michelin*, 476 N.W.2d 184 (Minn. App. 1991) (in tire design defect case, results from tests conducted by university research institute were admissible as business records, where 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).
- *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).
- *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).
- *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).

New Jersey and Pennsylvania 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).

VII. EXPERT OPINIONS CONTAINED IN GOVERNMENT RECORDS.

A. Generally.

Government records are called "public records and reports" in the TRE. The term "public records and reports" includes "records, reports, statements, or data compilations of public offices or agencies," which set forth "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to reports, or (C) factual findings resulting from an investigation made pursuant to authority granted by law." TRE 803(8).

B. Hearsay.

Government records, if offered for the truth of the matter stated, are hearsay, and would not be admissible unless an exception to the hearsay rule is met. *See Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.–Corpus Christi 1989, writ denied) ("Even though official public records or certified copies thereof may be admissible in evidence, that does not mean that ex parte statements, hearsay, conclusions and opinions contained therein are admissible"). There is an exception to the hearsay rule which applies to government records. TRE 803(8) provides that the following are not excluded by the hearsay rule:

> **Public Records and Reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
>
> (C) in a civil case as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
>
> unless the sources of information or other circumstances indicate lack of trustworthiness.

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 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.

There is one distinction between Federal Rule of Evidence 803(8) and the Texas rule. Under FRE 803(8), the "lack of trustworthiness" provision is applicable only

to subdivision (C) of the rule, while in Texas, such provision is applicable to all three subdivisions.

C. Other Admissibility Issues.

1. Public Office.

The evidence must be in the form of a record, report, statement, or data compilation of a public office or agency. TRE 803(8); *Robinson v. Warner-Lambert and Old Corner Drug*, 998 S.W.2d 407 (Tex. App.–Waco 1999, no pet.) (an article of a report of a study done by the Bureau of Public Health and the Centers for Disease Control is not a report of an agency and not admissible under Rule 803(8)(C)).

2. Hearsay Within Hearsay.

TRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. In *First Southwest Lloyds Insurance Company v. MacDowell*, 769 S.W.2d 954 (Tex. App.–Texarkana 1989, writ denied), the trial court properly excluded a fire marshal's written report of a fire because it contained reference to an eyewitness account which did not fall within any other exception to the hearsay rule. *See id.* at 959. The written report itself fell within the TRE 803(8) government records exception, but the eyewitness account contained in the report was not admissible under the present sense impression or the excited utterance exceptions to the hearsay rule because it was a narrative account given after the eyewitness had returned to the fire scene. *Id.*

3. Matters Observed Pursuant to Duty Imposed by Law.

TRE 803(8)(B) provides that "matters observed pursuant to duty imposed by law as to which matters there was a duty to report *excluding in criminal cases matters observed by police officers and other law enforcement personnel*," are not excluded by the hearsay rule. *See* TRE 803(8)(B)(emphasis added). Matters observed by police officers and other law enforcement personnel are excluded from this exception based on the presumption that observations by an officer at the scene of a crime are not as reliable as observations by other public officials. *See Perry v. State*, 957 S.W.2d 894, 896 (Tex. App.–Texarkana 1997, pet. ref'd). This perceived unreliability is due to the adversarial nature of encounters between the defendant and the police in the criminal context.

Courts have found reports prepared pursuant to other duties imposed by law admissible. *See Truck Insurance Exchange v. Smetak*, 102 S.W.3d 851 (Tex. App.–Dallas 2003, no pet.) (decision of Workers' Compensation appeals panel is admissible under rule 803(8) because such panel had a duty imposed by law to issue a decision after its review of the hearing officer's decision); *In the Interest of B.J.*, 100 S.W.3d 448 (Tex. App.–Texarkana 2003, no pet.) (disciplinary referrals prepared by a teacher employed by a public agency with a duty imposed by law to supervise children and report any violations of the student code of conduct were admissible under the public records exception); *Leyva v. Soltero*, 966 S.W.2d 765, 768 (Tex. App.–El Paso 1998, no pet.) (accident report and investigating officer's statement regarding motor vehicle accident were within hearsay exception for public records and reports); *Bingham v. Bingham*, 811 S.W.2d 678, 684 (Tex. App.–Fort Worth 1991, no writ) (social study made as the result of an order of a court in a matter affecting the parent/child relationship was admissible).

4. Law Enforcement/Investigative Reports.

TRE 803(8)(C) provides that "in civil cases as to any party and in criminal cases **as against the state**, factual findings resulting from an investigation made pursuant to authority granted by law" are not excluded by the hearsay rule. *See* TRE 803(8)(C) [emphasis added]. These investigative reports are not limited to only factual findings as the rule might suggest. *See Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988) (portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion). Investigatory reports may contain opinions or conclusions, as long as they are based on a factual investigation and they satisfy the trustworthiness provision of TRE 803(8). *See Id.; Cowan v. State*, 840 S.W.2d 435, 437 (Tex. Crim. App. 1992), *see also McRae v. Echols*, 8 S.W.3d 797, 799-800 (Tex. App.–Waco 2000, pet. denied) (conclusions and opinions of police officer as to causation contained in accident report were based on factual investigation and were admissible absent evidence showing a lack of trustworthiness).

5. Lab Reports.

The Fifth Circuit Court of Appeals has made a distinction between reports prepared in a nonadversarial environment and those resulting from 'the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation:'

> This circuit has recognized that Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter...such records are, like other public documents, inherently reliable.

United States v. Quezada, 754 F.2d 1190, 1194 (5th Cir. 1985). The Texas Court of Criminal Appeals rejected that distinction in *Cole v. State*, 839 S.W.2d 798, 804 & 808 (Tex. Crim. App. 1990). It has been found that the Texas Department of Public Safety's chemists were law enforcement personnel and that admission of their reports was prohibited by TRE 803(8)(B) because they constituted 'matters observed by police officers and other law enforcement personnel' and were not prepared in a routine, nonadversarial setting. *See Id. but see Butler v. State*, 872 S.W.2d 227, 237-238 (Tex. Crim. App. 1994) (holding that autopsy reports are admissible under Rule 803(8)); *Garcia v. State*, 868 S.W.2d 337, 342 (Tex. Crim. App. 1993) (holding that reports by medical examiners are admissible as business records and are not subject to exclusion under the other law enforcement personnel exception to the hearsay rule); *see also Aguilar v. State*, 887 S.W.2d 27 (Tex. Crim. App. 1994) (the testimony of a qualified expert chemist who did not personally perform the analysis of the substance at issue was admissible, even though he used the reports of another chemist to testify to his own opinion of the substance); *Martinez v. State*, 22 S.W.3d 504 (Tex. Crim. App. 2000) (citing *Aguilar*, a testifying chemist who did not analyze a substance may testify to his opinion about the substance and, in doing so, may rely upon the report of the chemist who performed the analysis as long as the report is not offered into evidence).

The Court of Criminal Appeals delineated two factors to be considered in determining the admissibility of a lab report prepared by a chemist unavailable to testify: "(1) the nature of the testing process, and (2) the context in which the relevant tests were conducted." *Cole*, 839 S.W.2d at 808-810. Specifically, was the testing process subjective in nature or imprecise and subject to individual interpretation, and was the information recorded as part of a routine procedure in a nonadversarial setting.

6. Lack of Trustworthiness.

The TRE 803(8) hearsay exception does not apply where *the sources of information or other circumstances indicate lack of trustworthiness.* It has been held that this rule creates a presumption of admissibility, with the burden being placed on the party opposing the admission of the record to show its untrustworthiness. *Beavers v. Northrup Worldwide Aircraft Services*, 821 S.W.2d 669, 675 (Tex. App.–Amarillo 1991, writ denied). As FRE 803(8) is identical to TRE 803(8), with the exception that the "lack of trustworthiness" paragraph is applicable to all three subdivisions in the Texas rule as opposed to only subdivision (C) in the Federal rule, federal cases interpreting the federal rule are persuasive in the interpretation of this rule. *Id*. The United States Supreme Court has held that a JAG report based upon a factual investigation satisfied the rule's trustworthiness requirement. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); *but see Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264, 1267 (S.D. Ohio 1979) (holding inadmissible a JAG report found to be untrustworthy because it was prepared by an inexperienced investigator in a highly complex field of investigation). The Federal Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on the trustworthiness question:

(1) the timeliness of the investigation;
(2) the investigator's skill or experience;
(3) whether a hearing was held; and
(4) possible bias when reports are prepared with a view to possible litigation.

See Beech Aircraft Corp., 488 U.S. at 167-168 n.11 (citing *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943)). Advisory Committee's Notes on Fed. Rule Evid. 803(8), 28 U.S.C.App., p. 725; see Note, *The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C)*, 96 HARV.L.REV. 492 (1982).

VIII. TCP&RC AFFIDAVITS RE: COSTS AND NECESSITY OF SERVICES.[2]

A. Generally.

Under Texas law, a claim for past medical expenses must be supported by evidence that such expenses were reasonably necessary for the plaintiff to incur as a result of her injuries. *Walker v. Ricks*, 101 S.W.3d 740, 746 (Tex. App.–Corpus Christi 2003, no pet.); *Transport Concepts, Inc. v. Reeves*, 748 S.W.2d 302, 305 (Tex. App.–Dallas 1988, no writ). It has been found that there are two ways in which a plaintiff can prove necessity of past medical expenses:

(1) presenting expert testimony on the issues of reasonableness and necessity; and
(2) presenting an affidavit prepared and filed in compliance with Sections 18.001 and

18.002 of the Texas Civil Practice and Remedies Code.

Walker, 101 S.W.3d at 746; *Rodriguez-Narrea v. Ridinger*, 19 S.W.3d 531, 532-533 (Tex. App.–Fort Worth 2000, no pet.). Ordinarily, expert testimony is required to establish reasonableness and necessity of medical expenses, but Texas Civil Practice and Remedies Code §18.001 provides a limited exception to this general rule as follows:

Texas Civil Practice and Remedies Code §18.001

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(d) the party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

TCP&RC §18.001. A party may submit medical bills and expenses as business records under rules 803(6) and

[2]The author received assistance in preparing this Section from Kimberly P. Harris, Attorney at Law, of Uloth & Peavler, L.L.P.

902(10); however, proof of the amounts by themselves, is not proof of reasonableness. Recovery by submitting medical bills and expenses solely pursuant to the exception provided in rule 803(6) will be denied in the absence of evidence showing the reasonableness and necessity of such expenses. *See Rodriguez-Narrea v. Ridinger*, 19 S.W.3d 531 (Tex. App.–Fort Worth 2000, no pet.) (no recovery was possible, regardless of TRE 803(6), because plaintiff did not meet requirements of Section 18.001 and presented no expert testimony on issues of reasonableness or necessity).

The Eastland Court of Appeals has stated that Section 18.001 is an evidentiary statute which accomplishes three things:

(1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay;
(2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and
(3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit.

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.–Eastland 1995, no writ); *accord Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646, 654 (Tex. App.–El Paso 1998, no writ).

It should be noted that a non-expert witness, such as a custodian of records, may not be permitted to testify that medical bills are reasonable or necessary. *See Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646 (Tex. App.–El Paso 1998, no writ). "While the Legislature has chosen to provide for the admissibility of an uncontested affidavit of a non-expert custodian of records which establishes the reasonableness and necessity of medical expenses, it has not provided that a custodian of records is competent to offer live testimony of these same facts." *See Id.* at 654.

1. Causation.

Section 18.001 only touches upon three elements of proof: (1) the amount of the charges; (2) the reasonableness of the charges; and (3) the necessity of the charges. *See Beauchamp*, 901 S.W.2d at 748. Affidavits under Section 18.001 are "sufficient evidence to support a finding of fact," but are not conclusive as to the amount of damages. *See* TCP&RC §18.001(b); *Beauchamp*, 901 S.W.2d at 748-749. Neither do affidavits under Section 18.001 establish any causal nexus between the accident and the medical expenses. *Beauchamp*, 901 S.W.2d at 749; *see also Walker*, 101 S.W.3d at 748.

To be entitled to recovery, a plaintiff must establish two causal nexuses:

(1) a causal nexus between the defendant's conduct and the event sued upon; and
(2) a causal nexus between the event sued upon and the plaintiff's injuries.

Walker, 101 S.W.3d at 747 (citing *Morgan v. Compugrahpic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984)). "The causal nexus between the event sued upon and the plaintiff's injuries is strictly referable to the damages portion of the plaintiff's cause of action. Even if the defendant's liability has been established, proof of this causal nexus is necessary to ascertain the amount of damages to which the plaintiff is entitled." *Morgan*, 675 S.W.2d at 732.

A jury judges the credibility of the witnesses, and may disbelieve a witness**,** even if his testimony is not contradicted. *See id.; see also Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 551 (Tex. App.–San Antonio 1994, no writ). A jury may choose to be guided by expert testimony on damages, but is not bound by it. *Peterson v. Reyna*, 908 S.W.2d 472, 477 (Tex. App.–San Antonio 1995), *modified on other grounds*, 920 S.W.2d 288 (Tex. 1996).

2. Controverting Affidavit

Section 18.001(f) requires a counteraffidavit to "give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit and be made by a person qualified to testify in contravention about matters contained in the initial affidavit." *See* TCP&RC § 18.001(f); *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.–Dallas 2001, pet. denied). This is unlike Section 18.001(c)(2)(B), which permits charges to be proved by a non-expert custodian of records. Thus, a greater burden of proof is placed on counteraffidavits. The idea behind this burden is to discourage the misuse of counteraffidavits in "a manner that frustrates the intended savings." *See Turner*, 50 S.W.3d at 747.

In *Turner v. Peril*, Turner filed affidavits pursuant to Section 18.001. Peril filed counteraffidavits by Dr. Sibley. Every counteraffidavit was identical except for the named service provider. The court ultimately found that Dr. Sibley's counteraffidavits were insufficient to controvert plaintiff's affidavits as to reasonableness and

necessity of medical expenses. Specifically, the court found that Dr. Sibley did not sufficiently show that he was "qualified ... to testify in contravention" of the matters in each of Turner's affidavits by simply reciting his credentials as an orthopedic surgeon and stating that the counteraffidavits were based on his "education, training, and experience." *See* TCP&RC §18.001(f). He may have been qualified to contravene some of Turner's affidavits but, "his status as a licensed physician did not automatically qualify him as an expert on every medical question." *See Turner*, 50 S.W.3d at 747; *see also Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). Further, the counteraffidavits did not address whether the charges for the various medical services were reasonable in terms of cost and made only a conclusory statement that the medical records failed to show any objective finding of a significant injury.

Simply put, the counteraffidavits should specifically address the claims made in the corresponding initial affidavit and state the basis for the contravention. General boilerplate language for counteraffidavits will not suffice. Such language does not give reasonable notice sufficient to controvert an initial affidavit. *See e.g. Turner*, 50 S.W.3d at 748.

IX. ADMISSIBILITY OF EXPERT REPORTS.

A. Hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TRE 801(d). As such, it appears that reports prepared by experts meet the definition of hearsay and should be excluded unless they meet an exception to the hearsay rule. There has been some case law discussing whether reports prepared by experts specifically for the litigation at hand would be admissible under the business records exception to the hearsay rule.

B. Expert Reports as Business Records.

The operative language in TRE 803(6) when determining the admissibility of expert reports under the business records exception to the hearsay rule is: "...if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation..." If expert reports are made specifically for litigation, unlike invoices, contracts, records, etc. made in the routine course of business**,** they do not come within the ambit of TRE 803(6). *See State v. Tomah*, 736 A.2d 1047 (Maine 1999) (forensic report of expert on blood spatter patters, 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 hearsay rule).

C. Parentage Testing Report.

Parentage testing reports are admissible even without the establishment of the business records exception pursuant to Texas Family Code §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).

X. LEGAL OPINIONS VS. MIXED FACT-LAW QUESTIONS.

Experts cannot testify what the law of the forum state is. The law of sister states and foreign countries is okay, but not law of Texas. *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied), was a contract case, involving scope of coverage under an insurance policy. The court of appeals ruled that an expert could not render an opinion on whether a particular event was or was not within the scope of an insurance policy. The court cited an earlier case which held that the question of "whether or not a legal duty exists under a given set of facts and circumstances is a question of law for the court." *See St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 284 (Tex. App.--Corpus Christi 1982, no writ). In *Texas Workers' Compensation Com'n v. Garcia*, 862 S.W.2d 61, 105 (Tex. App.--San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995), the appellate court held that expert testimony of a law professor as to the constitutionality of a statute was not admissible, since it was opinion testimony on a legal issue. However, in

Transport Ins. Co. v. Faircloth, 861 S.W.2d 926, 938-39 (Tex. App.--Beaumont 1993), *rev'd on other grounds*, 898 S.W.2d 269 (Tex. 1995), the appellate court held that expert testimony of a former Texas Supreme Court justice regarding the proper procedure for settling a personal injury claim of a minor child, and whether it had been followed in this instance, was admissible. And in *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied), a former OSHA compliance officer could testify whether a training regimen did or did not comply with OSHA regs, since that was a mixed fact law question involving the application of OSHA regs to the facts of the case.

In *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.--Corpus Christi 1990, no writ), a divorce case involving tracing of commingled separate and community funds, the appellate court held the trial court properly refused to let Wife's attorney cross-examine Husband's CPA as to the CPA's understanding of the community-money-out-first presumption under the *Sibley* case. However, the court noted a "host of legal problems" raised by the *Birchfield* rule permitting a witness to testify on mixed fact-law questions. Where the "law part" is debatable, one party's right to elicit expert testimony on mixed fact-law questions collides with the opponent's right to cross-examine, all in the context of the trial court's power to restrict cross-examination to avoid jury confusion.

The court, in *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.--Texarkana 1994, writ dism'd by agr.), explores the distinction between an expert testifying on mixed fact-law questions and pure law questions. The court posited the following definition of a mixed fact-law question:

> [A]n opinion or issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.

Id. at p. 134. Using this standard, it was not error to permit the expert to testify that Mary Carter agreements at issue in the case were against public policy.

In *Holden v. Weidenfeller*, 929 S.W.2d 124 (Tex. App.--San Antonio 1996, writ denied), the trial judge excluded expert testimony from a law school professor, who was Board Certified in Real Estate Law, based upon the pleadings, depositions, and documents on file in the case, as to whether an easement appurtenant, an easement by estoppel or a public dedication existed in the case. The appellate court held that the opinion offered was not one of pure law, but rather of mixed fact-law. However, since the trial was to the court without a jury, it was not an abuse of discretion to exclude the testimony since it was not "helpful to the trier of fact," as required by TRE 702. This is because the trial court, being a legal expert himself, was "perfectly capable of applying the law to the facts and reaching a conclusion without benefit of expert testimony from another attorney." *Id.* at 134.

See Fleming Foods of Texas, Inc. v. Sharp, 951 S.W.2d 278 (Tex. App.--Austin 1997, writ denied) (former Attorney General Waggoner Carr not permitted to testify that changes to the Texas Tax Code were substantive, since statutory construction is a pure question of law); *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56,94 (Tex. App.--Houston [14th Dist.] 2004, n.p.h.) (a former Texas Supreme Court Justice and a law professor were improperly allowed to testify to their views of what the law is).

APPLYING *DAUBERT*/*ROBINSON* TO CPAs

XI. RELIABILITY OF FINANCIAL EXPERTS.

This section uses financial experts as an example of how the *Daubert-Robinson-Gamill* reliability standards apply to a non-scientific field of expertise.

A. Applicability of Reliability Requirement to Financial Experts.

1. Economists.

The *Daubert* reliability concept has been applied to economists. In *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), the court of appeals applied the *Daubert* reliability standard to the testimony of an economist in an anti-trust case, and ruled the testimony inadmissible because not all relevant circumstances were incorporated into the expert's economic model, and the model failed to account for market events that did not relate to any anticompetitive conduct.

In *Liu v. Korean Air Lines Co., Ltd.*, 1993 WL 478343 (S.D.N.Y. 1993), the trial court applied *Daubert* standards and partially admitted and partially rejected a professional economist's testimony. The court permitted testimony on: the future growth of Taiwan's economy and its effect on employment in the shipping industry; the concept of the lost value of household services (but not the value of them, since the expert's value was based in US and not Taiwanese figures); the decedent's statistical work life expectancy; the projected spread of growth of decedent's income over 10 years. The court rejected testimony on: the likelihood of the decedent being promoted on any particular dates; the assumption of an

8% annual increase in the decedent's earnings; lost fringe benefits (because the expert did not support with evidence his assumption that fringe benefits equalled 19.95% of salary).

Other cases applying the *Daubert* reliability concept to economists are discussed in Androgue & Ratliff, *Kicking the Tires After Kuhmo: the Bottom Line on Admiting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 454-464 (2000).

2. Accountants.

The *Daubert* reliability concept has been applied to accountants. In *G.T. Laboratories, Inc. v. The Cooper Companies, Inc.*, No. 92-C-6647 (W.D. Ill. Sept. 24, 1998) [1998 WL 704302], an accountant's testimony was excluded because it was based on non-standard methodology and the expert did not show that the methodology had been tested or subjected to peer review or had had an error rate determined. In *S.E.C. v. Lipson*, 46 F. Supp.2d 758 (N.D. Ill. 1999), a CPA's opinion that a company's internal financial reports were not reliable was excluded because the expert's opinions were not based on the methods and principles of accountancy. These cases and others are discussed in Androgue & Ratliff, *Kicking the Tires After Kuhmo: the Bottom Line on Admiting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 454-464 (2000).

In *TUF Racing Products v. American Suzuki Motor*, 223 F. 3d 585 (7th Cir. 2000), the court of appeals upheld the admission of a CPA's opinion on lost profits under *Daubert* standards. It was permissible for the CPA to testify to the discounted present value of lost future earnings based upon information provided by the plaintiff and assumptions given by counsel.

In *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564 n. 17 (11th Cir. 1998), the court said: "We do not doubt that accounting expertise is among the sorts of technical and specialized expertise the use of which is governed by Rule 702 and Daubert."

3. Other Financial Experts.

In *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999), the Delware Supreme Court held that *Daubert* and *Kumho Tire* apply to valuation experts testifying in appraisal proceedings regarding corporate stock. The court upheld the lower court's decision to reject an expert's capital market approach to valuation, and both sides' experts' discounted cash flow approach to valuation. How *Daubert* standards might be applied to valuation experts is further discussed in Androgue & Ratliff, *Kicking the Tires After Kuhmo: the Bottom Line on Admiting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 454-464 (2000).

In *Callahan v. A.E.V. Inc.*, 182 F.3d 237 (3rd Cir. 1999), the court of appeals indicated that *Daubert* applied to lost profit testimony in an antitrust case and ruled that the testimony of two financial experts was admissible.

In *In re Valley-Vulcan Mold Co.*, 2001 WL 224066 (6th Cir. 1999) [No. 98-8070] (not selected for publication in the Federal Reporter), the Court of Appeals applied *Kuhmo* and affirmed the admission of the opinion of a financial expert on the solvency of a company in connection with an effort to recover fraudulent conveyances. The witness, who was national director of a valuation services group, had degrees from prestigious universities, and had experience in determining the solvency of companies.

United States v. Whitehead, 176 F.3d 1030 (8th Cir. 1999), the appellate court upheld the admissibility of an FBI agent's opinions explaining the criminality of a check kiting scheme. *Accord*, *United States v. Yoon*, 128 F.3d 515, 527-28 (7th Cir. 1997) (also involving a check-kiting scheme).

XII. STABLISHING RELEVANT PROFESSIONAL STANDARDS FOR CPAs.

To establish the qualifications of accountant witnesses, and the reliability of their methodology, it is necessary to know something about the licensing and professional standards in the accounting field. To lay the predicate for an expert opinion, it is necessary to become familiar with sources of authority in the accounting field.

A. Licensing.[3]

Certified Public Accountants (CPAs) are licensed professionals in the broad field of accounting. After passing a uniform national CPA examination, CPAs are licensed and regulated by state (and related U.S. jurisdictions such as the District of Columbia, etc.). Boards of Accountancy that set forth their own education, experience and other requirements. These State Boards are given broad powers to adopt regulations, promulgate rules of conduct for the proper administration of the law, and ensure that the public is served by qualified professional accountants. They are generally made up of practicing CPAs plus attorneys, economists, state officials and public members among

[3]The author received assistance in preparing this section from Patrice L. Ferguson, of Ferguson, Camp & Poll, Houston, Texas. Ms. Ferguson is both an attorney and a CPA, and has a forensic and accounting practice throughout Texas.

others. The State Boards of Accountancy are generally guided by their respective governments, the American Institute of Certified Public Accountants (AICPA), and to a lesser extent the Securities and Exchange Commission (SEC). Authorized Edition of The AICPA's Uniform CPA Exam –1991; Information for CPA candidates section, page xiii.

In Texas, for example, the Texas State Board of Public Accountancy has been given the legal authority to govern the practice of public accountancy in Texas. The Board has adopted many of the AICPA professional standards as their own professional conduct rules. The Texas State Board of Accountancy requires that a CPA have a Bachelor's Degree and complete not fewer than 150 semester hours (of which 30 semester hours are accounting courses), and pass a test administered by the Texas State Board of Accountancy.

Most states provide for periodic peer review of CPAs' accounting and auditing practices. The AICPA has promulgated "Standards for Performing and Reporting on Peer Reviews." These standards have been adopted in various states.

In some states it is permissible for a person to render bookkeeping services without being licensed.

> Some states have additional categories of accounting practitioners, such as public accountants or registered accountants, who are not certified but who are otherwise licensed to offer certain types of services to the general public.

D. Edward Martin, ATTORNEY'S HANDBOOK OF ACCOUNTING, AUDITING AND FINANCIAL REPORTING § 1.01[1] at 1-4 (1996), cited in *Ferriso v. NLRB*, 125 F.3d 865, 871 (D.C.Cir. 1997). For example, Federal law permits audits of employee benefit plans and publicly traded firms to be performed either by certified public accountants or by licensed public accountants. *Ferriso v. NLRB*, 125 F.3d 865, 871 (D.C.Cir. 1997).

B. The Aicpa.

The American Institute of Certified Public Accountants (AICPA) describes itself as the premier national professional association for CPAs in the United States. The AICPA has more than 330,000 members.

To qualify for admission to membership in the American Institute, a CPA must:

– possess a valid and unrevoked CPA certificate issued by the legally constituted authorities of the states, the District of Columbia, territories, or territorial possessions of the United States;
– have passed an examination in accounting and other related subjects satisfactory to the AICPA Board of Directors, which the board has resolved is the Uniform CPA Examination;
– practice in a firm enrolled in Institute-approved practice monitoring programs as long as one is engaged in public accounting as a proprietor, partner, or shareholder, or as an employee who has been licensed as a CPA for more than two years;
– agree to abide by the AICPA Bylaws and the Code of Professional Conduct.

In order to retain membership in the AICPA, a member in public practice for each three-year reporting period must complete 120 hours of continuing professional education with a minimum of 20 hours each year. A member not engaged in public practice must, during the each three year reporting period complete 90 hours of continuing professional education with a minimum of 15 hours in each year.

C. Standards Governing Accountants.

CPAs doing audits, financial statements, or income reporting ordinarily use Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS). CPAs who are performing consulting or valuation services don't have "generally accepted" guidelines.

1. FASB Standards.

The Financial Accounting Standards Board (FASB) is a 7-person committee which sets standards for financial accounting and reporting in the USA. The members of the FASB are selected by the Financial Accounting Foundation. The Financial Accounting Standards Advisory Council (FASAC), made up of 30+ members who are broadly representative of preparers, auditors and users of financial information, consults with the FASB on technical issues.

The FASB standards are officially recognized as authoritative by the Securities and Exchange Commission (Financial Reporting Release No. 1, Section 101) and the American Institute of Certified Public Accountants (Rule 203, Rules of Professional Conduct, as amended May 1973 and May 1979). See *PNC Bancorp, Inc. v. Commissioner*, 212 F.3d 822, 824 (3d Cir. 2000) (the Securities and Exchange Commission recognizes the FASB's financial accounting standards as authoritative.).

In *General Elec. Co. v. Delaney*, 251 F.3d 976, 979 (Fed. Cir., 2001), the court said:

> Standard financial accounting practice recognizes a hierarchy of generally accepted accounting principles. The highest authorities in the system of accounting norms are the statements published by the Financial Accounting Standards Board (FASB).

2. GAAP.

Generally Accepted Accounting Principles ("GAAP") are the official standards adopted by the American Institute of Certified Public Accountants (the "AICPA"), based on the decisions of three groups it has established: the Committee on Accounting Procedure; the Accounting Principles Board (the "APB"); and the Financial Accounting Standards Board. *See Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 168-69 (2d Cir. 2000).

The AICPA Professional Standards Vol. 1 AU §411.05 describes the sources of established accounting principles that are generally accepted in the United States as:

(1) Pronouncements of an authoritative body designated by the American Institute of Certified Public Accountants (AICPA) Council to establish accounting principles pursuant to Rule 203 of the AICPA Code of Professional Conduct, including the Financial Accounting Standards Board (FASB) Statements of Financial Accounting Standards, FASB Interpretations; Accounting Principles Board (APB) Opinions, and AICPA Accounting Research Bulletins;

(2) Pronouncements of groups of expert accountants that deliberate accounting issues in public forums and have been exposed for public comment for the purpose of establishing accounting principles or describing existing accounting practices that are generally accepted;

(3) Pronouncements of groups of expert accountants organized by an authoritative body that deliberates accounting issues in public forums but have not been exposed for public comment for the purpose of interpreting or establishing accounting principles or describing existing accounting practices that are generally accepted;

(4) Practice or pronouncements that are widely recognized as being generally accepted because they represent prevalent practice in a particular industry.

The U.S. Supreme Court has noted that GAAP are far from being a canonical set of rules that insure identical accounting treatment of similar transactions. Instead, GAAP tolerates a range of reasonable treatments, leaving the choice among the alternatives to company management. *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 99 S.Ct. 773, 58 L.Ed. 2d 785 (1979).

Thus, GAAP does not prescribe a fixed set of rules, but rather represent "the range of reasonable alternatives that management can use." *In re Burlington Coat Factory*, 114 F.3d at 1421 n. 10 (citing *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979)). The determination that a particular accounting principal is generally accepted can be difficult to establish since no single reference source exists for all such principles.

3. OCBOA.[4]

The FASB has elected not to address accounting bases other than those prepared on a GAAP basis. Additionally, the AICPA's accounting standards executive committee has not issued any guidance in this area of other bases of accounting presentations.

The only guidance for the issuance of Other Comprehensive Bases of Accounting (OCBOA) financial statements is that issued by the AICPA in Statement of Accounting Standards No. 62, Special Reports. That statement identifies only the following four categories as being appropriate OCBOA presentations.

1. A basis of accounting that the reporting entity uses or expects to use to file its income tax return for the period covered by the financial statements.
2. The cash receipts and disbursements basis of accounting, and modifications of the cash basis having substantial support, such as recording depreciation on fixed assets or accruing income taxes.
3. A definite set of criteria having substantial support that is applied to all material items appearing in financial statements, such as the price-level basis of accounting.

[4]The author received assistance in preparing this section from William C. Bradley, CPA/ABV, who has an accounting office and forensic practice in San Antonio, Texas.

4. A basis of accounting that the reporting entity uses to comply with the requirements or financial reporting provisions of a governmental regulatory agency to whose jurisdiction the entity is subject; for example, the basis of accounting that insurance companies use pursuant to the rules of a state insurance commission.

Non-authoritative guidance on OCBOA financial statements can be found in the AICPA's Technical Practice Aids, Section 1500, Financial Statements Prepared Under an Other Comprehensive Bases of Accounting (OCBOA).

4. GAAS.

"Auditing" is the process whereby the independent CPA conducts an examination of management's financial statements to determine whether the statements present fairly the financial information which they purport to convey. *SEC v. Arthur Young &* Co., 590 F.2d 785, 788 n. 2 (9th Cir.1979). "Generally accepted auditing standards ('GAAS') are the standards prescribed by the Auditing Standards Board of the . . . AICPA . . . for the conduct of auditors in the performance of an examination." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1200 n. 3 (11th Cir. 2001). GAAS are general standards of conduct relating to the auditor's professional qualities as well as to the judgments exercised by him in the performance of his examination and issuance of his report. AICPA, Professional Standards, Statements on Auditing Standards No. 1, § 150.01. *See SEC v. Arthur Young &* Co., 590 F.2d 785, 788 n. 2 (9th Cir. 1979); *Potts v. SEC*, 151 F.3d 810, 812 (8th Cir. 1998) (GAAS are "well-established norms of the accounting profession").

5. Financial Statements.

Most businesses prepare financial reports to reflect the financial condition of the business. When the financial reports are prepared by the owners or managers of the company, there is no independent assurance of accuracy. When the financial reports are prepared by a certified public accountant, the rules imposed by the accounting profession regarding the accuracy of the financial reports can give a degree of assurance of accuracy, depending upon the extent of the involvement of the CPA.

From highest to lowest, the degree of assurance of a CPA-prepared financial report ranges from (1) audited (highest), to (2) reviewed, to (3) compiled (lowest). Financial reports prepared without input from a CPA are called "internally-generated" reports.

a. Audited.

The objective of the ordinary audit of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present, in all material respects, financial position, results of operations, and its cash flows, in conformity with GAAP. The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Because of the nature of audit evidence and the characteristics of fraud, the auditor is able to obtain reasonable, but not absolute, assurance that material misstatements are detected. As noted in *Potts v. SEC*, 151 F.3d 810, 812-13 (8th Cir. 1998), some of the standards required for an audit are:

> [A]n auditor's opinion must have a reasonable basis in sufficient evidence. . . . An auditor must maintain "an appropriate level of professional skepticism." . . . . An auditor who has reason to suspect a material misstatement in the audited company's financial report must extend his or her audit accordingly. . . . The more important the item, or the greater the possibility of material misstatement, the stronger must be the grounds for the auditor's opinion.

b. Reviewed.

The objective of the review is to perform inquiry and analytical procedures that provide the accountant with a reasonable basis to express limited assurance that there are no material modifications that should be made to the statements in order for them to be in conformity with GAAP or, if applicable, an OCBOA (Other Comprehensive Basis of Accounting, e.g. cash basis or tax basis). A review differs from the audit in that a review does not provide the basis for the expression of an opinion because a review does not require the obtaining of an understanding of the internal control structure or assessing control risk, tests of accounting records and responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation, and certain other procedures ordinarily performed during an audit. Authorized Edition of The AICPA's Uniform CPA Exam – 1991; Information for CPA candidates section, page xiii., AR §100.04. As stated in *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-07 (9th Cir. 1999):

> In a review, an accountant relies on the representations of management to issue a report "stating that he or she is not aware of any material modifications that should be made to the financial statement in order for it to be in conformity with" generally accepted accounting principles.

c. Compiled.

The objective of the compilation is to present in the form of financial statements information that is the representation of management without undertaking to express any assurance on the statements. A compilation differs from a review in that a review should provide the accountant with a reasonable basis for expressing limited assurance that there are no material modifications that should be made to the financial statements. No expression of assurance is contemplated in a compilation. Authorized Edition of The AICPA's Uniform CPA Exam – 1991; Information for CPA candidates section, page xiii., AR § 100.04. As stated in *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106 (9th Cir.1999):

> A compilation involves the preparation of a financial statement regarding which the accountant expresses no assurance of accuracy, completeness, or conformity with generally accepted accounting principles.

d. Internally Generated.

The objective of the internally generated financial statement is to provide information to the client's management for use in its internal operations. The accountant may not report on financial statements that include one or more periods of client-prepared financial statements that have not been audited, reviewed, or compiled by the accountant.

6. Income Reporting.

Tax accounting is different from ordinary accounting. The sources of authority for tax reporting principles include the Internal Revenue Code, Revenue Rulings, and court rulings. Tax laws are promulgated for purposes of federal revenue and not to make an accurate measure of the income and resources of a business.

7. SEC Disclosure Standards.[5]

The Securities and Exchange Commission imposes accuracy requirements on the financial statements of publicly-traded businesses. In general terms, the SEC requires that the accounting records and financial reports be kept in accordance with GAAP. Item 303 of Regulation S-K requires financial statements to include a narrative portion that makes certain disclosures. The disclosures include: (1) specific information about liquidity, capital resources, and results of operation; (2) known material events and uncertainties that make the historical financial information misleading; (3) the cause of material changes in line items of the prior period's financial report; (4) the effect of inflation and changing prices on the business; and (5) any other information the company feels is necessary to understand its financial condition. For purposes of matrimonial litigation, the reporting standards of the SEC are, as a general rule, not important, since any company coming under SEC reporting requirements will have a market for its publicly traded shares, and the market price probably will determine the value of the spouse's ownership interest in the business, as opposed to the financial statements. There will be exceptions to this when dealing with various types of stock options and stock restricted from the freely traded marked due to certain SEC rules.

8. Litigation Services, or Forensic Work.[6]

Litigation services are rendered by a CPA using accounting and consulting skills to assist a client in a matter that involves pending or potential litigation or dispute resolution proceedings with a trier of fact. These services may include fact-finding (including assistance in the discovery and analysis of data), damage calculations, document management, expert testimony, and other professional services required by the client or counsel. Application of AICPA Professional Standards in the Performance of Litigation Services, AICPA Consulting Services Special Report 93-1, 1993.

a. General Standards.

The AICPA classifies litigation services as one of six types of consulting services and is therefore subject to the general standards of the AICPA Code of

[5]The author received assistance in preparing this section from William C. Bradley, CPA/ABV, who has an accounting office and forensic practice in San Antonio, Texas.

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Professional Conduct. The general standards cover professional competence, due professional care, planning and supervision, and sufficient relevant data. The general standards are concerned with the quality of the performance of any professional service.

b. Consulting Standards.

In addition to the general standards, specific consulting standards apply to the consulting process and are established by the Statement on Standards for Consulting Services (SSCS) under Rule 202 of the AICPA Code of Professional Conduct. The consulting standards apply specifically to the consulting process to guide practitioners in their relationships with consulting clients. These standards concern serving the client's interest, entering into an understanding with the client, and communicating with the client

In Texas, the Texas Board of Public Accountancy has determined that the SSCS set the professional standards for practice in the consulting area and thus Texas CPAs are bound under the Board's Rules to these AICPA standards.

c. No Forensic Standards, Per Se.

The CPA organizations do not promulgate standards for much of the forensic work accountants do. CPAs testifying as to lost profits, business valuation, or the character of marital property as separate or community, are operating without controlling standards issued by the accounting profession.