

**FEDERAL AND STATE EXPERT TESTIMONY  
UNDER *DAUBERT* AND *ROBINSON*:  
WHAT'S THE DIFFERENCE?**

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**23<sup>rd</sup> ANNUAL ADVANCED  
CIVIL APPELLATE PRACTICE COURSE**  
September 10-11, 2009  
Austin

**CHAPTER 4**

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## FEDERAL AND STATE EXPERT TESTIMONY UNDER *DAUBERT* AND *ROBINSON*: WHAT'S THE DIFFERENCE?

This paper explores the general requirements to proffer and seek review of the admission and exclusion of expert testimony in federal and state court. It focuses on the standards for admissibility, the role of experts in summary judgment proceedings, preservation, and standards of review on appeal in federal and state court. Along with a few practice tips, the article notes differences where discernible between federal and state court.<sup>1</sup>

### I. EXPERT TESTIMONY STANDARDS

Although a court has discretion to admit or exclude expert testimony, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999), the law has developed certain guidelines that govern the contours of that discretion. This section discusses the general admissibility requirements set out in the landmark federal and state cases. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993), and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Although often couched in the same terms, the application of those standards sometimes varies between federal and state court.

#### A. Designation and disclosure

##### 1. Disclosure of expert and expert report under federal law

Under Federal Rule of Civil Procedure 26(a)(2)(C), absent a stipulation or court order, a party must identify testifying experts at least 90 days before the date set for trial or, if only for rebuttal on the same subject matter identified by another party, within 30 days after the other party's disclosure. Additionally, unless otherwise stipulated or modified by court order, a party must furnish an expert report for every retained testifying expert witness and for a party's employee whose duties involve giving expert testimony. FED. R. CIV. P. 26(a)(2)(B). The report is to accompany the disclosure and must contain all information required under the Rule. *Id.*; see also *Sierra Club, Lone Star Chap. v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996) (analyzing insufficiency of expert report that contained short

outline, two-paragraph summary description, and statement of subjects to be discussed at trial); *Bro-Tech Corp. v. Purity Water Co.*, No. SA-08-CV-0594, 2009 WL 1748539 (W.D. Tex. June 19, 2009) (holding that report that fails to make any conclusions or otherwise attempt to comply with Rule 26 should be stricken). Nor will a "supplemental" report generally be allowed to proffer or disclose new opinions. See, e.g., *Williams v. Toyota Motor Corp.*, No. 4:08-CV-487, 2009 WL 305183 (E.D. Tex. Feb. 6, 2009) (supplementation not intended extend deadline or "give ineffective litigants a second chance at presenting their case"); *Reliance Ins. Co. v. La. Land & Expl. Co.*, 110 F.3d 253, 257-58 (5th Cir. 1997).

Proposed amendments would require experts who need not provide a report to disclose the subject matter of the expected testimony and a summary of the facts and opinions. See Alan S. Loewinsohn and Carol E. Farquhar, Experts – An Overview, Advanced Evidence and Discovery Course, State Bar of Texas (2009) (discussing and attaching proposed amendments).

##### 2. Disclosure of expert and expert report under state law

Texas Rule 195.2 requires that an expert be designated (*i.e.*, the information required by Rule 194.2(f) be furnished) by the later of 30 days after service of the request or 90 days before the end of the discovery period (for the party seeking affirmative relief) or 60 days before the end of the discovery period for all other experts. TEX. R. CIV. P. 195.2. The disclosure must provide the expert's identity, subject matter of his or her testimony, general substance of the opinions and the basis therefore, and generally the materials provided to, reviewed by, or relied upon by the expert (along with his or her resume). TEX. R. CIV. P. 194.2(f). For experts retained by, employed by, or in the control of the responding party, the disclosure must include all reports, documents and compilations prepared by the party. *Id.*; see, e.g., *Jennings v. Hatfield*, No. 14-04-00907-CV 2005 WL 2675048, \*6 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (memo opin.) (holding no error in excluding expert when all information required by Rule 194.2(f) not disclosed *and* no expert report ever provided).

A party may request disclosure of reports of any testifying expert under Rule 192.3(e)(6), and a court may order that reports be produced under Rule 195.5. Additionally, a party may decide to produce a report with the designation rather than provide the expert for deposition before the opposing party must designate its expert on the same subject matter. TEX. R. CIV. P. 195.3.

<sup>1</sup> With regard to federal law, the paper primarily reports on cases from the Fifth Circuit except in circumstances where a case from another circuit has received particular attention or frequent citation. Other than the landmark expert testimony cases, the paper also focuses primarily on very recent cases.

### 3. Exceptions from exclusion for failure to disclose worded differently in federal and state rules

Under federal law, if an expert is not timely disclosed as required by Rule 26(a), the party is not allowed to use the witness unless the failure was “substantially justified” or “harmless.” FED. R. CIV. P. 37(c)(1). Under Texas law, Rule 193.6 provides that the failure to timely provide or supplement discovery precludes introducing the material or information not timely disclosed unless a court finds “good cause” for the failure to timely designate or the failure to timely designate will not “unfairly surprise or prejudice the other parties.” TEX. R. CIV. P. 193.6. Even if the record does not show an exception, a trial court may allow a continuance to allow the supplementation and the opposing party an opportunity to conduct discovery. *Id.*

As such, the stated exceptions differ in focus. The Fifth Circuit, however, uses a four-factor test that re-injects a form of good cause *and* prejudice analysis into the excuse. *See Primrose Op. Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 564 (5th Cir. 2004) (listing four factors to consider in deciding whether failure to disclose witness or provide report harmless: “(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party’s failure to disclose.”); *see also Bro-Tech*, 2009 WL 1748539 at \*9 (holding additional continuance not warranted for stricken report under four-factor test when additional time previously provided and continuance would prejudice parties after close of discovery). Although the state test is an “or” and the Fifth Circuit test considers “all” factors, these exceptions in application may lead to the same result in deciding whether a trial court abused its discretion in admitting or excluding the testimony for late designation.

### 4. State law may impose expert or deadline requirements in addition to or different from the procedural rules

In addition to the general expert requirements, several statutes impose additional requirements on parties in certain contexts. Although an in-depth discussion of such requirements is beyond the scope of this article, several areas that arise recurrently include health care claims, TEX. CIV. PRAC. & REM. CODE § 74.351, certain professional liability claims, TEX. CIV. PRAC. & REM. CODE § 150.002, and asbestos-related injury claims, TEX. CIV. PRAC. & REM. CODE § 90.003-.007. Parties should consult those statutory provisions for additional information. Additionally, parties should consult the substantive

law to determine when expert testimony is required for one or more elements of the claims at issue. *See, e.g., Battaglia v. Alexander*, 177 S.W.3d 893, 899 (Tex. 2005) (standard of care for health care liability claim); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 472, 583 (Tex. 2006) (products liability causation). Whether expert testimony is required and on what topics should be part of the initial analysis. *See, e.g., Dewbre v. Anheuser-Busch, Inc.*, No. 10-08-22-CV 2008 WL 5093385, \*1 (Tex. App.—Waco Jan. 27, 2009, pet. denied) (memo opin.) (assuming expert testimony required in negligence case when neither party disputed requirement).

Notably, although federal procedural requirements govern admissibility of expert testimony, substantive Texas law may govern the need for or scope of any necessary expert testimony. *See, e.g., Black v. Food Lion, Inc.*, 171 F.3d 308, 312 (5th Cir. 1999) (citing *Havner* as controlling causation burden but using federal admissibility standards). The opposite may be true as well with Texas law governing procedural aspects of admission even if federal substantive law applies. *See, e.g., In re GlobalSantaFe Corp.*, 275 S.W.3d 477, 486-89 (Tex. 2008) (applying TCPRC Chapter 90 requirements for silica-related diseases and *Robinson* to Jones Act case).

## B. General admissibility standards

If timely disclosed (or an exception is met for the failure to timely designate), the next battleground in federal or state court becomes whether to admit or exclude the proffered testimony. This section discusses the general requirements under federal and state law (which generally follow similar guidelines), and the following section discusses admissibility and procedural issues peculiar to the summary judgment stage.

### 1. Federal standards for admission of expert testimony

In the landmark *Daubert* case, the Supreme Court rejected the previous “general acceptance” standard in favor of a multi-part test of admissibility based on the wording of the federal rules. 509 U.S. 579, 597. The Court stated that *Frye*’s “rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules” and therefore, “should not be applied in federal trials.” *Id.* at 588-89. In its place, the court held that testimony from a qualified expert must be relevant and reliable for admission. *Id.* at 590-91. The Supreme Court noted that these requirements would be determined by the district courts, commonly referred to as the “gatekeepers.” *Id.* at 597. *Daubert* identified four general factors of reliability that a district court might consider: testing, peer review, error rates, and ‘acceptability’ in the relevant scientific community. *Id.* at 593-94. Other factors may likewise be relevant. *Black*, 171 F.3d at 312.

Rule 702 was later amended to incorporate *Daubert* and its progeny. The rule, as amended, states –

- (1) If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact issue, [i.e., *relevance*],
- (2) a witness *qualified* as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise,
- (3) if [*reliable*, because],

- [i] the testimony is based upon sufficient facts or data,
- [ii] the testimony is the product of reliable principles and methods, and
- [iii] the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702 (emphasis added). However, even if the evidence satisfies the qualification, relevancy, and reliability requirements, the testimony could be excluded unless –

- (4) its probative value is not substantially outweighed by its *unfair prejudice*.

*Daubert*, 509 U.S. at 595 (citing Rule 403); see *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) (using *Daubert* factors to assess admissibility of expert testimony). These requirements are explored separately below.

## 2. State standards for admission of expert testimony

In Texas, Rule 702 of the Texas Rules of Evidence governs admissibility of expert testimony. The rule states that “if *scientific, technical, or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert* by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” TEX. R. EVID. 702 (emphasis added).

Only two years after *Daubert*, the Texas Supreme Court decided *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), noting that “scientific evidence” must be reliable. Thus, as with *Daubert*, after *Robinson*, for expert testimony to be admissible, it must meet three requirements: (1) the witness must be qualified, (2) the testimony must be reliable, and (3) the testimony must be relevant. *Id.* at 556; see also *Gammill v.*

*Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998) (incorporating the traditional relevancy standards under Rules 401 and 402). And similar to admissibility standards in federal courts, there is a fourth prerequisite: (4) the evidence could be excluded if it violates Rule 403, which states that courts may exclude evidence if the unfair prejudice substantially outweighs the probative value. TEX. R. EVID. 403.

Unlike the federal rules, Texas did not amend Rule 702 after *Robinson*. But Texas Rule 705(c), like Federal Rule 702, requires that the expert testimony be based on sufficient underlying data or facts. TEX. R. EVID. 705.

## 3. Federal and state law use same core admissibility standards

Despite the adoption of the additional language in the federal rules to comport with *Daubert*, federal and state courts use the same core standards for the admissibility of expert testimony. That is, admissibility requires that (1) the witness is qualified, (2) the testimony is relevant, (3) the testimony is reliable, and (4) it does not violate Rule 403. See *Daubert*, 509 U.S. at 594-95; *Robinson*, 923 S.W.2d at 556-57.

## C. Expert qualifications

### 1. Federal law standards on qualification

Similar to the state rule, Federal Rule of Evidence 702 requires that an expert witness be qualified by knowledge, skill, experience, training, or education in order to testify as an expert. FED. R. EVID. 702. The Fifth Circuit has held that “to qualify as an expert, the witness must have such knowledge or experience in [his] field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.” *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004). The court stated that Rule 702 does not mandate that an expert be “highly qualified in order to testify about a given issue”; “[d]ifferences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility.” *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009); see also *Suzlon Wind Energy Corp. v. Shippers Stevedoring Co.*, No. H-07-155, 2009 WL 197739 (S.D. Tex. Jan. 27, 2009) (NFPA certified fire and origin investigator qualified to testify on fire cause and prevention with factfinder to decide weight based on extent of specific experience with welding standards and wind turbines).

The Third Circuit noted that Rule 702’s qualification requirements should be interpreted liberally, holding that a “broad range of knowledge, skills, and training qualify an expert.” *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). And, when the testimony is not scientific in nature, qualification may be better judged by personal knowledge, work experience or training. See, e.g.,

*Redding Linden Burr, Inc. v. King*, No. H-07-2925, 2009 WL 277531, \*2 (S.D. Tex. Jan. 4, 2009) (citing Rule 702 and *Kumho*). If relying on experience, “the witness must connect the experience to the conclusion offered, must explain why the experience is a sufficient basis for the opinion, and must demonstrate the appropriateness of the application of the experience to the facts.” *Id.*

In a recent decision by the Fifth Circuit, the court held that the lower court abused its discretion when it excluded the defendant’s expert witness because he was not qualified. *Huss*, 571 F.3d at 455. The expert witness was board certified in internal medicine and had treated numerous patients with heart disease, but the court held that he was not qualified to testify about a cardiac condition. *Id.* at 454. The Fifth Circuit noted that the lower court erroneously focused on the fact that the defendant’s expert had less training and experience than the plaintiff’s expert on the issue. *Id.* at 455. It held that once the threshold requirement is met regarding one’s qualifications, the amount of experience and training of each expert is only relevant to the weight the factfinder will give the testimony, not to its admissibility. *Id.* at 452. The court stated that the defendant’s expert witness did not need to be board certified in cardiology to be qualified, but that his training and experience as a medical professional qualified him to testify. *Id.* at 455. In short, the expert’s experience qualified him to rebut plaintiffs’ toxicologist’s theory as unsupported by medical literature.

While some federal courts may use a broad interpretation of the qualification requirement and leave the weight of testimony to the trier of fact, that breadth is not without limit. For example, a lay witness – even with extensive personal knowledge of the facts – does not meet expert qualification requirements. *Villaje Del Rio, Ltd. v. Colina Del Rio, LP*, No. SA-07-CA-947-XR, 2009 WL 1606431 (June 8, 2009) (fact witness did not meet expert qualification requirement to testify on financial solvency for fraudulent transfer claim). And a failure to establish qualifications at all likewise should result in exclusion. *See, e.g., Redding Linden Burr*, 2009 WL 277531 (excluding disclosed experts when plaintiff failed to provide any support for contention that witnesses qualified, not offering resume, vitae or any other evidence of knowledge, experience or training).

## 2. State law standards on qualification

Texas Rule of Evidence 702 requires that experts be qualified “by knowledge, skill, experience, training, or education,” and that their testimony

“assist the trier of fact.” *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); TEX. R. EVID. 702. In *Broders*, the court stated that the proponent must establish that the expert has the “knowledge, skill, experience, training, or education regarding the specific issue before the court, which would qualify the expert to give an opinion on that particular subject.” *Broders*, 924 S.W.2d at 153 (holding general medical expertise not sufficient to qualify as expert in area with no particular experience or training). The court further stated that when a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields. *Id.* at 154.

The expert must possess experience and expertise regarding the specific issue before the court. *Roberts v. Williamson*, 111 S.W.3d 113, 122 (Tex. 2003). In *Roberts*, the plaintiff argued that a board-certified pediatrician was not qualified to testify regarding a newborn’s neurological injuries. *Id.* at 121. The Texas Supreme Court concluded that a board-certified pediatrician was qualified to testify regarding the specific causes and effects of the newborn’s neurological injuries, even though he was not a neurologist. *Id.* at 122. The court stated that the record before the court established that the pediatrician had the experience and expertise regarding the specific causes and effects of the plaintiff’s injuries; therefore, he was a qualified expert. *Id.*; *see also Collini v. Pustejovsky*, 280 S.W.3d 456 (Tex. App.—Fort Worth 2009, no pet.) (holding medical doctor qualified to testify about general practices on prescriptions and warnings but not on causation when report reflected no experience with drug at issue in claim); *Bechtel Corp. v. Citgo Prods. Pipeline Co.*, 271 S.W.3d 898 (Tex. App.—Austin 2008, no pet.) (holding expert qualified on experience and testimony reliable based on known data points).

For an expert to be qualified, the trial court must “ensur[e] that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.” *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006). In *Cooper Tire*, the Texas Supreme Court analyzed whether an expert was qualified to testify regarding a tire manufacturing defect. *Id.* at 800. The expert alleged that the tire failed because the skim stock was contaminated with hydrocarbon wax when it was manufactured, which caused the tread to separate on the tire. *Id.* at 800. In deciding whether the expert was qualified, the court stated that although he had an undergraduate degree in chemistry and a master’s degree in polymer science and engineering, tire chemistry and design is a highly specialized field. *Id.* at 806. The court stated that the expert had never worked for a tire company or published any articles on tire chemistry, nor did he consider himself an expert in tire design or have

any expertise in the field of tire manufacturing. *Id.* The court concluded that even though he had a degree in chemistry, without more specialized education, training, or experience in tire chemistry, he was not qualified to testify. *Id.* at 807; *see also* *Champion v. Great Dane L.P.*, No. 14-08-310-CV, 2009 WL 1311922 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet. h.) (holding mechanical engineer with experience in loading/unloading trailers did not qualify him as an expert on safer alternative design as to uncovered gutter on refrigerated trailer).

### 3. Federal court may allow broader qualifications to suffice

Both federal and state courts have emphasized that experts do not have to be highly qualified, or the most qualified, on the issue in order to be qualified as an expert witness. *See Huss*, 571 F.3d at 452; *see also Roberts*, 111 S.W.3d at 122. Texas courts repeatedly state that the expert must be qualified on the specific issue before the court, especially if it is a highly specialized subject matter. *See Cooper Tire*, 204 S.W.3d at 800. However, both federal and state courts have held that physicians do not need to be board certified in a specific area of practice in order to be a qualified expert on that specific area; experience, rather than certification, may suffice. *See Huss*, 571 F.3d at 455; *Roberts*, 111 S.W.3d at 122.

Although both federal and state courts have very similar standards for experts to be qualified, federal courts are slightly more liberal in qualifying experts on a particular subject, holding that a “broad range of skills” can qualify an expert. *Pineda*, 520 F.3d at 244. Frequently, the Fifth Circuit decides that the level of qualification goes to weight, not admissibility. In contrast, Texas courts focus more on the expert’s particular skills, experience, and training regarding the specific issue before the court.

**PRACTICE TIP:** Show broad *and* narrow qualifications by training *and* experience. In state court, only qualification by training or experience on the exact, narrow issue might suffice, particularly the more scientific in nature the issue. In federal court, however, broad experience might suffice in more circumstances.

## D. Expert testimony must be relevant

### 1. Federal standards for relevancy

The expert’s testimony must be “relevant to the task at hand.” *Daubert*, 509 U.S. at 597. The court stated that Rule 702’s requirement that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue” is the

relevancy inquiry. *Id.* at 591. If the expert testimony does not relate to any issue in the case, it is not relevant. *Id.* In *Daubert*, the Court described the relevancy requirement as a “fit,” meaning that expert testimony must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)).

The Fifth Circuit has excluded expert testimony because it failed the relevancy requirement set out in *Daubert*. *See Pipitone v. Biomatrix*, 288 F.3d 239, 244 (5th Cir. 2002). In *Pipitone*, the plaintiff brought a products liability action against a fluid manufacturer after receiving an injection of synthetic fluid in his knee and contracting a salmonella infection. *Id.* at 241. The plaintiff’s expert witness testified that it was as likely that the infection was caused by a dirty syringe as it was caused by infected fluid manufactured by the defendant. *Id.* at 245. The Fifth Circuit stated that to be admissible, the expert’s testimony must be relevant to the issue of causation of the salmonella infection. *Id.* But, the court stated, the expert’s perfectly equivocal opinion was not helpful to the fact finder because the expert did not conclude that it was more likely than not that the fluid caused the infection. *Id.* Because the equivocal testimony did not aid the jury, the court concluded that the testimony was not relevant and, therefore, not admissible. *Id.*

### 2. State standards for relevancy

The relevancy standard likewise applies in state court. *Robinson*, 923 S.W.3d at 556. To meet the relevancy requirement, the testimony must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* at 556. The relevancy requirement incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Evidence. *Id.* If the evidence has no relationship to any of the issues in the case, it is irrelevant and is inadmissible under Rule 702 as well as under Rules 401 and 402. *Id.*

The Texas Supreme Court has held evidence was inadmissible on relevancy grounds when it rests within the common knowledge of the jury and, therefore, would not assist the jury in deciding the fact issues. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). For expert testimony to assist the trier of fact, it must be beyond that of the average juror and it must help the jury to understand the evidence or determine a fact issue. *Id.* at 360. If the testimony is not any assistance to the jury, it is inadmissible. *Id.*

### 3. Similar relevancy standards applied in federal and state court

Although reliability of an expert's testimony is more often the issue for courts rather than its relevance, both federal and state courts will exclude expert testimony on relevancy grounds. *See Pipitone*, 288 F.3d at 244; *Honeycutt*, 24 S.W.3d at 360. Both federal and state standards for relevant testimony are the same: the testimony must be sufficiently tied to the facts of the case and aid the jury in resolving a factual dispute. *Daubert*, 509 U.S. at 591; *Robinson*, 923 S.W.3d at 556.

Federal and state courts readily recognize expert testimony that does not assist the fact finder in understanding the evidence or determining a fact in issue, as required by Rule 702. Therefore, whether it is testimony that is equivocal or testimony that is common knowledge, if it does not assist the jury in resolving a factual dispute, it is inadmissible.

## E. Only reliable expert testimony is admissible

### 1. Federal standards for reliability

Reliability requires that the testimony be grounded in the methods and procedures of science and must be more than unsupported speculation or subjective belief. *Daubert*, 509 U.S. at 590. Rule 702 expressly requires that the testimony be (i) based upon *sufficient facts or data*, (ii) the product of *reliable principles and methods*, and (iii) the principles and methods *reliably applied* to the facts of the case. FED R. EVID. 702 (emphasis added). Citing cases from other circuits, however, at least one court held that the sufficiency of the facts underlying the opinion goes to weight, not admissibility. *See Suzlon Wind Energy*, 2009 WL 197739.

As noted above, the Supreme Court outlined four non-exclusive factors for trial courts to consider when determining reliability: (1) whether the technique has been *tested*; (2) whether the technique has been subjected to *peer review* and publication; (3) whether the technique has a known or knowable *rate of error*; and (4) whether the technique is *generally accepted* in the scientific community. *Daubert*, 509 U.S. at 593-94 (emphasis added). However, each factor "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150-51. The trial court's obligation to ensure that expert testimony is relevant and reliable applies to all expert testimony, not just scientific testimony – even if all factors do not apply to the testimony. *Id.* at 147. Given the wide range of possible expert testimony, the trial judge has considerable leeway in deciding

how to determine whether expert testimony is reliable. *Id.* at 152.

The Federal Rules Advisory Committee noted that courts have found other factors relevant in determining reliability of expert testimony. Those factors include: (1) whether experts are proposing to testify about matters growing naturally and directly out of *research they have conducted* independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying; (2) whether the expert has *unjustifiably extrapolated* from an accepted premise to an unfounded conclusion; (3) whether the expert has adequately accounted for obvious *alternative explanations*; (4) whether the expert is being as *careful* as he would be in his regular professional work outside his paid litigation consulting; and (5) whether the *field of expertise* claimed by the expert is known to reach reliable results for the type of opinion the expert would give. FED R. EVID. 702 advisory committee's notes (emphasis added).

Although the *Daubert* factors are not dispositive or exclusive, the Fifth Circuit has held that the trial court should consider the *Daubert* factors first, and then the court can consider whether other factors are relevant to the case. *Paz v. Brush Engineered Materials Inc.*, 555 F.3d 383, 388 (5th Cir. 2009); *Black*, 171 F.3d at 311. In *Black*, the Fifth Circuit explained that although the Supreme Court in *Kumho Tire* held that a trial judge "may" consider the *Daubert* factors, this should not be misunderstood to allow courts to discretionarily disavow the *Daubert* factors. *Black*, 171 F.3d at 311. The Fifth Circuit noted that the factors should be a starting-point for analysis, and after the trial court considers whether the factors are appropriate, it can consider whether other factors, not mentioned in *Daubert*, are relevant to the case. *Id.* at 311-12.

Given this *Daubert*-first analysis when combined with the constraints of Rule 702, as further discussed below, the Fifth Circuit upholds exclusion of expert testimony that rests on *ipse dixit*, speculation, erroneous information, unreliable methodology, or a gap in data and methodology. *See, e.g., Paz*, 555 F.3d at 388-90 (upholding exclusion of expert medical testimony as unreliable when based on erroneous information or assumptions regarding underlying data on which opinion formed); *Bro-Tech*, 2009 WL 1748539 (holding opinion based on insufficient facts and data and not reaching conclusion that product "more likely than not" defective rendered opinion unreliable). Not all *Daubert* factors, however, need always be met. *See Broussard v. State*, 523 F.3d 618, 631 (5th Cir. 2008) (data from space center and eyewitnesses relied upon to form opinion sufficiently reliable without requiring independent testing on whether wind destroyed home prior to storm surge).

## 2. State standards for reliability

In addition to showing that the expert witness is qualified, expert testimony must be relevant to the issues in the case and based upon a reliable foundation. *Robinson*, 923 S.W.2d at 556. Similar to *Daubert*, the Texas Supreme Court enumerated a non-exclusive, six-factor test: (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. *Id.* at 557. Eight months prior to *Kumho*, the supreme court held that the relevance and reliability requirements apply to all evidence offered under Rule 702, not only scientific testimony. See *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998). The court also adopted an "analytical gap" test to apply even when the *Robinson* factors do not apply. *Id.*

The Texas Supreme Court noted that the criteria for assessing reliability may vary depending on the nature of the evidence, but general reliability requirements must always be satisfied. *Id.* Therefore, a trial court should consider the *Robinson* factors (and any other applicable factors) "when doing so will be helpful in determining the reliability of an expert's testimony, regardless of whether the testimony is scientific in nature or experience-based." *Mack Trucks*, 206 S.W.3d at 579.

Ultimately, the trial court, as gatekeeper, determines how the reliability of expert testimony is to be assessed. *Gammill*, 972 S.W.2d at 726. The Texas Supreme Court has stated that "[a] significant part of the trial court's gatekeeper function is to evaluate the expert's qualifications, listen to the testimony, view the evidence, and determine which factors and evaluation methodology are most appropriate to apply." *Mack Trucks, Inc.*, 206 S.W.3d at 579.

## 3. Federal and state courts apply similar reliability standards although not always with same result

The *Robinson* court adopted the four *Daubert* factors – testing, peer review, error rate and general acceptance – for assessing reliability and two additional factors – extent of subjective interpretation and the non-judicial uses that have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. In both *Daubert* and *Robinson*, the courts emphasized that the enumerated factors were not exclusive and

trial courts may consider other factors helpful in determining the reliability of the evidence. *Daubert*, 509 U.S. at 593; *Robinson* 923 S.W.2d at 557. Additionally, both apply reliability to all expert testimony, not just "scientific" testimony. *Kumho*, 526 U.S. at 147; *Gammill*, 972 S.W.2d at 727. Moreover, although not as direct as the *Daubert*-first warning in *Paz* and the reliable application prong of Federal Rule 702, Texas courts may apply *Daubert/Robinson* factors and the analytical gap test.

Several themes run through challenges to expert testimony as unreliable. Some relate to *Daubert/Robinson* factors, with the form or lack of testing being a common challenge. Additionally, the Federal Rule 702 factors also often form the basis of a challenge: sufficiency of underlying facts, reliability of the methodology, and reliably applying the method to the facts (*i.e.*, the analytical gap). FED R. EVID. 702 (emphasis added). Some of these common themes are discussed below.

**PRACTICE TIP:** Be prepared to show why any or all of the *Daubert/Robinson* factors do or do not apply and how each is met or not (depending upon whether you are the proponent or opponent). Also be prepared to show that the expert reliably applied the methodology to the facts (or instead where there is an analytical gap). It is not safe to assume the factors do not apply.

### a. Mere *ipse dixit* not sufficient

"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) ("[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."); see also *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

That is, "[i]t is not so simply because an expert says it is so." *Gammill*, 972 S.W.2d at 726; *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005) (the mere *possibility* that it occurred as the expert opined was not enough; expert excluded – a "bare opinion" is "not enough"). Instead, as discussed below, proper foundation without speculation or conclusory statements is required.

### b. Proper foundation

"[I]f the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Merrell*

*Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Also, “[i]f an expert’s opinion is based on facts that are materially different from the facts in evidence, then the opinion is not evidence.” *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 596 (Tex. 1999); see also *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 20 (Tex. App.—Fort Worth 2002, no pet.) (professional engineer properly excluded as an expert because he based assumption on an unproven fact).

*Daubert* also recognized the importance of ensuring that an expert’s testimony “rests on a reliable foundation.” *Daubert*, 509 U.S. at 597. The court in *Kumho Tire* also acknowledged the need for a reliable foundation, stating that “the trial judge must determine whether the testimony has ‘a reliable basis in the knowledge and experience of [the relevant] discipline’ by analyzing the ‘testimony’s factual basis, data, principles, [and] methods.’” *Kumho Tire*, 526 U.S. at 149.

For example, in *Cooper Tire*, the Texas Supreme Court applied this reasoning when it held that a tire expert’s opinion was unreliable and thus inadmissible. *Cooper Tire*, 204 S.W.3d at 803. The expert claimed that the inner surfaces of the tire had been contaminated with wax, yet he offered no proof of contamination. *Id.* The court noted that foundation proof of the contamination was lacking and therefore, his opinion was excluded. *Id.* On the other hand, a court is not to decide if the expert’s conclusions are correct, only if based on reliable data, methodology and application. *Gammill*, 972 S.W.2d at 728.

#### c. Opinion cannot be mere speculation

Federal and state courts have recognized that expert testimony based on speculation and possibility is unreliable and inadmissible. See *Viterbo*, 826 F.2d at 422; *Havner*, 953 S.W.2d at 712; *Schaefer v. Tex. Employers’ Ins. Ass’n*, 612 S.W.2d 199, 204 (Tex. 1980); *Hess II v. McLean Feedyard, Inc.*, 59 S.W.3d 679, 686 (Tex. App.—Amarillo 2000, pet. denied) (affirming no-evidence summary judgment because causation expert’s affidavit was “based completely upon speculation and surmise,” which “amounts to no evidence”). An expert’s opinion should be excluded when it piles “speculation on speculation and inference on inference.” *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003). Likewise, the Fifth Circuit has held that “[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury” and is unreliable. *Viterbo*, 826 F.2d at 422.

As an example, in *Schaefer*, the plaintiff contracted a strain of tuberculosis and attempted to trace the bacteria to his workplace. *Id.* at 204. An

expert testified that the infection was present where the plaintiff worked, even though the particular strain that the plaintiff contracted had not been identified and there was no evidence that the bacteria was present where he worked. *Id.* The Texas Supreme Court held the opinion unreliable because it was no more than “mere possibility, speculation, and surmise.” *Id.*; see also *Am. Cas. Co. v. Zachero*, No. 11-07-183-CV, 2008 WL 5205642, \*3 (Tex. App.—Eastland Dec. 11, 2008, no pet.) (memo opin.) (noting that causation testimony requires medical expert to opine within “reasonable medical probability,” not possibility, speculation or surmise, and citing *Burroughs v. Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995)).

#### d. Testing

Although the extent to which the theory has been or can be tested is merely one factor in the reliability analysis, if the theory has not been tested, the evidence may fail other *Daubert/Robinson* factors and ultimately be inadmissible. An untested theory probably has not been subjected to peer review or publication, its potential rate of error is unknown, and it has likely not been generally accepted by the scientific community.

This untested-theory phenomena is demonstrated in both state and federal cases. See e.g., *Mack Trucks*, 206 S.W.3d at 580-81 (causation expert who did not analyze, test or investigate characteristics of batteries like the battery in the wrecked truck to support his opinion that battery system caused the fire was properly excluded; his testimony did no more than set out factors and facts that were consistent with his opinion and thus was unreliable); *Cooper Tire*, 204 S.W.3d at 806 (testimony of plaintiffs’ tire failure expert was of no assistance to the jury because his opinion was unsupported by any measurements, testing, references to peer-reviewed studies, proof of acceptance in scientific community or proof of use in non-judicial contexts); *Volkswagen*, 159 S.W.3d at 905 (Tex. 2004) (plaintiffs’ accident reconstruction expert did perform any tests or cite any publications to support his theory and thus theory was unreliable); *Valero v. Ford Motor Co.*, 2001 WL 1617181 (Tex. App.—San Antonio, Dec. 19, 2001, no pet.) (not designated for publication) (plaintiffs’ mechanical engineering expert’s failure to perform tests and rule out alternative causes rendered his opinion unreliable).

Indeed, one federal court described the testing factor as follows:

The first factor — whether the theory or conclusion can be and has been tested — has been described as the ‘most significant *Daubert* factor,’ *Cummins v. Lyle Industries*, 93 F.3d 362, 368 (7th Cir. 1996), and

numerous cases have held that the failure to subject a proffered opinion to scientific testing justifies exclusion. *E.g.*, *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000) (holding that failure to test theory of causation justified exclusion of expert testimony); *Moore*, 151 F.3d at 279 (same); *Pride v. BIC Corp.*, 218 F.3d 566, 577-78 (6th Cir. 2000) (holding that theory of manufacturing defect properly excluded where experts failed to timely conduct reliable testing or validate theory by reference to generally accepted scientific principles); *Bourelle v. Crown Equipment Corp.*, 220 F.3d 532, 536-38 (7th Cir. 2000) (holding that alternative design theory properly excluded where expert conducted no scientific testing in support of theory).

*Garcia v. BRK Brands, Inc.*, 266 F. Supp. 2d 566, 574 (S.D. Tex. 2003) (rejecting opinion based on untested theory); *see also Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 2001) (personal opinion may not suffice if theory lends itself to testing).

Tested theories also may be subject to challenge. If the expert cannot explain how the research or tests he relies on support his conclusion, the expert cannot close the analytical gap between the foundation he relies on and his opinion. *Volkswagen of America v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004); *Paz*, 555 F.3d at 389; *Black*, 171 F.3d at 313. Moreover, courts generally require “substantial similarity” between circumstances at the time of the experiment and at the time of the event in question. “When there is dissimilarity in the conditions, the admission of the experiment is within the trial court’s discretion if the differences are minor and explained to the jury.” *See, e.g., Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79, 84 (Tex. App.—Houston [1st Dist.] 2009, no pet. (holding that testing done under substantially similar circumstances formed reliable basis for expert testimony). *Garcia* also rejected theories based on unreplicated and dissimilar tests as irrelevant:

While a single test might constitute ‘sufficient facts or data’ under Rule 702 where repeated tests are unavailable or impracticable because of prohibitive expense or other reasons, this is certainly not such a case. Further, both experts used smoke detectors models other than the SA67D in their tests, and neither [expert] made sufficient attempts to replicate the

conditions in [the] residence prevailing at the time of his death.

*Garcia*, 266 F. Supp. 2d at 574. As addressed below in subsection (j), the Texas Supreme Court may have an opportunity to address when and how the testing factor applies. *See Whirlpool v. Comancho*, 215 S.W.3d 88 (Tex. App.—Corpus Christi 2008, pet. granted); *Whirlpool v. Comancho*, No. 08-0175, Petitioner’s Brief on the Merits at 35 (asking the Supreme Court to clarify that *Daubert/Robinson* standards apply to the safer alternative design element in products cases).

**PRACTICE TIP:** If the expert did no testing, be prepared to explain why not. If the expert did testing, be ready to explain how it is substantially similar to events at issue.

e. Case studies, peer review and publications

Failure to show the *Daubert/Robinson* factors on peer review, case studies, learned publications and the like also can render testimony unreliable. *See, e.g., Hackett v. Littlepage & Booth, PA*, No. 03-08-56-CV, 2009 WL 416620 (Tex. App.—Austin Feb. 20, 2009, no pet.) (memo opin.) (medical expert testimony unreliable to show causation when did not rule out other causes and did not show underlying studies, peer reviews or medical publications to support theory that drug caused or worsened renal condition).

f. Objective standards within degree of certainty

For an expert’s testimony to be admissible, the expert must testify to a reasonable degree of certainty. *Black*, 171 F.3d at 310; *Havner*, 953 S.W.2d at 711. In *Black*, the Fifth Circuit stated that it was the plaintiff’s burden to prove “to a reasonable degree of medical certainty, based on [a] reasonable medical probability and scientifically reliable evidence,” that her condition was caused by an injury at defendant’s store. *Black*, 171 F.3d at 310. But mere use of “magic words” without proper foundation or methodology is not sufficient. *See Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 446 (Tex. App.—Fort Worth 1997, pet. denied) (holding expert testimony no evidence of causation when he relied on unspecified published literature despite saying that he reached his conclusions “with[in] a reasonable degree of scientific certainty”).

g. Standard of care testimony

Expert testimony may be needed to establish a duty of care for negligence cases. For example, in a specialized industry, expert evidence may be necessary to establish a duty to conform to a particular “standard of care for inspecting and maintaining” the equipment at issue. *See FFE Transp. Servs. v. Fulgham*, 154 S.W.3d

84, 91-92 (Tex. 2004) (directed verdict proper in absence of expert testimony to establish duty to conform to what standard of care in inspecting and maintaining refrigerated trailers). The supreme court expressly required expert evidence that would show at least “the frequency and type” or “nature” of inspection a reasonable member of the industry would follow; merely saying there is a “duty to inspect” does not suffice. *See id.* at 91-92.<sup>2</sup>

#### h. Toxic-tort causation issues

In toxic torts cases, a plaintiff must show general and specific causation. “General causation describes whether a substance is capable of causing a particular injury or condition in the general population, while specific causation describes whether a substance caused a particular individual’s injury....Proving one type of causation does not necessarily prove the other, and both are needed for a plaintiff in a toxic-tort suit to prevail.” *Merck & Co. v. Ernst*, No. 14-06-835-CV, 2009 WL 1677857 (Tex. App.—Houston [14th Dist.] June 4, 2009, no pet. h.) (citing *Havner*). “To survive a legal sufficiency review, a claimant must...show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies.” *Id.* (reversing judgment when experts reached speculative conclusion on specific causation based on facts not in evidence, leaving no evidence to support jury findings); *Plunkett v. Connecticut Gen. Life Ins. Co.*, 285 S.W.3d 106, 118 n.8 (Tex. App.—Dallas 2009, no pet. h.) (toxic tort cases require general and specific causation proof); *see also Seaman v. Seacor Marine, LLC*, 2009 WL 1158799 (5th Cir. Apr. 30, 2009) (noting that courts apply two-part test in toxic-tort cases).

The failure of epidemiological studies to meet the *Havner* requirements may not raise a fact issue on general causation. *See Wells v. Smithkline Beecham Corp.*, No. A-06-CA-126-LY, 2009 WL 564303 (W.D. Tex. Feb. 18, 2009) (holding study that met *Havner*’s “double the risk” statistical requirement also subject to review under Bradford Hill criteria and ultimately deciding no fact issue raised on

<sup>2</sup> *See also Simmons v. Briggs Equip. Trust*, 221 S.W.3d 109, 114-15 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (summary judgment proper when lack of expert testimony to establish how often a reasonable person should inspect or replace components of an engine, hydraulic pump or other internal parts of a rail-car mover); *Schwartz v. City of San Antonio*, 2006 WL 285989, \*4 (Tex. App.—San Antonio Feb. 6, 2006, pet. denied) (to establish duty to conform to standard of care with regard to “whether electrical services were negligently provided...requires specialized knowledge”).

general causation). A “substantial factor” causation test also applies in (at least) asbestos-related cases. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771 (Tex. 2007).

**PRACTICE TIP:** Know when general and specific causation standard applies. Be prepared to meet both prongs, even at the summary judgment stage. *See* Section II.

In addition to showing general and specific causation (ruling in one theory), a plaintiff may need to negate (or rule out) other theories “with reasonable certainty” if other plausible causes exist. *Merck*, 2009 WL 1677857 (citing *Havner* and *Robinson*). At the least, an expert would need to negate the causation theory postulated by the defendant. *See Thomas v. Uzoka*, No. 14-08-182-CV, 2009 WL 1493032 (Tex. App.—Houston [14th Dist.] May 28, 2009, no pet. h.) (holding expert considered and sufficiently negated defendant’s causation theory based on physical evidence at scene of fatal auto accident).

#### i. Alternative safer design in products liability case

In a products liability case, effective and reliable testimony from a qualified expert may be strategically and legally essential to a claim. For example, for design defects, courts must review testimony regarding the existence of an alternative safer design. *Champion*, 2009 WL 1311922 (reviewing expert testimony regarding economic and technological feasibility of alternative safer design). A full treatment of issues is beyond the scope of this paper, but care should be taken to ensure that sufficiently reliable testimony is proffered to meet or defeat a products liability claim.

#### j. Satisfying the analytical gap

The United States Supreme Court adopted the analytical gap test in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Joiner*, the court excluded the plaintiff’s expert testimony because there was an “analytical gap” between the expert’s opinion and the existing data. *Id.* at 146. As noted above, the Texas Supreme Court adopted *Joiner*’s analytical gap test for determining reliability in *Gammill*. *Gammill*, 972 S.W.2d at 727. In *Gammill*, the court recognized that the *Robinson* factors were inapplicable to the facts of the case. *Id.* It held that for the opinion to be reliable there must not be an analytical gap between the opinion and the data. *Id.*

Immediately after *Gammill*, some courts applied only the “analytical gap” test to nonscientific testimony. The supreme court later clarified that the *Robinson* factors may still apply to nonscientific testimony. *Mack Trucks, Inc.*, 206 S.W.3d at 579; *Cooper Tire*, 204

S.W.3d at 800. If the factors are inapplicable, the analytical gap test can sometimes show the reliability (or not) of the proffered testimony. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).

The court may have an opportunity to further frame the interplay of the *Robinson* factors and the *Gammill* analytical gap test in *Whirlpool Corp. v. Camacho*, 215 S.W.3d 88 (Tex. App.—Corpus Christi 2008, pet. granted), on which oral argument was heard in March 2009. In that case, the court of appeals focused on the analytical gap test; however, testability of causation (one of the *Robinson* factors) was disputed at trial and debated on appeal. *Id.*

## F. Danger of unfair prejudice cannot substantially outweigh probative value

### 1. Federal unfair prejudice standard

Under Rule 403 of the Federal Rules of Evidence, relevant evidence is excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” FED. R. EVID. 403. Thus, even if a court determines that the expert is qualified and his testimony is relevant and reliable, it can still be excluded if it is too prejudicial. *See Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 n.11 (5th Cir. 1996). In *Daubert*, the U.S. Supreme Court recognized the prejudicial effect that expert testimony can have on a jury and stated, “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than lay witnesses.” *Daubert*, 509 U.S. at 595. Decreasing relevance may increase the unfair prejudice. *See Tratree v. BP Pipelines (N. Am.), Inc.*, No. H-03-0954, 277 Fed. Appx. 390 (S.D. Tex. May 2, 2008) (unpublished) (testimony not scientific in nature within province of trier of fact and failure to meet initial burden on reasonableness rendered mitigation of employment irrelevant and prejudicial).

### 2. State unfair prejudice standard

Texas Rule of Evidence 403 is the same as Federal Rule 403, which states that relevant evidence will be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403. However, in *Robinson* the Texas Supreme Court omitted the word “substantially” when it restated the rule and instead noted that a court may exclude the evidence if its probative value is *outweighed* by the danger of unfair prejudice. *Robinson*, 923 S.W.2d at 557 (emphasis added). One appellate court has noted that *Robinson*

lowered the burden of unfair prejudice to just “outweigh” instead of “substantially outweigh.” *See Minn. Mining & Mfg. Co. v. Atterbury*, 978 S.W.2d 183, 189 (Tex. App.—Texarkana 1998, pet. denied).

### 3. Successful Rule 403 challenges not frequent in federal or state forum

Both federal and state rule 403 remain the same: the evidence may be excluded if the probative value is substantially outweighed by unfair prejudice. TEX. R. EVID. 403; FED. R. EVID. 403. For an opponent of expert testimony, Rule 403 is likely to work best with other factors to exclude the testimony. Under most circumstances, if an expert is easily qualified and his testimony has been determined to be relevant and reliable with little difficulty, it will likely also survive a Rule 403 challenge.

## II. EXPERT TESTIMONY AT THE SUMMARY JUDGMENT STAGE

Expert testimony proffers and challenges at the summary judgment stage may present unique procedural and strategic challenges. That is, the summary judgment process may put expert testimony issues to the test early and failure to recognize the challenges may result in the granting or denying of summary judgment on the basis of the expert testimony ruling alone. These challenges apply whether in federal or state court (subject to any distinctions between the two forms noted elsewhere in the paper).

### A. Expert designation

As noted above, under Texas law, Rule 193.6 provides that the failure to timely provide or supplement discovery precludes introducing the material or information not timely disclosed unless a court finds good cause or the failure to provide or supplement the discovery will not unfairly prejudice the other parties. TEX. R. CIV. P. 193.6. There was a split in authority under Texas law as to whether Rule 193.6 applied to summary judgment proceedings and thus as to whether an expert need be timely designated at the summary judgment stage. *Compare Johnson v. Fuselier*, 83 S.W.2d 892, 897 (Tex. App.—Texarkana 2002, no pet.) (holding discovery rules for designating experts did not apply to summary judgment proceedings) *with Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 273 (Tex. App.—Austin 2002, pet. denied) (requiring an expert be timely designated).

The Texas Supreme Court recently agreed that Rule 193.6 applies to summary judgment proceedings. *Fort Brown II Condominium Ass'n v. Gillenwater*, 285 S.W.3d 879, 881-82 (Tex. 2009). Noting that the court had already agreed that evidentiary rules apply to summary judgment proceedings, the court held that

amendments to the Rules establish a date certain for the completion of discovery and (when combined with the no-evidence summary judgment rule) ensure that evidence presented at the summary judgment and trial stage will remain the same. *Id.* In that case, a party failed to timely disclose his expert under the extended date provided for by scheduling order, not designating the expert until five months after the expert designation deadline. *Id.*

The court held that the trial court did not abuse its discretion in striking the expert's affidavit under Rule 196.3 when the party failed to show good cause for the untimely designation. *Id.*; see also *Plunkett*, 285 S.W.3d at 118 (noting that expert not designated by some parties could not be relied upon by those parties for summary judgment purposes).

Federal courts also look to the scope of the designation when reviewing the admissibility of expert witness testimony. See, e.g., *Guzman v. Mem. Hermann Hosp. Sys.*, No. H-07-3973, 2009 WL 1684580 (S.D. Tex. June 16, 2009) (noting that no dispute that expert qualified to testify to subject for which designated under Rule 26).

**PRACTICE TIP:** Even at the summary judgment stage, designate all experts in accordance with deadlines provided in the rules or any applicable scheduling order.

#### B. Objections and rulings on expert testimony

A complaint about expert testimony that does not meet the federal or state requirements should be raised at or before the summary judgment stage (although for preservation purposes a complaint raised at trial may suffice, see Part III). The timing and format might vary depending upon the circumstances.

Scheduling orders or local rules often set a date for the designating and striking of expert testimony. That order or rule may resolve issues regarding expert testimony proffered at a later summary judgment proceeding. For state court proceedings where hearings are often held for both types of motions, that ordering of proceedings may prevent the mixing of an evidentiary *Robinson* hearing with a non-evidentiary summary judgment hearing. When expert motions are not set to be heard prior to the summary judgment proceedings, however, a party should consider how best to raise and obtain a ruling on the motion to strike the expert or objections to the summary judgment expert testimony evidence. Moreover, the proponent must consider how to carry its burden to establish the admissibility of the expert testimony – as discussed below, if not established by evidentiary hearing, the proffered affidavits (or other

evidence attached thereto, included therewith or secured by deposition) must show the qualifications, relevance and reliability of the expert and his testimony.

**PRACTICE TIP:** Consider at the scheduling order stage whether preference is to set motions to strike experts at a time that precedes the summary judgment proceedings.

Thus, a motion to strike expert testimony can be made prior to or with a motion for summary judgment, response or reply, depending upon the posture, if a party intends to urge that the testimony can or cannot be considered in determining whether a fact issue exists. For example, with a no-evidence summary judgment motion, a defendant may simply move on no-evidence grounds on an element such as causation. On response, the plaintiff often would need to proffer expert testimony, and the defendant should challenge the expert's testimony with its reply. Objections to summary judgment evidence (and requests to strike evidence) should include any and all complaints about proffered expert testimony. Additionally, a party should show, when possible, that the expert testimony – even if not excluded – raises no fact issue to defeat a motion for summary judgment. *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (opinion testimony that is conclusory or speculative is “incompetent evidence” that cannot support a judgment).

Care should be used in how the objection or request to strike is worded. For example, arguing that testimony is “conclusory” because it does not raise a fact issue was held in one case to go to the efficacy of the evidence, not to whether the conclusions were supported by facts. See, e.g., *Page v. State Farm Lloyds*, 259 S.W.3d 257 (Tex. App.—Waco 2008, pet. granted). As such, the court considered the evidence in assessing whether summary judgment had been properly granted. *Id.* Similarly, objecting that the testimony is conclusory or speculative does not expressly challenge the underlying methodology, particularly when there is no mention of *Daubert/Robinson* or the progeny of those cases. See *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 126-27 (Tex. App.—Texarkana 2008, pet. filed) (holding objection that testimony speculative and conclusory did not challenge scientific reliability of methodology). In that case, a court may consider only the foundational arguments that undercut the evidence and assume the methodology to be reliable. *Id.*

When successful, these motions and objections may be dispositive of the summary judgment motion. For example, the granting of a motion to strike filed with a motion for summary judgment may result in the granting of summary judgment. See, e.g., *Seaman*, 2009 WL

1158799, \*3-4 (holding only causation expert failed to provide reliable testimony on general and specific causation in toxic-tort case); *Larson v. Matter*, No. 3:06-CV-1496-D, 2008 WL 3876015 (N.D. Tex. Aug. 18, 2008) (unpublished) (addressing motions to strike and summary judgment together); *Childs v. Crutchfield*, No. 09-07-65-CV, 2007 WL 5075982 (Tex. App.—Beaumont April 10, 2008, pet. denied) (memo opin.) (analytical gaps and lack of support rendered expert testimony offered by affidavit too unreliable such that trial court did not err in striking affidavit). Conversely, the denial of motions to strike (or not raising an objection at all or in proper form) may mean that the expert testimony sufficiently raises a fact issue to defeat summary judgment. See, e.g., *Page*, 259 S.W.3d at 266-68 (expert testimony was sufficiently reliable to raise fact issue in absence of analytical gap); see also *Dewbre*, 2008 WL 5093385 (holding expert testimony sufficiently reliable to raise fact issue). Thus, the decision on when and if to move to strike an expert may involve different risks and decisions than the analysis for purposes of moving before or during trial, which is discussed with preservation issues below.

As with any objection to summary judgment evidence, the necessity of a ruling in the record is important. Many courts of appeals will not consider objections to summary judgment evidence not expressly ruled upon by the trial court. *Id.*;<sup>3</sup> *Dewbre*, 2008 WL 5093385 (holding improper designation complaint waived when no ruling obtained). Some summary judgment rulings may implicitly grant certain types of complaints about experts (or at least confirm that the proffered testimony is “no evidence”). Compare *Weiss v. Mech. Assoc. Servs., Inc.*, 989 S.W.2d 120, 125-26 (Tex. App.—San Antonio 1999, pet. denied) (involving grant of summary judgment despite proffered expert testimony) with *Barraza v. Eurkea Co.*, 25 S.W.3d 225, 232 (Tex. App.—El Paso 2000, pet. denied) (holding expert testimony not stricken raised fact issue). The express/implied ruling issue is beyond the scope of this paper, but practitioners should seek a ruling on all objections to summary judgment evidence (including expert testimony) to ensure the complaint is preserved for appeal.

**PRACTICE TIP:** Timely object to expert testimony proffered to raise a fact issue in a summary judgment proceeding. Make sure the objection includes all possible bases to challenge the expert testimony – whether designation, qualifications, methodology, foundation, the analytical gap or any other basis applicable. Seek a ruling on your objections. Argue any admitted testimony raises (or not) a fact issue.

### C. Qualifications

An expert’s qualifications are subject to the same scrutiny at the summary judgment stage as at a pre-trial hearing or at trial. See, e.g., *Larson*, 2008 WL 3876015 (holding medical expert not qualified to render opinion on protocols for cardiovascular surgeons but finding experts qualified to testify on causation); *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam) (holding expert offered in response to motion for summary judgment not qualified and entering take-nothing judgment against plaintiff); *Page*, 259 S.W.3d at 266-68 (holding expert sufficiently qualified to provide expert testimony on whether mold caused damage).

### D. Reliability

Testimony proffered in support of a summary judgment or response should show its reliability. The failure to do so can result in exclusion of the testimony or a ruling that the testimony provides no evidence to create a fact issue. See, e.g., *Jenkins v. Slidella*, No. 08-30912, 318 Fed. Appx. 270 (5th Cir. Mar. 27, 2009) (affirming holding that expert testimony excluded as unreliable when based on inadequate foundation); *Wells*, 2009 WL 564303 (failing to meet *Havner* general causation requirement rendered testimony unreliable to raise fact issue on summary judgment); *Galderma Labs., LP v. Aquent, Inc.*, No. 4:06-CV-822-Y, 2009 WL 498113 (N.D. Tex. Feb. 27, 2009) (holding lack of methodology in report rendered testimony unreliable for consideration in summary judgment proceeding); *Plunkett*, 285 S.W.3d 106 (medical opinion based on “possibility,” not reasonable medical probability, and not based on facts in evidence, personal examination or other proper foundation not reliable evidence of causation and summary judgment proper); *Degrade v. Exec. Imprints, Inc.*, 261 S.W.3d 402, 410-11 (Tex. App.—Tyler 2008, no pet.) (holding causation expert testimony insufficient to defeat no-evidence motion for summary judgment when mere conclusory statements for which no support provided).

### E. Relevance

Pure legal conclusions are not relevant to assist trier of fact and not properly proffered in support of summary

<sup>3</sup> In its petition, State Farm asks the supreme court to decide whether an objection was required when the trial court had already stricken the expert’s testimony and opinions for late designation. The supreme court granted the petition and set oral argument for November 2009.

judgment. See, e.g., *Aviall Servs., Inc. v. Cooper Indus., LLC*, 572 F. Supp. 2d 676 (N. D. Tex. 2008); *Dalrymple v. Fairchild Aircraft Inc.*, 575 F. Supp. 2d 790 (S.D. Tex. 2008) (same).

#### F. Changing expert deposition testimony by affidavit in effort to create fact issue

When an expert changes his deposition testimony by affidavit without explanation, the opposing party should consider whether a motion to strike the affidavit as a “sham” is appropriate. *Plunkett*, 285 S.W.3d at 119-20. The sham affidavit doctrine has been recognized by several courts of appeals. See *Argovitz v. Argovitz*, No. 14-07-00206-CV, 2008 WL 5131843 (Tex. App. Houston [14th Dist.] Dec. 12, 2008, pet. denied) (memo opin.) (listing courts that apply the doctrine). Cf. *Modica v. United States*, 518 F.2d 374 (5th Cir. 1975) (upholding summary judgment when affidavit attempted to deny facts admitted over three-year period, noting “bad faith” affidavit). That is, if recognized, the sham affidavit doctrine may prevent changed expert testimony or opinions from creating a fact issue.

### III. PRESERVING COMPLAINTS ON ADMISSION OR EXCLUSION OF EXPERT TESTIMONY

#### A. Admission

##### 1. Federal standards for preserving errors in admitting expert testimony

The uniform law of the federal circuits, including the Fifth Circuit, is that without a timely objection to the admission of expert evidence before or during trial, appellate review is waived absent plain error. See *Huss v. Gayden*, No. 04-60962, 2009 WL 1609390, \*22 (5th Cir. June 10, 2009) (Higginbotham, J., dissenting) (collecting federal cases nationally); *SEC v. Snyder*, No. 07-20455, 2008 WL 4218781, \*8 (5th Cir. Sept. 16, 2008) (construing the defendant’s arguments to be belated attempts to challenge the admissibility of the expert’s opinions under FED. R. EVID. 702 and *Daubert*, rather than challenges to the sufficiency of the evidence, and holding that the defendant forfeited the issue by failing to object to the admissibility of the expert’s testimony); *H.E. Stevenson v. E.I. DuPont De Nemours and Co.*, 327 F.3d 400, 406-07 (5th Cir. 2003); *United States v. Bates*, 240 F.3d 1073, 2000 WL 1835092, \*3 (5th Cir. 2000) (unpublished) (“If the defendant fails to object to the expert’s testimony, then the defendant ‘waives appellate review absent plain error.’”). The unobjected-to evidence is competent and passes to the jury for credibility and weight determinations. *Id.*

As in state court practice, a *Daubert* complaint can be raised either before or during trial. In *Bates*, however, the district court improperly refused to allow a *Daubert* challenge at trial. *U.S. v. Bates*, 2000 WL 1835092, \*2-3 (5th Cir. 2000). When the defendant attempted to question the reliability of the government’s handwriting expert through cross-examination, the court interjected stating that defense counsel should have filed a motion for a *Daubert* hearing outside the presence of the jury and that his questioning was inappropriate at that time. *Id.* The Fifth Circuit held that, while the district court, “in performing its ‘gatekeeping’ function, has discretion to choose the manner in which the reliability of an expert’s testimony is appraised,” the district court has no discretion to abandon its role as gatekeeper. *Id.* (citing *Kumho*). However, instead of objecting to the witness or moving for a *Daubert* hearing, the defendant passed the witness. Because the defendant did not object to the admission of the evidence, the Fifth Circuit found waiver and reviewed the admission of the expert’s testimony for plain error. *Id.*

With regard to the timeliness of the objection at trial, federal courts seem to require that *Daubert* objections to be made before the conclusion of the expert’s testimony (or at least on that same day). *Foradori v. Harris*, 523 F.3d 477, 507-08 (5th Cir. 2008) (holding that a trial objection must be timely, and a motion to strike that is not raised until the day after the expert finishes testifying is not timely); *United States v. Pettigrew*, 77 F.3d 1500, 1516 n.14 (5th Cir. 1996) (holding that a motion to strike testimony filed the following day does not constitute a “timely objection” under FED. R. EVID. 103(a)).

##### 2. State standards for preserving errors in admitting expert testimony

In the leading case of *Maritime Overseas v. Ellis*, 971 S.W.2d 402, 557 (Tex. 1998), the Texas Supreme Court held that 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. The Court reasoned that a *Daubert/Robinson* challenge to the reliability of a scientific process or technique must be timely made in order to allow the court to exercise its gatekeeper function; otherwise, 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. *Id.*; see also *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590-91 (Tex. 1999) (“To allow a *Robinson* challenge here, when G.M. did not object at all in the trial court to the reliability of the expert evidence, would deny [the plaintiffs’] experts the opportunity to ‘pass muster’ in

the first instance and usurp the trial court's discretion as 'gatekeeper.'").

A failure to comply with the *Maritime Overseas* objection requirement will not necessarily preclude an *Havner* challenge, however. See *Havner*, 953 S.W.2d at 712 (applying the *Robinson* standards for admissibility to legal sufficiency challenges on appeal). The Texas Supreme Court has drawn a distinction between (i) challenges to an expert's scientific methodology, technique, or foundational data, and (ii) no-evidence challenges where, on the face of the record, the evidence lacked probative value. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009). A failure to object at trial will be excused in the second category of cases, when the challenge is restricted to the face of the record such as when the expert testimony speculative or conclusory on its face. *Id.*; *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 229 (Tex. 2004).

Although a pre-trial objection is not required under Texas law, *Kerr-McGee v. Helton*, 133 S.W.3d 245, 251 (Tex. 2004), a pre-trial *Robinson* hearing has become the standard method of preserving errors to admissibility of expert testimony. In *Robinson* itself, the Court sanctioned the pretrial hearing approach used in that case. See *Robinson*, 923 S.W.2d at 558 (commenting that it can be difficult to explain weaknesses to the reliability of an expert's opinion to a jury and that extensive cross-examination may make the matter worse, but that "judges can freely ask questions in a preliminary hearing and thus can glean more information without these risks."). In fact, the Supreme Court's use of the disjunctive "or" in *Maritime Overseas* indicates that it may not be necessary to follow up and object during the trial itself.

When the objection comes at trial, it must be made timely. An objection made when the witness begins his testimony is timely. *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002). Unlike the rule in the Fifth Circuit, an objection made after cross-examination of the expert can be sufficient. As the Texas Supreme Court has stated, the opponent need not anticipate a deficiency before it is apparent. See *Iracheta*, 161 S.W.3d at 471 (rejecting plaintiff's argument that the defendant waived any complaint about the expert's reliability by waiting until the end of cross-examination to object, concluding that the "utterly conflicting nature" of the expert's testimony "was not fully apparent until cross-examination"). Therefore, when the unreliability of the expert's opinions does not emerge until trial, a motion to strike expert testimony immediately after cross-examination is sufficient to

preserve error in Texas. *Id.*; see also *Kerr-McGee v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004) (defendant's motion to strike after cross-examination was sufficient to preserve its no-evidence complaint on appeal); compare *Foradori*, 523 F.3d at 507-08; *Pettigrew*, 77 F.3d at 1516 n.14.

Finally, the objection should be specific. In *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 143-44 (Tex. 2004), the Court held that a party waived its objection to an expert's qualifications because the motion to exclude only challenged the reliability of the expert's opinions and not his qualifications. See also *Old Republic Ins. Co. v. Weeks*, No. 13-07-451-CV, 2009 WL 1740820 (Tex. App.—Corpus Christi June 11, 2009, no pet. h.) (memo opin.) (holding lack of objection to qualifications precluded complaint on appeal); *Kroger Co. v. Betancourt*, 996 S.W.2d 353, 361 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (objection that the expert's opinion was speculative did not preserve error on the expert's lack of qualifications).

**PRACTICE TIP:** The best bet is to object before and at trial. The second best bet (if there was no pre-trial gatekeeper hearing) is to object at trial *before* the conclusion of the direct examination of the expert.

### 3. Comparison of application of federal and state law

To preserve a *Robinson* objection to the admissibility of an expert's testimony (unlike preservation of a legal sufficiency challenge), both federal and state courts recognize that the trial judge, as "gatekeeper," has considerable leeway in determining how a *Daubert/Robinson* challenge will be dealt with, and both allow an objection either before trial or when the evidence is offered. One difference in federal and state preservation jurisprudence is that Texas state courts are more likely to find that error has been preserved after the conclusion of an expert's testimony. However, as discussed below, federal courts are more likely to find that an objection to the admissibility of expert testimony has been preserved through a motion in limine.

#### a. Motions in limine

Traditionally, the federal courts, including the Fifth Circuit, have held that an overruled motion in limine will not preserve a challenge to the admission of expert testimony, requiring a trial objection to preserve a claim that the district court erroneously admitted unreliable expert testimony. See *Rushing v. Kan. City S. Ry.*, 185 F.3d 496, 506 (5th Cir. 1999); *Tanner v. Westbrook*, 174 F.3d 542, 545 (5th Cir. 1999); *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir. 1997); see also *United States v. McGauley*, 279 F.3d 62, 72 n.7 (1st Cir. 2002). For example, in *Tanner*, the Fifth Circuit concluded that

the district court's denial of a pretrial motion to strike was tantamount to the denial of the motion in limine because the order provided that the district court would "pass on the qualifications of the said witnesses at trial." *Id.* Thus, there was no pretrial ruling, and error was not preserved.

However, following the 2000 amendments to Federal Rule of Evidence 103(a)(2), there has been a trend in federal courts towards allowing a motion in limine to preserve such a challenge, even if there is no objection at trial. *See Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002). These cases hold that the opponent of expert testimony need not renew at trial the objections advanced in pre-trial motions in limine because, under newly amended Federal Rule of Evidence 103(a)(2), "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." FED. R. EVID. 103(a); *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1062-63 (9th Cir. 2002), amended on other grounds, 319 F.3d 1073, 1074 (9th Cir. 2003).

But reliance on a motion in limine to preserve an expert challenge is not without risk in the Fifth Circuit. Currently there is conflicting authority regarding whether a challenge to the admission of expert testimony can be preserved by filing a motion in limine. *Compare Foradori*, 523 F.3d at 508 (5th Cir. 2008) (relying on pre-2000 Fifth Circuit authorities and finding error was waived when the defendant raised a *Daubert* objection to the expert's qualifications in a motion in limine but failed to object at trial) *with Mathis*, 302 F.3d at 460 (5th Cir. 2002) (finding error preserved by a motion in limine even though there was no objection at trial).

Like its federal counterpart, Texas Rule of Evidence 103(a)(1) provides that a timely objection or motion to strike will preserve a complaint about the improper admission of evidence and 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." TEX. R. EVID. 103(a)(1). Despite its similarity to Federal Rule of Evidence 103(a)(2), there has not been a significant shift in Texas to allow overruled motions in limine to preserve appellate complaints about expert qualifications and reliability.

The general rule in Texas is that a motion in limine will not alone preserve a challenge to the admissibility of an expert. *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-04 (Tex. App.—Texarkana 2000, pet. denied); *see also Acord v.*

*General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984) ("the mere overruling of a motion in limine is not reversible error"). However, when a trial court rules on a pretrial *Robinson* objection, a question arises about whether a pretrial gatekeeper ruling should be considered a ruling on a motion in limine (which will not preserve error) or a pretrial ruling excluding evidence (which can preserve error). *Huckaby*, 20 S.W.3d at 203-4 (citing *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 557 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (1998)).

In *Huckaby*, the Texarkana Court of Appeals acknowledged the uncertainty in this area of the law and urged the Texas Supreme Court to address the issue. *See id.* at 205 (citing Michol O'Connor, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 268 (1999) ("It is uncertain whether the pretrial ruling on a gatekeeper motion is considered a ruling on a motion in limine or a ruling excluding evidence.")). It concluded that the "Plaintiffs' Objections, and Motion, to Exclude Evidence" which did not contain standard motion-in-limine language requiring the party to approach the bench before introducing the evidence, was sufficient to preserve error, even without a trial objection. *Id.* (distinguishing *Tanner v. Westbrook*, 174 F.3d 542, 545 (5th Cir. 1999)).

Thus, while the state and federal rules of evidence governing pre-trial evidentiary rulings contain similar language, the federal courts appear more willing to allow a definitive pre-trial ruling on a motion in limine to preserve a complaint about the admission of unreliable expert testimony. In both jurisdictions, preservation will depend upon the definitive nature of the pre-trial ruling and whether the trial court has instructed counsel to approach the bench and make further objections after the parties have developed their evidence at trial. Regardless of the court, the safest bet is to object the expert's testimony when it is offered at trial.

b. Preservation of challenges to the legal sufficiency of expert testimony

In the Fifth Circuit, a defendant's waiver of any challenges to the *admissibility* of expert testimony will not prevent the appellate court from reviewing the record to determine the *sufficiency* of the evidence when such a legal sufficiency challenge is properly preserved. *S.E.C. v. Snyder*, No. 07-20455, 2008 WL 4218781, \*8 (5th Cir. Sept. 16, 2008) (unpublished); *Stevenson v. E.I. DuPont De Nemours and Co.*, 327 F.3d 400, 406-07 (5th Cir. 2003) (citing *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124 (2d Cir. 1995)).

Although the Fifth Circuit's review of expert testimony for sufficiency of the evidence is not as rigorous as it would be under a properly preserved

challenge to the admissibility of the testimony under *Daubert*, the Court will nevertheless look “to the basis of the expert’s opinion, and not the bare opinion alone,” to determine whether there is legally sufficient evidence to support a jury verdict. *Snyder*, 2008 WL 4218781 at \*8 (citing *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005); *Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400, 406 (5th Cir. 2003); and *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132-33 (2d Cir. 1995)).

In *Stevensen*, plaintiffs argued that the defendant had waived its right to challenge their expert’s testimony. The court rejected Plaintiffs’ waiver argument, holding that while the defendant lost the right to challenge the admissibility of the evidence when it waived its *Daubert* challenge at a pre-trial hearing, it did not lose the right to challenge the sufficiency of the evidence. The Court adopted the reasoning of the Second Circuit, which held that *Daubert* did not change the traditional role of a sufficiency inquiry, but only expanded the trial court’s role regarding the admissibility of expert evidence. It explained that under *Daubert*, the proper method of attacking questionable-but-admissible expert evidence remains a “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.” *Id.* at 1132 (quoting *Daubert*, 509 U.S. at 599). Thus, a sufficiency inquiry asks whether the collective weight of a litigant’s evidence is adequate to present a jury question, and can be preserved through a motion for judgment as a matter of law. *Stevenson v. E.I. DuPont De Nemours and Co.*, 327 F.3d at 406-07.

Waiver of a sufficiency challenge occurs when the party fails to raise the issue in a motion at the close of all of the evidence. See *Huss v. Gayden* 571 F.3d 442, 457 (5th Cir. 2009) (defendant failed to adequately preserve its sufficiency challenge by failing to renew his motion for judgment as a matter of law at the conclusion of all evidence). When a sufficiency issue is preserved, the Court asks whether substantial evidence supported the verdict. *Id.* (citing *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir.1993)). If the issue was not preserved, the Court asks whether any evidence supported the verdict, and appellate relief is limited to ordering a new trial. *Id.* (citing *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir.1996)).

**PRACTICE TIP:** In federal court, renew your objection to the sufficiency of the expert’s testimony at the conclusion of all evidence.

As in federal court, if a party fails to object to the reliability or relevance of an expert’s testimony at trial, the Texas Supreme Court has held that the party may still bring a properly preserved legal sufficiency challenge to the expert’s testimony on appeal. *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 229 (Tex. 2004). Bare, baseless opinion testimony will not support a judgment even if there is no objection to its admission in evidence. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009). Therefore, a party may complain that such conclusory opinions are legally insufficient evidence to support a judgment even without an admissibility objection. *Id.*

In *Pollock*, the Texas Supreme Court recently provided additional guidance on the distinction between errors that require a trial objection and those that do not:

When the expert’s underlying methodology is challenged, the court necessarily looks beyond what the expert said to evaluate the reliability of the expert’s opinion. When the testimony is challenged as conclusory or speculative and therefore non-probative on its face, however, there is no need to go beyond the face of the record to test its reliability. We therefore conclude 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 as to admissibility.

*Pollock*, 284 S.W.3d at 817 (citing *Coastal*, 136 S.W.3d at 233).

Under state law, a legal sufficiency challenge can be raised on appeal even if Rule 702 objections to the admissibility of the expert’s testimony were not raised before or at trial, so long as the no-evidence argument was properly preserved through a directed verdict, objection to the jury charge, motion notwithstanding the jury’s verdict, or the like. *Coastal*, 136 S.W.3d at 230 (reviewing whether the trial court properly granted a directed verdict). In that circumstance, any reliability challenge requiring the court to evaluate the experts’ underlying methodology, technique, or foundational data will have been waived and the reviewing court will consider only those objections “restricted to the face of

the record.” *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 769 n.11 (Tex. 2007).

Thus, under federal and state practice, a properly-preserved legal sufficiency challenge can be raised on appeal even if *Daubert/Robinson* objections to the admissibility of the expert's testimony were not raised before or at trial.

**PRACTICE TIP:** A first bite is good, but a second bite is better. When a challenge to the admissibility of expert testimony has been waived, a sufficiency challenge can provide a means for challenging unreliable expert evidence on appeal. But a properly preserved admissibility and sufficiency challenge can provide two bites at the *Daubert/Robinson* apple.

## B. Exclusion

### 1. Federal standards for preserving errors in excluding expert testimony

To complain about the exclusion of expert testimony, the offering party must make an offer of proof. FED. R. EVID. 103(a)(2). The “function of an offer of proof is to inform the court what counsel expects to show by the excluded evidence.” *U.S. v. Graves*, 5 F.3d 1546, 1551 (5th Cir. 1993).

As is the case with preserving errors in admitting evidence, there is tension in the Fifth Circuit regarding whether a party who unsuccessfully contests a motion in limine must attempt to offer the evidence at trial to preserve the issue for appeal. Compare *United States v. Estes*, 994 F.2d 147, 149 (5th Cir. 1993) (holding that the proponent must lodge a contemporaneous objection in order to preserve the issue for appeal); with *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) (finding that the proponent preserved its challenge to the exclusion of the evidence, even though he made no offer of proof at trial, because the motion in limine papers and briefs made “the substance of the deposition known” to the district court).

When an offering party fails to preserve its objection to the trial court's order excluding expert testimony, the error is not waived all together. Instead, federal courts will review the ruling under the more restrictive plain error standard of review. *Hathaway v. Bazany* 507 F.3d 312, 317 (5th Cir. 2007). However, where the record provides no hint about what the excluded evidence might contain, the Fifth Circuit will not disturb the trial court's ruling. *Bommarito v. Penrod Drilling Corp.* 929 F.2d 186, 191 (5th Cir. 1991) (“Penrod, unaware or indifferent to FED. R. EVID. 103(a)(2), did not proffer the report. . . . Whether the trial court's instantaneous exclusion of the study was sound or unsound is a complete

unknown to this Court, presented as we are with a totally negative record.”).

**PRACTICE TIP:** Do not rely on arguments offered in support of *or in opposition to* a motion in limine as a means to preserve error in the admission *or exclusion* of expert testimony.

### 2. Standards under state law

When a party complains about the trial court's exclusion of evidence, the offering party can preserve error by making an offer of proof, also known as a bill of exceptions in Texas. See TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33 (comment to 1997 change); *Mack Trucks v. Tamez*, 206 S.W.3d 572, 577 n.4 (Tex. 2006). The purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded. *Mack Trucks*, 206 S.W.3d at 577. The goal is to ensure that the record reflects the specific nature of the excluded testimony and the reason why it is relevant if it is not already apparent. That way the appellate court can determine that the evidence was relevant and reliable and its exclusion probably led to an improper verdict. TEX. R. APP. P. 44.1. Finally, the offering party must obtain a ruling. TEX. R. APP. P. 33.1.

The offer of proof must come before the trial court's ruling, or else it cannot be considered by the appellate court. In *Mack Trucks v. Tamez*, the Texas Supreme Court held that the trial court did not abuse its discretion by excluding the expert's testimony because the expert did not testify at the *Robinson* hearing to a methodology by which he reached his conclusion that a truck fire was caused by defects in the truck's fuel and battery systems. The Court determined that testimony from a bill of exceptions made pursuant to a motion to reconsider the trial court's *Robinson* and summary judgment rulings could not be considered in determining whether the trial court earlier erred in sustaining a *Robinson* objection.

### 3. Comparison of application of federal and state law

The standard for preserving error in excluding expert testimony is substantially the same in federal and state-court practice. The proponent must make an offer of proof (or bill of exceptions in Texas) to inform the appellate court of the substance of the expert's testimony. In Texas, it is clear that the appellate court can only consider evidence offered before the trial court rules on the expert challenge.

#### IV. APPELLATE REVIEW OF RULINGS ON EXPERTS

##### A. Mandamus, interlocutory, or ordinary appeal

###### 1. Standards under federal law

Federal courts generally hold that “no interlocutory appeal of a pretrial ruling on the admissibility of evidence is available.” *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1342 (9th Cir. 1985). *Daubert* rulings are considered unappealable interlocutory orders. See *McKinney v. Duplain*, 463 F.3d 679, 692 (7th Cir. 2006) (refusing to exercise pendent appellate jurisdiction to consider a *Daubert* challenge). Mandamus is not available unless the challenging party can show that it has “no other adequate means to attain the relief he desires,” such as the regular appeals process. See *In re Volkswagen of America, Inc.*, 545 F.3d 304, 311 (5th Cir. 2008). Nor are evidentiary rulings certifiable for interlocutory appeal under 28 U.S.C.A. § 1292(b). *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1246 (5th Cir. 1974). The rationale is straightforward. Any harm flowing from a pretrial evidentiary ruling is wholly speculative and subject to change when the case unfolds. See *McSherry v. City of Long Beach*, 423 F.3d 1015, 1022 (9th Cir. 2005) (noting that evidentiary rulings on motions in limine are reversed only upon a showing of harmful error, which is virtually impossible to demonstrate absent a trial, a ruling in the context of trial, and the return of a verdict).

###### 2. Standards under state law

As in federal court, Texas recognizes that a *Robinson* ruling is not the proper subject of an interlocutory appeal. No statute authorizes such an appeal. TEX. CIV. PRAC. & REM. CODE § 51.014. And mandamus is not available to challenge rulings on the admissibility of expert evidence because of the availability of an adequate remedy at law. See *In re Pena*, No. 13-05-00316-CV, 2005 WL 1120127, \*3 (Tex. App.—Corpus Christi May 12, 2005, orig. proceeding) (denying mandamus relief because the Relators’ ability to present a viable defense was not severely compromised or vitiated by the trial court’s ruling that Relators’ expert was unqualified); *In re Garlock Sealing Technologies LLC*, No. 14-06-00467-CV, 2006 WL 2669365, 1 (Tex. App.—Houston [14th Dist.] Sept. 19, 2006, orig. proceeding).

However, in *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 462-64 (Tex. 2008), the Texas Supreme Court granted mandamus where the trial court abused its discretion by ruling that plaintiffs’ expert was qualified to offer an opinion in support of the

plaintiffs’ health care claims.<sup>4</sup> *Id.* The Supreme Court held that mandamus relief might be available in cases “in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.” *Id.* at 465. Although the opinion was grounded in the legislative purposes behind the health care liability statute, the Supreme Court’s grant of mandamus relief in *McAllen* arguably opened the door to future mandamus petitions seeking relief from rulings on expert qualifications and admissibility.

One such attempt came in *In re Pilgrim’s Pride Corp.*, 2008 WL 4907589, \*2-3 (Tex. App.—Texarkana 2008, orig. proceeding), a personal injury case in which the relator sought mandamus relief from the exclusion of its expert’s scientific testimony under *Robinson*. Relying on *McAllen*, the Relator argued that an appellate remedy was inadequate because the exclusion of its expert effectively eviscerated Relator’s only defense—that the plaintiff proximately caused his own injuries. In rejecting the Relator’s inadequate-remedy-at-law argument, the court of appeals held that the Relator could still proffer other evidence of the plaintiff’s actions at trial, find another expert who could offer scientifically reliable testimony, and appeal the trial court’s ruling on the admissibility of expert testimony on post-trial direct appeal.

Further, the Court in *Pilgrims Pride* held: “To the extent *McAllen* extended the availability of mandamus relief,” its holding was limited to healthcare liability cases and did not expand the reach of extraordinary relief in that ordinary personal injury case. *Id.*

**PRACTICE TIP:** The unavailability of mandamus to remedy ordinary *Daubert/Robinson* rulings will often be of no moment. For example, when a court grants a *Robinson* motion and then refuses to find good cause for allowing the late designation of a new expert, the case will likely be disposed of in short order at summary judgment. See *Fort Brown Villas III Condominium Ass’n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009) (holding that the trial court properly excluded expert affidavit in a no-evidence summary judgment proceeding when the expert was designated after the expert designation and scheduling order deadlines).

###### 3. Comparison of application of federal and state law

In both state and federal courts, appellate review of *Daubert/Robinson* rulings will be limited to an ordinary

<sup>4</sup> Now, an interlocutory appeal is available from a trial court’s refusal to dismiss a health care liability claim for failure to serve an adequate expert report within 120 days of suit. TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(9); 74.351; *Ogletree v. Matthews*, 262 S.W.3d 316, 319 (Tex. 2007).

appeal. Pretrial rulings are highly susceptible to change, and harmful error cannot be determined without fleshing out the issues and evidence at trial. Interlocutory review, via statute or mandamus, is generally not available. While the Texas Supreme Court's grant of mandamus relief to cure a trial court's improper admission of a medical expert in *In re McAllen* could have been construed to open the door to mandamus challenges of expert rulings, subsequent Texas decisions have limited *McAllen*'s reach to cases governed by the health care liability statute at issue in that case.

## B. Standards for reviewing the improper admission or exclusion of expert testimony

### 1. Application under federal law

#### a. Application of the abuse-of-discretion standard in federal court

In *Joiner*, 522 U.S. at 141-42, the Supreme Court clarified the proper scope of review of the trial court's expert admissibility rulings, stating that courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination.

Before *Joiner*, the proper standard of review was unclear. Because *Daubert* did not address the standard of appellate review for evidentiary rulings, courts of appeals settled into the general rule requiring the abuse of discretion standard for evidentiary rulings. However, a split developed in certain circuits regarding whether a different standard of review should be applied when the district court's exclusion of scientific opinion testimony would foreclose submission of a party's case to the jury on the basis of a threshold determination of nonreliability of opinion evidence. Compare *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3d Cir.1994); and *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir.1996) (both adopting a more stringent review for case-dispositive exclusionary rulings), with *Duffee By and Through Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1410-11 (10th Cir. 1996) (strictly adhering to the abuse-of-discretion standard that governs all admissibility rulings).

The Supreme Court granted certiorari in *Joiner* to resolve that conflict. In *Joiner*, the plaintiff offered expert testimony to establish his causation theory. The district court ruled that the testimony was scientifically unreliable, refused to admit the expert's testimony, and granted the defendant's motion for summary judgment. The Eleventh Circuit Court of Appeals reversed. It held that because the Federal Rules displayed a liberal preference for admissibility, the simple abuse of discretion standard of review did

not apply. Rather, the Eleventh Circuit held, "a particularly stringent standard of review" applied "to the trial judge's exclusion of expert testimony" that resulted in the dismissal of the suit. *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir.1996).

The Supreme Court rejected the Eleventh Circuit's conclusion that the review standard varied depending on whether scientific evidence was excluded or admitted. The Court held that the usual abuse of discretion standard that generally applied to evidentiary rulings also applied to the admission or exclusion of expert testimony. *General Elec.*, 522 U.S. at 142-43. The Court explained that "[a] court of appeals applying 'abuse of discretion' review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it." *Joiner*, 118 S. Ct. at 517.

Moreover, the Supreme Court rejected any notion that the standard of review should change because the admissibility ruling resulted in an "outcome determinative" summary judgment ruling. *Id.* at 142-143. "On a motion for summary judgment, disputed issues of fact are resolved against the moving party. . . . But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard."

Because the court of appeals "failed to give the trial court the deference that is the hallmark of abuse-of-discretion review," its decision allowing the expert testimony was reversed. *Id.* at 143; see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999) (citing *Joiner* and stating that the law grants a district court "broad latitude" when it makes a reliability determination).

The Fifth Circuit has applied the abuse-of-discretion standard in its review of decisions both admitting and excluding scientific evidence, hewing closely to the traditional view that in making admissibility decisions, district courts are not to evaluate the weight of competing expert claims. *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. June 10, 2009) (while the question of whether an individual is qualified to testify as an expert is a question of law, the court reviews the admission or exclusion of expert testimony for an abuse of discretion); *Moore v. Ashland Chemical Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc) (applying abuse-of-discretion review to a lower court's decision to exclude evidence); *Vogler v. Blackmore*, 352 F.3d 150, 153-53 (5th Cir. 2003) (applying abuse-of-discretion review to a lower court's decision to admit evidence).

Under the Fifth Circuit's application of the abuse-of-discretion standard, "the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *Tanner v. Westbrook*, 174 F.3d 542, 545-46 (5th Cir. 1999). In its review the Court

asks “whether the expert testimony meets or fails to meet the *Daubert* standard of admissibility,” including the scientific validity, evidentiary relevance, and reliability of the “principles that underlie a proposed submission.” *Id.* If an abuse of discretion is found in admitting evidence, the Court then reviews the error under the harmless error doctrine, affirming the judgment, unless the ruling affected substantial rights of the complaining party. *See id.* (citing FED. R. EVID. 103(a); *United States v. Skipper*, 74 F.3d 608, 612 (5th Cir.1996)).

When the Fifth Circuit applies the abuse-of-discretion standard to rulings on an expert's admissibility in the summary judgment context, it takes great care to keep its *Daubert* analysis (governed by the abuse of discretion standard) separate from its summary judgment analysis (governed by the *de novo* standard). Acknowledging that “the applicable standards of review overlap somewhat” when a case involves the “exclusion of expert testimony for the purposes of a summary judgment determination,” the Fifth Circuit employs a two-step review process. It first reviews the district court's exclusion of plaintiffs' expert's evidence for abuse of discretion. Second, it reviews *de novo* the grant of summary judgment based on the evidence properly before the district court. *Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000); *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 668-69 (5th Cir. 1999) (“We must first review the trial court's evidentiary rulings under an abuse of discretion standard. . . . Then, with the record defined, we must review *de novo* the order granting [summary] judgment as a matter of law”).

b. Application of a *de novo* or *de novo*-like standard in federal court

In federal court, the “abuse of discretion” standard of review applies to both the district court's admission and exclusion of expert testimony. *See infra* part IV.B.1.a. Federal courts have not gone as far as *Havner*, and generally afford more discretion in their review of district court rulings on the admissibility of expert testimony than in state court. When the legal sufficiency of an expert's testimony is challenged in a motion for judgment as a matter of law, the Fifth Circuit has applied a *de novo* standard of review that is “especially deferential,” stating that it must draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the non-moving party and reverse “only if no reasonable jury could have arrived at the verdict.” *Stevenson v. E.I. DuPont De Nemours and Co.*, 327 F.3d 400, 404-405 (5th 2003); *Snyder*, 2008 WL 4218781 at \*6 (“Although our review is *de novo*, . . .

our standard of review with respect to a jury verdict is especially deferential.”).

However, in *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002), the Fifth Circuit arguably came close to a *de novo*-like review of the district court's admission of expert testimony. Because the district court in *Mathis* had failed to “offer any reasons in support of admitting [the expert's] testimony” as required by Fifth Circuit precedent, the Court's ability to conduct its abuse-of-discretion review was hampered. *Id.* at 460 (citing *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 581 (5th Cir. 2001)). Rather than remanding the case to the district court, the Fifth Circuit concluded that it could carry out the review itself on appeal. Although the ruling was affirmed, the Court did not appear to give much deference to the district court, holding: “Because admissibility is a legal question—one ill-suited to remand and further explication by the district court—we will decide the question in this case without remanding.” *Id.*

**PRACTICE TIP:** When seeking to affirm a *Daubert* ruling in federal court, make sure that the district court's order excluding or admitting expert evidence makes findings in support of its ruling. That way, the ruling will be afforded a substantial amount of deference on appeal.

2. Standards under state law

a. Application of the abuse-of-discretion standard in state court

In Texas, the general rule is that a trial court's evidentiary ruling admitting or excluding expert testimony is reviewed under an abuse of discretion standard. *Exxon Pipeline v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). This is consistent with the standard practice of reviewing evidentiary rulings under an abuse of discretion standard of review. *See Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 262 (Tex. App.—San Antonio 1999, pet. denied). Further, the abuse-of-discretion standard applies to questions about the expert's methodology as well as her qualifications. *Broders v. Heise* 924 S.W.2d 148, 151 (Tex. 1996) (“The qualification of a witness as an expert is within the trial court's discretion.”).

The test for abuse of discretion in Texas is “whether the trial court acted without reference to any guiding rules or principles.” *Robinson*, 923 S.W.2d at 558.

b. Application of a *de novo* or *de novo*-like standard in state court

Whereas a *Robinson* admissibility challenge is reviewed for an abuse of discretion, a *Havner* legal sufficiency challenge is reviewed *de novo*. *Havner*, 953

S.W.2d at 712-13. In *Havner*, the Texas Supreme Court held that a determination of reliability is appropriate for both admissibility and legal sufficiency. See *Havner*, 953 S.W.2d at 712. The Texas Supreme Court addressed whether the evidence at issue in that case was legally sufficient to support the jury's finding of causation. *Id.* at 711. The court noted that under a traditional legal sufficiency review, a reviewing court is to consider the evidence in the light most favorable to the verdict. The Court said, however, that in conducting a legal sufficiency review, for a reviewing court to not look beyond the expert's testimony to determine reliability would be to engage in 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." *Id.* at 712.

Thus, the Court held that when determining whether expert testimony is some evidence, the reviewing court must undertake an almost *de novo*-like review and, like the trial court, look beyond the expert's bare testimony to determine the reliability of the theory underlying it. *Id.* The *Havner* Court then undertook an examination of the reliability of the evidence on which *Havner's* experts relied. In determining reliability, the court stated, "[w]hile Rule 702 deals with admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value." *Id.*

Thus, the *Havner* court applied the same factors it had set out in *Robinson*, stating that although the issue in *Robinson* was the admission of evidence, "the same factors may be applied in a no evidence review of scientific evidence." *Id.*; see also *City of Keller v. Wilson*, 168 S.W.3d 802, 812-13 (Tex. 2005) ("[T]he exception [to the general rule that contrary evidence is ignored] frequently applies to expert testimony. . . . After we adopted the gate-keeping standards for expert testimony, evidence that failed to meet the reliability standards was rendered not only inadmissible but incompetent as well. Thus, an appellate court conducting a no-evidence review cannot consider only an expert's bare opinion, but must also consider contrary evidence showing it has no scientific basis.").

Since *Havner*, several Texas courts of appeals have held that when a no-evidence challenge turns on the reliability of expert testimony, an appellate court must conduct a *de novo* or "*de novo*-like" review of such testimony. E.g., *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 475 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("When a trial court admits expert testimony and on appeal that testimony is challenged as constituting no evidence, an appellate court considers whether the expert

testimony is reliable under a *de novo* standard of review."); *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 538 (Tex. App.—Fort Worth 2006, pet. denied) ("In determining whether expert testimony is reliable, and, therefore, some evidence supporting the judgment, the appellate court must employ "an almost *de novo*-like review and, like the trial court, look beyond the expert's bare testimony to determine the reliability of the theory underlying it."); *Matt Dietz Co. v. Torres*, 198 S.W.3d 798, 802 (Tex. App.—San Antonio 2006, pet. denied) ("Because Dietz alleges that there is no evidence as to causation, we review the reliability of the expert's testimony under a *de novo* standard of review."); *Gross v. Burt*, 149 S.W.3d 213, 237 (Tex. App.—Fort Worth 2004, pet. denied) (using the same language as *Burry*); *Goodyear Tire & Rubber Co. v. Rios*, 143 S.W.3d 107, 113 (Tex. App.—San Antonio 2004, pet. denied); *Missouri Pac. R.R. Co. v. Navarro*, 90 S.W.3d 747, 750 (Tex. App.—San Antonio 2002, no pet.) (using the same language as *Walker*).

Again, a case to watch on the expert testimony standard of review issue is *Whirlpool Corp. v. Camacho*, 251 S.W.3d 88 (Tex. App.—Corpus Christi 2008, pet. granted). One of the issues in that case is whether "an appellate court reviewing a legal sufficiency challenge based on the unreliability of expert testimony [may] apply an 'abuse of discretion' standard rather than a *de novo* or *de novo*-like standard of review." *Whirlpool Corp. v. Camacho*, No. 08-0175, Petitioner's Brief on the Merits at xix.

### 3. Comparison of application of federal and state law

Although there once was a question about whether a more stringent standard of review applied for case-dispositive exclusionary rulings, the Supreme Court in *Joiner* clarified that the abuse-of-discretion standard applies in federal court to challenges of admission and exclusion alike. Therefore, federal courts consistently apply an abuse of discretion standard to questions of admissibility. Unlike Texas courts, federal courts have not adopted an appellate legal sufficiency standard involving the use of the *Daubert/Robinson* factors. Even when federal courts review a legal sufficiency challenge of an expert's testimony on a motion for judgment as a matter of law, the Fifth Circuit has applied a *de novo* standard of review that is "especially deferential" to the district court's ruling.

Generally, Texas affords less discretion to the trial court in its review of an expert challenge. While the traditional abuse-of-discretion review standard applies to standard *Robinson* challenges to the qualifications or admissibility of experts, less deference is afforded when it is argued that the expert's testimony is so unreliable that it constitutes no evidence. Since *Havner* was decided, Texas has seen a trend towards applying a *de*

*novo* or *de novo*-like standard of review when the appellant challenges the reliability of the expert for legal sufficiency. *Havner*, 953 S.W.2d at 712-13 (instructing appellate courts to “independently evaluate” the reliability of expert testimony on a legal sufficiency challenge, lest the no-evidence review becomes “a meaningless exercise.”). This is perhaps one of the most significant differences between state and federal practice relating to expert challenges.

## V. CONCLUSION

The federal and state substantive expert requirements for expert testimony rest on similar principles, although the procedural mechanisms differ slightly for disclosures and reports. As to qualifications, the Fifth Circuit may be slightly more likely to allow an expert to qualify by experience than in Texas state courts. Additionally, the Fifth Circuit sometimes takes a broader view of what goes to the weight rather than the admissibility of the evidence. In either court, however, the risks of summary disposition or full-blown trial arising from not properly or thoroughly objecting to and proving the admissibility of expert testimony opposed or proffered at summary judgment proceedings is undeniable. Moreover, although slightly different in form or timing, the more often and clearly a party objects to or proves admissibility the more likely any complaint on admission or exclusion will be held preserved for review on appeal. Finally, federal courts appear more deferential in the ruling admitting or excluding expert testimony as well as in its review of the legal sufficiency of that evidence to raise a fact issue or to support a factfinding. In either court, the core requirements should be borne in mind as the experts are disclosed, proffered, challenged and appealed as it is those factors that drive the analysis at each step.