

**EXPERT WITNESS UPDATE AND
ATTORNEYS AS TESTIFYING EXPERTS
(EXCEPT ON ATTORNEY'S FEES)**

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CHAPTER 13

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EXPERT WITNESS UPDATE AND ATTORNEYS AS TESTIFYING EXPERTS (EXCEPT ON ATTORNEY'S FEES)

I. SUMMARY OF THE ISSUES

This paper examines the practical and theoretical legal issues that arise in examining and cross-examining expert witnesses – and ultimately challenging their testimony - in the Texas state and federal civil trial courts. This paper also focuses on specific issues recently decided by the Texas Supreme Court, including its recent decision in *Borg-Warner Corp. v. Flores*, ___ S.W.3d ___, 2007 WL 1650574 (Tex. June 8, 2007), which discusses legal sufficiency of expert evidence in a toxic tort case. In addition to this update, this paper focuses on the use of attorneys as experts, except for the area of attorneys' fees, and discusses the hurdle of attempting to introduce expert evidence on what may be deemed “legal issues” by the Court.

This paper also examines practical and theoretical issues for admission of all types of expert testimony, including: (a) practical management of expert evidence issues in the pre-trial and trial phases of a case; (b) specific discussion of recent changes in the law involving expert issues in Texas state and federal courts; and (c) practical examination tips and motions and form orders for use by the Texas trial practitioner with regard to expert evidence for examination and cross-examination purposes.

For most Texas trial lawyers, there are several questions to be asked regarding expert evidence for the purposes of admitting expert testimony – or excluding your opponent's expert:

- (1) Is my expert evidence in admissible form?
- (2) Will my expert evidence be admitted by the trial judge? Is it considered a “legal issue” (if an *attorney-expert* is being offered)?
- (3) Will my expert evidence be held admissible by an appellate court in post-trial proceedings?

With respect to the use of an attorney as an expert witness, the challenge is even greater. It is established law that expert testimony that consists of legal conclusions is not admissible at trial. See *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001). Expert testimony is admissible, under Federal Rule of Evidence 702 and Texas Rule of Evidence 702 only if it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” This raises issues as to whether the opinion of an attorney, on contractual issues, regulatory issues, standards of practice and customs, and other “legal

issues” can be admitted, in either a jury trial or a bench trial. However, opinion testimony on “ultimate issues” is admissible under both Federal Rule of Evidence 704 and Texas Rule of Evidence 704, allowing a strong argument for use of attorneys as expert witness on regulatory, statutory, or other specialized areas of legal issues and practices.

The answers to these questions, as with any other experts, will also inevitably lie in the application of the Texas and federal rules as interpreted in seminal decisions on expert evidence. In federal courts, the guiding cases of *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) are the leading decisions in this area. For a challenge under Texas law, the seminal Texas Supreme Court cases of *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) and *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and later cases should be considered as governing law on these issues.

In answering these questions, a trial attorney also must consider from the very start of a case what critical expert evidence may be admitted at trial. If a piece of evidence (such as testimony, a favorable document, or an opinion by an expert) is helpful in developing a client's case, it is paramount that the attorney not only examines the merits of the expert evidence and its impact on the case but begins to question its admissibility far in advance of trial. By thinking through questions of admissibility during pre-trial proceedings, an attorney can use discovery and other pre-trial management techniques to insure that admissible evidence gets before the judge or jury at trial including evidence offered from an attorney designated as an expert.

The focus of this paper and the author's speech is to heighten each Texas trial attorney's awareness of the need to consider expert evidentiary issues far ahead of trial. By careful planning and preparation, a trial attorney can avoid the pitfalls of having expert evidence excluded that can lead to disastrous results. Both the substantive law of evidence and appellate rules on preserving the record for appeal should be the trial practitioner's handbook in examining critical expert evidence prior to trial. A trial attorney should also be intimately familiar with the key decisions of the United States Supreme Court in *Kuhmo Tire* and *Daubert* and the Texas Supreme Court's opinions in *Robinson* and *Havner*. With these tools, offering and excluding expert evidence can become a powerful tool to present one's experts in the most favorable light and to attack opposing counsel's expert evidence with vigor. This is very critical in the attempt to use attorneys as experts, particularly due to the judicial opinions limiting the use of expert testimony on “legal issues” reserved for the Court.

II. THE LEGAL STANDARDS FOR ADMISSIBILITY OF EXPERT EVIDENCE AND UPDATE ON RECENT CASE LAW

Expert witnesses play a key role in a jury or bench trial. Because of their label as “experts,” such witnesses can have an extremely prejudicial impact on the jury. In fact, juries often will rely heavily on an “expert” as a perceived neutral figure with the education, knowledge and expertise to clear up a difficult issue. As one commentator has noted, “to the jury an ‘expert’ is just an unbridled authority figure, and as such he or she is more believable.” Richey, Charles R., *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 544 (1994). In response to these concerns, both federal courts, including the United States Supreme Court, and the state courts, including Texas’ highest court, have set judicial standards on admissibility of expert opinion evidence. These cases provide the blueprint for preparing your case as an advocate as either a plaintiff or a defendant.

A. Texas Law

1. The Robinson/Gammill test in Texas state courts

In the *Robinson* case, the Texas Supreme Court adopted *Daubert’s* reliability and relevancy requirements for determining the admissibility of **scientific** expert testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). However, instead of adopting the four *Daubert* factors, the Texas Supreme prescribed its own list of six non-exclusive factors for courts to consider, as follows:

- (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 that have been made of the theory or technique.**

Id. at 557. After a trial judge determines that the proffered testimony is relevant and reliable, he or she must then determine whether to “exclude the evidence because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” *Id.*; TEX. R. CIV. EVID. 403.

In following *Daubert*, the Texas Supreme Court in *Robinson* also noted that a particular case may require a trial court to consider other factors of reliability. *Id.* It is, however, arguable that the *Robinson* test is more restrictive than *Daubert* because the Texas Supreme Court specifically identified two additional factors that may weigh against admissibility - the extent to which the theory or technique depends upon subjective interpretation and the non-judicial uses that have been made of the technique.

The Texas Supreme Court also held in *Gammill v. Jack Williams Chevrolet, Inc.* that “Rule 702’s fundamental requirements of reliability and relevance are applicable to **all expert testimony** offered under that rule.” 972 S.W.2d 713, 726 (Tex. 1998). *Gammill* also reiterates that the *Robinson* factors are not exclusive. *Id.*; *Robinson*, 923 S.W.2d at 557. However, even when the *Robinson* factors cannot be applied to the testimony at issue, the trial court must still satisfy rule 702’s reliability requirement. *Gammill*, 972 S.W.2d at 727. The test in such cases is whether “there is simply too great an analytical gap between the data and the opinion offered.” *Id.* As the Texas Supreme Court noted in *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002), the Court recognized that “the trial court does not decide whether the expert’s conclusions are correct; rather, the trial court determines whether the analysis used to reach those conclusions is reliable.” *Id.*

2. Texas Rule of Evidence 702

The Texas Rules of Evidence permit expert testimony by an individual when that individual, by reason of study and/or experience, has special knowledge which jurors do not possess and is better able to draw conclusions from the facts at hand. *Seale v. Winn Exploration Co.*, 732 S.W.2d 667, 669 (Tex. App.--Corpus Christi 1987, writ denied). Texas Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 contains three requirements for the admission of expert testimony:

1. The testimony must “assist the trier of fact to understand the evidence or determine the fact in issue”;
2. The proposed testimony must be “scientific, technical, or other specialized knowledge”; and

3. The witness must be qualified.

The Texas Supreme Court has limited those issues on which expert testimony will be admitted. *See GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999). When “the issue involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide, and admission of expert testimony on the issue is error.” *Id.* at 620.

The party offering the expert witness has the burden of proving that the requirements of Texas Rule of Civil Evidence 702 have been satisfied. *Broders v. Heise*, 924 S.W.2d 148 (Tex.1996); *Robinson*, 923 S.W.2d at 556.

3. The Texas Supreme Court Opinion in Borg-Warner, June, 2007

A recent opinion of the Texas Supreme Court deserves mention because of its emphasis on the issue of causation and evaluation of expert evidence in a setting involving personal injury claims. In *Borg-Warner Corporation v. Flores*, _____ S.W.3d _____, 2007 WL 1650574 (Tex. June 8, 2007), the Texas Supreme Court held that Plaintiff's expert evidence was legally insufficient to establish, in a products liability action, that the Defendant manufacturer's brake pads containing asbestos was a substantial factor in causing the Plaintiff's alleged asbestosis. *Id.* As of this time, the opinion has not been released for publication, but it is also available at 50 Texas Supreme Court Journal 851 (2007).

In the opinion released on Westlaw, Chief Justice Jefferson states that the court has “not had the occasion to decide whether a person's exposure to ‘some’ respirable fibers is sufficient to show that a product containing asbestos was a substantial factor in causing asbestosis.” *Id.* at *1. Because the court concluded, as a matter of law, that Plaintiff's expert did not meet the criteria for establishing causation, the trial court verdict in favor of the Plaintiff was reversed and judgment rendered for Defendant.

The opinion focuses on causation specific to asbestos cases, based on the “frequency, regularity, and proximity” test established in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). In particular, the Texas Supreme Court ultimately finds that some exposure “threshold” must be demonstrated in the evidence before a claimant can prove his asbestosis was caused by a particular product. *Id.* at *7. The court's analysis on causation, drawn from the Federal Reference Manual on Scientific Evidence, is illustrative:

An opinion on causation should be premised on three preliminary assessments. First, the expert should analyze whether the disease can be related to chemical exposure by a

biologically plausible theory. Second, the expert should examine if the plaintiff was exposed to the chemical in a manner that can lead to absorption into the body. Third, the expert should offer an opinion as to whether the dose to which the plaintiff was exposed is sufficient to cause the disease.

Id. at *5 (quoting Federal Reference Manual at p.419). This opinion was also recently followed by the Texas Court of Appeals, Houston, 1st Dist. in *Georgia-Pacific Corp. v. Stephens*, _____ S.W.3d _____, 2007 WL 2137801 (Tex. App.-Houston [1st Dist.], July 26, 2007), the Texas Court of Appeals followed the reasoning in the *Borg-Warner* opinion. In that case, a jury verdict against the Defendant was also reversed in an asbestos case due to legal insufficiency of the evidence to support the jury's causation finding. *Id.* at *1. (Opinion by Justice Bland).

B. Federal Law

1. The Daubert/Kumho test in federal court

The *Daubert* standard requires the trial judge to determine whether scientific evidence is reliable or trustworthy. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). To assist trial judges in this determination, the Supreme Court provides a set of flexible, nonexclusive guidelines that trial courts may apply at a *Daubert* hearing, as follows: (1) whether the theory or technique has been scientifically tested; (2) whether the theory or technique has been published or subject to peer review; (3) the error rate of a particular technique; and (4) acceptance of the theory in the scientific community. *Id.* at 593-504. The *Daubert* court cautioned, however, that these factors are not a “definitive checklist or test,” and that the gate keeping inquiry must be tied to the facts of a particular case. *Id.* at 591 & 593.

In the *Kumho Tire* case, the Supreme Court made it clear that *Daubert* applies to expert testimony generally, and not only testimony on scientific matters. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 140 (1999). With respect the specific factors identified in *Daubert*, the Court concluded that, where they are reasonable measures of reliability, courts should use those guidelines. *Id.* at 150. However, the ultimate choice of which factors to apply depends upon the nature of the issue, the expert's area of knowledge, and the subject of the testimony. *Id.* The Court emphasized the discretion of trial judges and said that the validity/reliability determination is meant to be a “flexible” one. *Id.*

The Fifth Circuit elaborated on the flexible nature of the *Daubert* test in a recent criminal case involving expert witnesses, *U. S. v. Hicks*, 389 F.3d 514 (5th Cir. 2004) as follows:

In *Daubert*, the Supreme Court announced several factors that courts should consider when exercising their gate-keeping function, including: (1) whether the technique in question has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the error rate of the technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94. The proponent of expert testimony--here, the government--has the burden of showing that the testimony is reliable. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir.1998) (en banc). To show that expert testimony is reliable, however, the government need not satisfy each *Daubert* factor. As the Supreme Court has stated, the test of reliability "is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co.*, 526 U.S. at 141 (emphasis in original).

See also Vogler v. Blackmore, 352 F.3d 150 (5th Cir. 2003) (discussing factors under *Kumho Tire* in affirming district court decision to admit testimony of "grief" expert in personal injury case).

In its *Black* case, the Fifth Circuit provides further guidance for the application of the *Daubert* factors in light of *Kumho Tire*. *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999). It observes that, "*Kumho Tire* refines in a common-sense way, but does not undermine, the use of the specific *Daubert* factors as a reference point for gauging the reliability of potential expert testimony." *Id.* at 310. In attempting to set forth a framework for the trial courts to follow, the Fifth Circuit writes that, "in the vast majority of cases, the district court first should decide whether the factors mentioned in *Daubert* are appropriate. Once it considers the *Daubert* factors, the court then can consider whether other factors, not mentioned in *Daubert*, are relevant to the case at hand." *Id.* at 311-12. However, in the case of *Pipitone v. Biomatrix, Inc.*, the Fifth Circuit acknowledged that the *Daubert* factors may not be pertinent in assessing reliability on a particular issue. 288 F.3d 239, 245 (5th Cir. 2002). In *Pipitone*, the Fifth Circuit concluded that the lack of literature dealing with injection-related salmonella infections of the joint caused by drugs other than Synvisc did not undermine an expert's conclusion, but

supported the notion Synvisc was the cause of the injury. *Id.* at 246.

In the Fifth Circuit opinions, it should be noted that the Court of Appeals has held that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Primrose Operating Co. v. National American Ins. Co.*, 382 F.3d 546 (5th Cir. 2004). In this case, the *Primrose Operating* panel held that evidence going to the weight to be accorded expert testimony was separate than the issue of admissibility. The *Primrose Operating* case dealt with the admissibility of expert opinion on admission of attorneys' fees.

2. Fed. R. Evid. 702

Federal Rule of Evidence 702 was amended in an effort to incorporate *Daubert* and its progeny into the text of the rule and to hopefully clarify some of the ambiguities of *Daubert* that have led to conflicts in lower courts. The amendment reads as follows

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, provided that (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendment does not attempt to codify the four *Daubert* factors. Rather, the Advisory Committee follows *Daubert*'s guidance that "no single factor is necessarily dispositive of the reliability of a particular expert's testimony." Fed. R. Evid. 702, as amended, Advisory Committee's notes.

The Advisory Committee does, however, identify from case law five factors to be considered in performing *Daubert*'s gate keeping function: (1) whether the expert's testimony results from matters growing naturally and directly out of research the expert has conducted independent of litigation, or matters that were developed expressly for purposes of testifying; (2) whether the expert has extrapolated from an accepted premise to an unfounded conclusion; (3) whether the expert has accounted for obvious alternative explanations, (4) whether the expert is applying the same standard of care in the litigation as the expert would normally apply outside of litigation; and (5) whether the expert's field of expertise is known to reach reliable results on the subject of the proffered

testimony. *Id.* Following the guidance of *Daubert* and *Kumho Tire*, the Advisory Committee reminds practitioners that “all of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended, and that “other factors may also be relevant,” and that “no single factor is necessarily dispositive of the reliability of a particular expert’s testimony.” *Id.*

As noted by the Fifth Circuit in *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831 (5th Cir. 2004), the district court’s determination of admissibility of expert evidence under *Daubert* is reviewed for abuse of discretion. *St. Martin v. Mobil Exploration & Producing U.S., Inc.*, 224 F.3d 402, 405 (5th Cir.2000) (citing *Moore v. Ashland Chem.*, 151 F.3d 269, 274 (5th Cir.1998) (en banc)). Erroneous admission of expert testimony is subject to a harmless error analysis. *St. Martin*, 224 F.3d at 405; *United States v. Matthews*, 178 F.3d 295, 304 (5th Cir.1999). Moreover, pursuant to Fed.R.Civ.P. 61, the appeals court is bound to disregard any errors, including the admission of expert testimony, that do not affect the substantial rights of the parties. *Bell v. Swift & Co.*, 283 F.2d 407, 409 (5th Cir.1960). The burden of proving substantial error and prejudice is upon the appellant on appeal of these issues. *Id.*

III. ATTORNEYS AS EXPERTS

Expert testimony that consists of legal conclusions is not admissible at trial. *See C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001); *CFM Communications, LLC v. MITTS Telecasting Co.* 424 F. Supp. 2d 1229, 1234 (E.D. Cal. 2005) (“The meaning of federal regulations is a question of law, not a question of fact.”), *citing Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994). This raises particular issues when trying to admit the testimony of an attorney as an expert, including in matters involving:

- Regulatory compliance;
- Contract interpretation;
- Statutory interpretation and compliance;
- Application of criminal laws to civil cases (and interpretation of the applicable criminal statutes and regulations); or
- Standard of care (in legal malpractice cases).

In many of these categories, use of an attorney as an expert will trigger an objection that this is a “legal issue,” and not a matter of fact. This is particularly true in a jury trial, but just as true in a bench trial. Thus, the focus of debate: is use of an attorney as an expert a violation of the rule that “legal issues” are the exclusive province of the Court? Does an attorney’s testimony also infringe on the role of the Court in providing directions to the jury, or in making findings

of fact and conclusions of law in a bench trial? There are two sides to this debate.

A. The Legal Standard

Expert testimony is admissible only if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702 (emphasis added). The Federal Rules of Evidence permit expert testimony where it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. Such testimony is permitted even if it is not based on firsthand knowledge or observations. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). *Accord*, Texas Rules of Evidence 702. Federal Rule of Evidence 702 sets the parameters in determining that an expert may testify if: “1) the testimony is based on sufficient facts or data; 2) the testimony is the product of reliable principles and methods; and 3) the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702. Expert testimony may reach the ultimate issue of fact in a cause of action to be decided by trier of fact. *See Fed. R. Evid. 704(a); Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988).

B. Prohibition on Expert Testimony on Legal Issues

Use of an attorney as an expert may be difficult, however, since expert testimony has been held inadmissible where it amounts to nothing more than legal arguments. *See C.P. Interests, Inc. v. Cal. Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001); *Snape-Drape, Inc. v. Commissioner*, 98 F.3d 194, 198 (5th Cir. 1996) (“Fed. R. Evid. 704(a) does not allow an expert to render conclusions of law.”); *see also, e.g., Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Objections made on the grounds of legal arguments are separate and distinct from an objection to “ultimate issue.” *See, e.g., Huddleston v. Herman & MacLeon*, 640 F.2d 534, 552 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983) (holding that testimony which embraced an ultimate issue was not objectionable for that reason alone).

Expert witnesses are permitted to reference laws and statutes in their testimony. *See Huddleston*, 640 F.2d at 552 (permitting an expert’s testimony on securities law because it assisted the jury’s weighing of the evidence on the issue of defendant’s scienter and materiality). Specifically, experts may opine, on both personal knowledge and expertise, as to business customs and practices in a specialized area because such testimony is not “outcome determinative.” *See Berkeley Inv. Group, Ltd. v. Cokitt*, 566 F.3d 195, 218 (3d Cir. 2006). Yet, the law clearly holds experts may not testify as to legal conclusions. *C.P. Interests*, 238 F.3d at 697. Legal conclusions create the parameters within which the fact finder is permitted to reach their

conclusions. See, e.g., *Specht*, 853 F.2d at 810. The role of the Court is to define those legal parameters. See FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS CIVIL § 3.1 (2006) (“It is your duty to follow the law as I give it to you.”) Further, adjudicating issues of law is the exclusive province of the Court. See *Huddleston*, 640 F.2d at 552; see also *Berkeley*, 455 F.3d at 217. Thus, the duty to distinguishing proper expert opinion from impermissible testimony on legal conclusions is not a facile task. See, e.g., *Owen*, 698 F.2d at 240.

Adjudicating issues of law, however, is arguably the distinct and exclusive province of the trial judge. See *Berkeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (mandating exclusion of expert testimony that expresses a legal opinion). May courts of appeals, including the Fifth Circuit, have expressly held that experts are prohibited from interpreting the law for the court or advising the court about how the law should apply to the facts of a particular case. See *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001) (“Neither rule [F.R.E. 704(a) or F.R.E. 702], however, permits expert witnesses to offer conclusions of law.”); *Estate of Sowell v. United States*, 198 F.3d 169, 171 (5th Cir. 1999) (“the proposed testimony offered a legal opinion and, as such, was inadmissible.”); *Askanase v. Fatjo*, 130 F.3d 657, 672-73 (5th Cir. 1997); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) (in the context of discussing F.R.E. 704, the Court noted that “allowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the Court’s province and is irrelevant.”); *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (citing cases from every circuit that hold that experts may not invade the court’s province by testifying on issues of law).

Indeed, the rule against permitting experts to opine on the law or its application in a particular scenario is “so well established that it is often deemed a basic premise or assumption of evidence law – a kind of axiomatic principle.” *Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D.N.J. 2005), quoting *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d at 64. Not surprisingly, courts have relied on this general principle to preclude experts from testifying as to the meaning and application of legal terms. See, e.g., *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (“We also believe this testimony was received in violation of the Federal Rules of Evidence. . . . It is the responsibility of the court, not testifying witnesses, to define legal terms. The expert’s testimony in this regard invaded the province of the court.”); *United States v. Leo*, 941 F.2d 181, 196-97 (3rd Cir. 1991) (counseling that district court must restrict expert testimony so as not to permit expert opinion on “what

the law required” or “testify as to the governing law”); *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d at 69 (“[T]here is no such thing as expert opinion when it comes to interpreting a statute unless that opinion belongs to a court.”); see also 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 702.03[1], [2][a] (2d. ed. 1997) § 702.03[3] (“Expert testimony is not admissible to inform the finder of fact as to the law that will be [applied] to the facts in deciding the case. . . . Expert witnesses are also prohibited from drawing legal conclusions. . . . This proscription precludes an expert from testifying in the language of statutes, regulations, or other legal standards that are at the heart of the case.”); *CFM Communications, LLC v. MITTS Telecasting Co.* 424 F. Supp. 2d 1229, 1234 (E.D. Cal. 2005) (“The meaning of federal regulations is a question of law, not a question of fact.”), citing *Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994); *United States v. Wilson*, 133 F.3d 251, 265 (4th Cir. 1997) (affirming the trial court’s exclusion of expert testimony containing legal opinions); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (reversing the trial court’s admission of expert testimony that went beyond “fact-based opinion” and constituted “a statement of legal conclusion”); *Aguilar v. Int’l Longshoremen’s Union Local #10*, 966 F. 2d 443, 447 (9th Cir. 1992) (explaining that legal opinions are “inappropriate subjects for expert testimony” and affirming the trial court’s exclusion of the testimony); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2nd Cir. 1992) (“This Circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion.”); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (10th Cir. 1990) (holding that the trial court abused its discretion in admitting expert testimony containing a legal conclusion).

Opinions of attorneys are treated with some degree of suspicion by the federal courts, see *Technip Offshore Contractors v. Williams Field Services*, No. 04-C-0096, 2006 WL 581273, at *6 (S.D. Tex. Mar. 7, 2006) (“Parties may present legal arguments and opinions to courts through briefs in support of motions, but expert opinions on legal questions are unnecessary and inappropriate.”) (citation omitted). An attorney as an expert can be perceived as attempting to usurp the Court’s role as the exclusive decision maker on issues of law. *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (explaining that “it must be posited as an *a priori* assumption [that] there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge.”)

C. Counter-Arguments: Expertise to Assist the Trier of Fact

On the other hand, there is case law and argument supporting the use of legal testimony under the Federal Rules of Evidence and the Texas Rules of Evidence from attorneys, even on matters that may be deemed “legal issues.” This may be particularly true in a bench trial. . The Court has great latitude in reviewing these materials in rendering its decision in a bench trial. *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000). As the Fifth Circuit noted in *Gibbs v. Gibbs*, 210 F.3d 491 (5th Cir. 2000): “Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a District Judge sits as the trier of fact in place of a jury.” 210 F.3d at 500 (upholding admission of expert testimony and discussing standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993)).

In a number of cases, despite the legal rule prohibiting testimony on legal issues, the court has admitted testimony on these issues from experts, including attorneys. See *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690 (5th Cir. 2001) (admitting expert testimony by a trademark expert, an attorney, to testify on trademark issues in case); see also, *CFM Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229 (E.D. Cal. 2005) (admitting expert testimony of a legal expert on the application of FCC regulations and denying a motion to strike the expert). The pertinent Rules of Evidence, including Federal Rule 704 and Texas Rule 704, both allow testimony in the form of an “Opinion on Ultimate Issues.” Federal case law under Rule 704 routinely allows expert witnesses (including government agents, present or retired) to testify on issues involving their personal experience and expertise on the day-to-day enforcement of agency regulations and statutes. The same can be said for attorneys interpreting regulations, statutes, or providing experience or expertise.

Experts are allowed to testimony on “ultimate issues,” such as complicated regulatory issues, when the testimony is based on the witness’ personal experience and expertise in implementing and enforcing the policies and practices of a government agency or in a private sector. See *U.S. v. \$9,041,598.68 (Nine Million Forty One Thousand Five Hundred Ninety Eight Dollars and Sixty Eight Cents)*, 163 F.3d 238 (5th Cir. 1998), *cert denied sub nom. Ruiz Massieu v. U.S.*, 527 U.S. 1023, 119 S.Ct. 2369, 144 L.Ed.2d 773 (U.S. 1999). Fed. R. Evid. 704(a) directly provides that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” (Emphasis added). It is appropriate for an expert witness to testify on issues within their particular expertise and experience, including issues relating to an expert’s trial testimony

on regulatory issues which are supported by the evidence in the case. *U.S. v. Willey*, 57 F.3d 1374, 1389 (5th Cir. 1995).

There are arguments and case law, including under Federal and Texas Rules 704, holding “opinion testimony that arguably states a legal conclusion is helpful to the jury, and thus admissible.” *United States v. Barile*, 286 F.3d 749, 760 n.7 (4th Cir. 2002), citing Weinstein’s Federal Evidence, § 704.04[2][a] (2d. ed. 2001). “The admissibility of opinion testimony that may involve legal conclusions ultimately rests upon whether that testimony helps the jury resolve the fact issues in the case.” 29 Wright & Miller, FEDERAL PRAC. & PROC. § 6284 (2006 updated ed.); see also 4 Weinstein’s FEDERAL EVIDENCE, § 704.04[2][a] (2d. ed. 2006) (“However, in some circumstances, opinion testimony that arguably states a legal conclusion is helpful to the jury, and thus admissible. For example, the testimony may be helpful is the case involves a specialized industry Also, the testimony may be helpful if it involves a specialized area of law”). This is particularly true if an attorney’s expertise and experience in a particular field can assist the Court or jury as the trier of fact.

As stated by the Fifth Circuit in the *C.P. Interests* decision: “Federal Rule of Evidence 704(a) states that opinion testimony otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact; Federal Rule of Evidence 702 permits the district court to admit expert testimony that will assist the trier of fact in either understanding the evidence or determining a fact in issue.” 238 F.3d at 697; see also, *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239 (“Fed. R. Evid. 704 abolishes the *per se* rule against testimony regarding ultimate issues of fact”).

This case law should help support admission of attorneys opining as experts on regulatory and specialized legal areas. In *CFM Communications, LLC*, the federal district court noted that “[t]he concerns about admitting expert legal opinion may be lessened where, as here, a court sits as trier of fact.” 424 F.Supp.2d at 1233-34; see also *Martin v. Ind. Mich. Power Co.*, 292 F.Supp.2d 947, 959 (W.D.Mich.2002) (admitting expert testimony regarding the FLSA under Rule 704 and concluding that dangers are “minimal if not nonexistent” where a court is the trier of fact). In particular, “[w]here complex administrative processes are at issue, expert testimony can be helpful to explain them to the trier of fact.” *CFM Communications, LLC*, 424 F.Supp.2d at 1240 (citing *Marx & Co., Inc. v. Diners’ Club, Inc.*, 550 F.2d 505 (2nd Cir. 1977)). In *Marx & Co., Inc. v. Diners’ Club, Inc.*, 550 F.2d 505 (2nd Cir. 1977), the Second Circuit allowed expert testimony in securities regulations to explain the ordinary course and practice in the industry of compliance.

The Second Circuit opinion in *Marx & Co.* provides the following rationale for admission of this testimony:

Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry.

550 F.2d at 509. This same rationale can be applied in Texas and federal courts to the use of attorneys as experts.

IV. EXPERT EVIDENCE: PROCEDURAL ISSUES ON ADMISSIBILITY

This section of the paper contains an overview of methods of making a *Robinson* challenge under Texas law and a *Daubert* challenge under federal law. It also focuses on methods of preserving error in the admission or exclusion of expert testimony in Texas subsequent to a *Robinson* challenge which present unique problems. Under federal law, recent amendments to Federal Rule of Evidence 103 have clarified this issue to some extent.

A. Summary of the Legal Standards

A challenge to expert testimony may arise in at least three contexts. A party may challenge expert testimony before trial, during trial, or, if counsel was asleep at the wheel, for the first time on appeal. However, in order to properly preserve expert issues for appeal, care must be taken to timely object at each required instance. Failure to raise the objection by the time is now considered a wavier under both Texas and federal law.

1. Texas law

An evidentiary challenge on one or more of these grounds places the burden on the offering party to establish the testimony's admissibility by a preponderance of the evidence. As the Texas Supreme Court has stated, however, the timing of an objection or motion to exclude expert evidence is critical:

To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush.

Maritime Overseas v. Ellis, 971 S.W.2d 402 (Tex. 1998). However, in Texas state court, it is clear that a ruling on a motion in limine does not preserve error. *Acord v. G. M. Corp.*, 669 S.W.2d 111, 116 (Tex. 1984). Accordingly, proper measures must be taken to ensure that a challenge under Texas law to an expert is made in such a manner to preserve the challenge for appeal. For example, in *General Motors Corporation v. Sanchez*, General Motors failed to object to the admission of expert testimony regarding a safer alternative automobile design, and raised the issue for the first time on appeal to the Texas Supreme Court. 997 S.W.2d 584, 590 (Tex. 1999). General Motors argued that Plaintiffs' expert testimony regarding a safer alternative design was unreliable because the expert's theory had not been tested or subjected to peer review. *See id.* The Texas Supreme Court noted that such arguments "go to the reliability and therefore the admissibility of expert evidence." *Id.* The result of General Motor's failure to object to the reliability of the testimony was that, on appeal, it could only argue that the expert testimony was not legally sufficient evidence of a safer alternative design. *See id. But see Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004). In the *Coastal Transport* opinion, Justice Schneider held that an argument regarding "the legal sufficiency of the evidence" with respect to an expert is not waived by the failure to object to the underlying methodology, technique or foundational data used by the expert under *Daubert* or *Robinson*. Thus, a post-trial challenge on a "no evidence" basis was sufficient on appeal to challenge the probative value of the expert testimony.

In *Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805 (Tex. 2002), the Texas Supreme Court held that a party did preserve its objection to expert testimony when the objection was raised at the time of trial. Justice Enoch wrote that: "**To preserve a complaint that an expert's testimony is unreliable, a party must object to the testimony before trial or when it was offered.**" *Id.* at 807. The Court held an objection made orally at trial sufficed when made before the expert testified, and thus the objecting party "preserved its complaint for our review." *Id.*

Properly preserving error is also necessary when the trial court excludes expert testimony. At least one prudent practice for preserving error when one's expert has been struck is illustrated by the *Robinson* case itself. In *Robinson*, after having his witness struck at a pretrial hearing, the plaintiff made an offer of proof by re-tendering the evidence during trial and asking the court to reconsider its ruling. *Id.* The proper "gatekeeper" procedures for preserving a challenge to an expert are discussed in detail in this section.

2. Federal law

Federal law also requires the proponent of the expert testimony to prove that the testimony is reliable by a preponderance of the evidence. *See Tanner v. Westbrook*, 174 F.3d 542, 547 (5th Cir. 1999). An objection to expert evidence must be made and preserved in a timely fashion in pretrial proceedings or during trial. If the court merely grants or denies a motion in limine, then no error is preserved, with the limited exception set forth in the recently revised Federal Rule of Evidence 103, which relieves a party to further object to a “definitive ruling on the record admitting or excluding evidence.” However, in at least the Fifth Circuit, a ruling on a motion in limine does not preserve error for appellate review (if there is no “definitive” ruling). *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988).

It is also clear that the denial of a pretrial motion in limine or to strike does not preserve error, and that is necessary to object to the evidence when it is offered at trial. *Rojas v. Richardson*, 703 F.2d 186, 189 (5th Cir. 1983) (requiring the party objection at trial because it gives “the trial court an opportunity to reconsider the grounds of the motion [in limine] in light of the actual - instead of hypothetical - circumstances at trial”). *See Tanner*, 174 F.3d at 545 (requiring renewal of objection at trial after court had refused to hold a Rule 104 hearing). If the court actually strikes the expert or a portion of the expert’s testimony, then to preserve error, care should be taken to ensure that the expert testimony and its basis are made part of the trial record. *See, e.g., Holst v. Countryside Enters.*, 14 F.3d 1319, 1322-23 (8th Cir. 1994) (affirming court below because the party “failed to make an offer of proof”).

In *General Electric Co. v. Joiner*, 118 S.Ct. 512 (1997), the U.S. Supreme Court determined that the “abuse of discretion” standard is the proper standard of review for a trial court’s decision to admit or exclude expert testimony under *Daubert*. The Supreme Court noted the following with respect to the standard of review:

Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the “gatekeeper” role of the trial judge in screening such evidence. A court of appeals applying “abuse of discretion” review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it. We likewise reject respondent’s argument that because the granting of summary judgment in this case was “outcome determinative,” it should have been subject to a more searching standard of

review. On a motion for summary judgment, disputed issues of fact are resolved against the moving party -- here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse of discretion standard.

118 S. Ct. at 517 (citations omitted). This “abuse of discretion” standard of review was also upheld by the United States Supreme Court in *Kuhmo Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

Finally, those who wait until the appeal to raise, for the first time, a challenge to the reliability of expert testimony do so at their peril. *See, e.g. McKnight v. Johnson Controls Inc.*, 36 F.3d 1396, 1406-07 (8th Cir. 1994) (rejecting argument that *Daubert* requires a trial court to raise reliability issues *sua sponte*, and holding that the issue cannot be raised for the first time on appeal absent “plain error”).

Under federal law, the preservation of error on a challenge to an expert under *Daubert* or *Kuhmo Tire* is predicated upon a proper motion to exclude the expert’s evidence (or a motion in limine). The recent changes to Federal Rule of Evidence 103 codify this rule, as discussed below.

B. Procedural Methods In Texas Of Making (And Defending) A Challenge To Expert Qualifications

A party may make a *Robinson* challenge by filing a motion in limine and/or a motion for a Rule 104 “gatekeeper” hearing.¹ Suzanne B. Baker, “*Gatekeeping*” in *Texas: The Practical Impact of Full Implementation of the Texas Rules of Civil Evidence Regarding Experts*, 27 St. Mary’s L.J. 237, 277-79 (1996) [hereinafter *Gatekeeping*]. These methods for excluding expert testimony are not mutually exclusive. *Id.* at 278 (noting that, in challenging the expert testimony at issue in *Robinson*, Du Pont filed a motion in limine and requested a Rule 104 hearing). Indeed, because both motions in limine and Rule 104 hearings allow the court to hear pre-trial argument on admissibility, the boundaries between the two are not always clear. *Gatekeeping* at 279 (noting further that, because the supreme court has not provided guidance on specific procedures for invoking Rule 104 gate keeping, “litigants must contend with some ambiguity in the proper methods for triggering gate keeping and in the terms used to describe those methods”).

¹ Rule 104(c) of the Texas Rules of Evidence provides for hearings on preliminary questions concerning the admissibility of evidence.

1. Motions in Limine

A *Robinson* challenge may be made in the form of a motion in limine challenging the expert's qualifications and/or the relevance, reliability, and relative probity of the expert's opinions. *Gate keeping* at 277-78; *see also* Daniel Riesel, *Pre-Trial Discovery of Experts, Scientific Proof, and Examination of Experts in Environmental Litigation*, C127 A.L.I.-A.B.A. 209, 285-86 (1995) (stating that motions in limine can be used to exclude expert testimony under Rules 702, 703, and 403 of the Federal Rules of Civil Procedure); Holley D. Thames, Comment, *Frye Gone, but Not Forgotten in the Wake of Daubert: New Standards and Procedures for Admissibility of Scientific Expert Opinion*, 63 Miss. L.J. 473, 497-98 (1994) (stating that motions in limine are proper for requests to exclude expert testimony because Rule 104 of the Federal Rules of Civil Procedure provides that judges should make this determination before trial).

[A motion in limine] requires the trial court to make a tentative, preliminary determination on the admissibility of the proffered opinion testimony. The court may then enter an order in limine forbidding all reference to the expert opinion until the final determination on admissibility is made at trial. When the expert witness is offered at trial, the court should make a final determination on whether the proponent has demonstrated by a preponderance of proof that the proffered testimony will meet the standards in *Du Pont*.

Id. (footnotes omitted).

Merely obtaining a ruling on a motion in limine does not preserve error in the subsequent admission of evidence. *Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App. -- Austin 1994, writ denied). The methods for preserving error after a motion in limine has been granted or denied are discussed below.

For a short time, some practitioners read the Texas Supreme Court's *Havner* decision to suggest that it might not be necessary to object to unreliable expert evidence to preserve error because unreliable scientific evidence is "no evidence." *See Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). In *Havner*, the court noted that the defendant had only objected to "some" of the plaintiff's causation evidence. *Id.* at 709. Nevertheless, the court reversed the verdict for the plaintiff. *See id.* at 730. The court did not directly address waiver, but did state that, "If for some reason [unreliable expert testimony] were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no." *Id.* at 712.

Notwithstanding the dicta in *Havner*, the Texas Supreme Court did finally address waiver in *Maritime Overseas Corp. v. Ellis*. 971 S.W.2d 402 (Tex.), *cert. denied*, 119 S. Ct. 541 (1998). In *Ellis* the court holds that any error by the trial court in admitting the expert evidence is waived if the proper objection is not made at trial. *Id.* ("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."). For example, in the recent Texas Supreme Court decision of *Guadalupe-Blanco River Authority v. Kraft*, the Authority preserved its complaint that an expert's testimony was unreliable by objecting at the start of the expert's testimony "based upon the failure of this witness's methodology to meet the reliability standards as articulated by the supreme court in *Gammill versus Jack William[s] Chevrolet* as applying to all expert testimony." 77 S.W.3d 805, 807 (Tex. 2002). The Supreme Court held that this objection was sufficient to preserve error even though the Authority had not moved to strike the testimony and had offered no objection to a tender of a summary of the expert's appraisal. *See id.* Those who fail to renew a pretrial objection to expert testimony at trial may attempt to take refuge in the court's use of the word "or," in stating that party must object to the evidence before trial or when the evidence is offered. However, in light of the long line of Texas cases holding that a limine ruling does not preserve error, it would be unwise to rely upon *Ellis* and to fail to renew one's objection when the evidence is offered at trial. Care should also be taken to prevent one's opponent from sneaking its expert reports onto its exhibit list so that any objections as to admissibility may be waived when the judge pre-admits the exhibits on both sides' lists in accordance with a pretrial hearing or deadline.

2. Motions for Rule 104(c) "Gatekeeper" Hearing

a. Pre-Trial

A *Robinson* challenge may also be made by filing a pre-trial motion for a "gatekeeper" hearing under Rule 104(c) of the Texas Rules of Evidence. Michol O'Connor, *O'Connor's Texas Rules: Civil Trials* 272-279 (2000) [hereinafter *O'Connor's*]. Like a motion in limine, a motion for a Rule 104 hearing should challenge the expert's qualifications and/or the relevance, reliability, and relative probity of the expert's opinions. *Id.* at 275.

Unlike a hearing on a motion in limine, however, a Rule 104 hearing may result in the pre-trial exclusion of the evidence. *Compare O'Connor's* at 275-6 (noting that 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) *with Gatekeeping* at 278-79 (noting that, in *Robinson*, Texas Supreme Court approved of trial court's making

pre-trial final ruling on admissibility of evidence after conducting Rule 104 gatekeeper hearing).

b. During Trial

It is advisable to make a motion for a Rule 104 gatekeeper hearing, and to hold such hearings, before the trial begins. *O'Connor's* at 275. However, if necessary, a motion for a Rule 104 hearing may be made during trial. *Id.* (noting exception in medical malpractice cases). If the Rule 104 hearing is conducted during trial, the jury should be excused before the hearing because the rules of evidence need not be enforced during such a hearing. *Gatekeeping* at 278 (citing Tex. R. Evid. 104(a), which provides that when a court is determining a preliminary questions concerning the admissibility of evidence, it is bound by only those rules of evidence concerning privileges); Tex. R. Evid. 104(c) (providing that “[h]earings on preliminary matters should be conducted out of the hearing of the jury”).

C. Preserving Error In The Exclusion Of Expert Testimony (Texas Law)

In order to preserve error in the exclusion of expert testimony, the party whose expert's testimony is excluded must not only timely and specifically object to the court's action, Tex. R. App. P. 52(a), but also make an offer of proof, Tex. R. Evid. 103(a)(2). It is also important that the court reporter be present at any relevant proceedings so that the appellate court will have a sufficiently developed record. *O'Connor's* at 277.

1. Error in Granting Motion in Limine

The court's granting of a motion in limine neither excludes the evidence nor preserves error in the court's subsequent exclusion of the evidence. *Johnson*, 884 S.W.2d at 834. The granting of a motion in limine merely requires the offering party to approach the bench for a ruling on the admissibility of the evidence before introducing it at trial. *Id.* Just before offering the evidence at trial, counsel should approach the bench, formally offer the evidence, and respond to any objection by stating the specific purpose for which the evidence is offered and why it is admissible. *See* Tex. R. App. P. 52(a); *Estate of Veale*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Next, the offering party should obtain a ruling from the court. *See* Tex. R. App. P. 52(a) (stating that, if the court refuses to rule, such refusal is sufficient to preserve the complaint).

If the court rules that the evidence is not admissible, the offering party can preserve error only by making an offer of proof, also known as a bill of exceptions. *See* Tex. R. Evid. 103(a)(2). The offer of proof should be made in the presence of the judge, the court reporter, and opposing counsel, but outside the

presence of the jury and before the reading of the charge. *Gatekeeping* at 286-87; *see also* Tex. R. App. P. 52(b). The offering party may make its offer of proof by making a statement summarizing the nature of the testimony that counsel would have elicited from the witness or, at the request of either party, by questioning the expert. Tex. R. App. P. 52(b). Again, the party should ensure that it obtains a ruling from the court. *See Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 181 (Tex. App.—Waco 1987, writ denied).

While the primary goal of an offer of proof is to ensure that the record reflects the nature of the excluded testimony, counsel should also use the offer of proof to supplement the record with any other information that would be important in the event of an appeal. This can generally be accomplished through a tender of the expert's deposition testimony and a transcript of any gate keeping proceedings. *Gatekeeping* at 286-87. Thus, during the gate keeping proceedings, counsel should state for the record the context in which the proof was offered, the purpose for which it was offered, the reasons the evidence should be admitted, and the reasons why the testimony is controlling on a material issue. *Id.* On appeal, counsel will be required to show that the testimony was controlling on a material issue (e.g., causation) in order to establish that its exclusion probably led to an improper verdict, *id.* at 287, and may not rely on grounds for admission not presented to the trial court, *Rhodes v. Batilla*, 848 S.W.2d 833, 847 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

2. Error in Ruling After Rule 104 Hearing

An offering party may want to follow a similar procedure even when it appears that the court has already excluded the evidence by means of a pre-trial Rule 104 ruling. “Because Texas courts are not accustomed to Rule 104 gate keeping and may treat a Rule 104 ruling as a ruling on a motion in limine, Texas attorneys should definitely continue to make bills of exception when testimony is excluded before trial to ensure that error is preserved.” *Gatekeeping* at 284-85.

3. The Robinson Approach

The plaintiff's response in *Robinson* to the exclusion of its only expert witness' testimony demonstrates not only the advisability of treating a Rule 104 ruling as a ruling on a motion in limine for the purposes of preserving error, but also an effective strategy for minimizing the adverse impact of a devastating evidentiary ruling. Following the court's exclusion of the plaintiff's only expert testimony, the parties agreed to a bench trial. *Robinson*, 923 S.W.2d at 552. As part of their agreement, the parties stipulated that the case would be retried to a jury if the

trial court was reversed on appeal. *Id.* In the course of the bench trial, the Robinsons sought to introduce the excluded testimony and, when the court abided by its earlier ruling, presented an informal bill of exceptions describing the testimony they wanted to present. *Id.*

By adopting this procedure, the Robinsons avoided a useless, protracted jury trial that they knew they could not win without their only causation expert. They also ensured a future jury trial if the appellate courts accepted their expert's testimony, and, more importantly, ensured error would be preserved whether the reviewing court treated the exclusion of testimony as a ruling on a motion in limine or as a distinct ruling under Rule 104.

Gatekeeping at 285.

D. Preserving Error In The Admission Of Expert Testimony

1. Motions in Limine

A motion in limine, whether denied or granted, does not preserve error in the subsequent admission of evidence. *Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App.--Austin 1994, writ denied). If the court has denied a motion in limine, counsel must therefore object when the expert witness is offered at trial. *See Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Hartnett v. Hampton Inns, Inc.*, 870 S.W.2d 162, 165 (Tex. App.--San Antonio 1993, writ denied). Similarly, if the court has granted a motion in limine, counsel must object when opposing counsel approaches the bench during the trial to obtain a ruling on the admissibility of the evidence. *See Gatekeeping* at 285. If opposing counsel attempts to introduce the evidence in violation of the court's order in limine, counsel must timely object. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 637 (Tex. 1986).

2. Rule 104 Hearings

As discussed above, a court's pre-trial ruling following a Rule 104 hearing is probably a final ruling on the admissibility of evidence. *See Robinson*, 923 S.W.2d at 552. It follows that a pre-trial ruling on the qualifications of an expert is probably a ruling that preserves error. *O'Connor's* at 277. However, until the issue is settled, counsel should continue to object to the admission of expert testimony at trial even though the court's pre-trial ruling following a Rule 104 hearing was that the testimony was admissible. *Id.*

E. Conclusions On Offering And Excluding Expert Testimony in Texas

While the law governing preservation of error in rulings on the admissibility of expert testimony is

currently unsettled, counsel can avoid waiver by treating any pre-trial ruling on admissibility as an order in limine. In seeking the admission of expert testimony, counsel should therefore treat a court's exclusion of the testimony in the context of a pre-trial Rule 104 hearing as a ruling on a motion in limine and offer the evidence again at trial. In seeking the exclusion of expert testimony, counsel should object to the admission of the evidence at trial even if the court has ruled the evidence admissible in the context of a pre-trial Rule 104 hearing. This area of the law will undoubtedly develop rapidly in the next few years as *Robinson* and *Daubert* challenges become more common, and counsel is advised to check for recent developments before each trial. This is particularly true in Texas, in which the rules have not yet codified a position as in the case of the federal rules.

V. AREAS IN WHICH EXPERT TESTIMONY MAY BE ADMITTED OR BE EXCLUDED

A. Specific Areas of Qualification for Expert Testimony

The review by a trial court of an expert's qualifications takes place on a case-by-case basis and is subject to an abuse of discretion standard of review.

1. Licensing

As a general rule, an expert witness who proposes to testify about the standard of care in a particular profession probably should be licensed in that same profession. *Parkway Corp. v. Woodruff*, 857 S.W.2d 903, 919 (Tex. App.--Houston [1st Dist.] 1993, writ granted); *Prellwitz v. Cromwell Truemper, Levy, Parker & Woodsmale, Inc.*, 802 S.W.2d 316, 317 (Tex. App.--Dallas 1990, no writ); but see *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 815-16 (Tex. App.--Beaumont 1990), writ *dism'd*, 811 S.W.2d 541 (Tex. 1991), *cert denied*, 502 U.S. 861 (1991). Texas courts, however, have not adopted a *per se* licensure or certification requirement. *See Southland Lloyd's Ins. Co. v. Tomberlain*, 919 S.W.2d 822 (Tex. App.--Texarkana 1996, writ denied); *Harris Co. Hosp. Dist. v. Estrada*, 872 S.W.2d 759 (Tex. App.--Houston [1st Dist.] 1993, writ denied). The tests set forth in *Robinson* and *Gammill* are now the governing guidelines on this issue.

2. Police Officers and Accident Analysts

A police officer is not qualified to render an expert opinion regarding an accident based upon his position as a police officer alone. *Lopez v. Southern Pac. Transp. Co.*, 847 S.W.2d 330, 334 (Tex. App.--El Paso 1993, no writ); *Pyle v. Southern Pac. Transp. Co.*, 774 S.W.2d 693, 695 (Tex. App.--Houston [1st Dist.] 1989, writ denied). Accident analysts and reconstruction experts may be qualified to testify as to causes of accidents if they are highly trained in the

science of which they testify. *Sciarrilla v. Osborne*, 946 S.W.2d 919, 921 (Tex. App.--Beaumont 1997, pet. denied); *Lopez*, 847 S.W.2d at 334; *Clark v. Cotten*, 573 S.W.2d 886, 887 (Tex. App.--Beaumont 1978, writ ref'd n.r.e.); *Texaco v. Romine*, 536 S.W.2d 253, 256-57 (Tex. App.--El Paso 1976, writ ref'd n.r.e.); *accord Hooper v. Torres*, 790 S.W.2d 757, 759 (Tex. App.--El Paso 1990, writ denied).

3. Economists and Punitive Damages

An economist may testify about the relative impact various punitive damage amounts might have on a defendant based on financial information about the company. Such testimony comes within the purview of Texas Rule of Civil Evidence 702 and may be properly admitted. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 202 (Tex. App.--Corpus Christi 1990, writ dismissed by agreement).

B. Testimony Which Will Assist the Trier of Fact

Texas Rule of Civil Evidence 702 also requires that the proposed expert testimony "assist" the trier of fact. See TEX. R. CIV. EVID. 702. The determination of whether such testimony will assist the trier of fact is made on a true case-by-case basis

Texas courts have held that expert testimony would not assist a trier of fact in the following cases:

1. Testimony Regarding Subjects Within Jurors' Personal Knowledge

If a juror is likely to have common knowledge regarding the subject matter at issue, the testimony of an expert is not necessary to assist the jury. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 200 (Tex. App.--Corpus Christi 1990, writ dismissed by agreement) (testimony regarding guidance and counsel was improperly admitted); *Borden Inc. v. De La Rosa*, 825 S.W.2d 710, 718 (Tex. App.--Corpus Christi 1991, error granted), 831 S.W.2d 304 (Tex. 1992) (no expert testimony as to whether plaintiff was fired as a result of filing worker's compensation claim since no specialized or technical knowledge was necessary to assist the jury in answering a simple factual inquiry).

2. Testimony Regarding Love and Affection

Expert testimony regarding the dollar value of loss of love, affection, companionship and society is not admissible. In *Seale v. Winn Exploration Co., Inc.*, 732 S.W.2d 667 (Tex. App.--Corpus Christi 1987, writ denied), Dr. Everett Dillman (an economist from El Paso about whom several opinions regarding his expert testimony have been written) offered testimony in a wrongful death case about the dollar value of such intangibles. Dr. Dillman based the present value of the loss of society and comfort on the average hourly

income of a psychiatrist and multiplied it by one hour per day over the life expectancy of the plaintiff. *Id.*

3. Testimony Regarding Truthfulness of the Witness

Expert opinions as to the truthfulness of another generally are not allowed. *James v. Texas Dept. of Human Servs.*, 836 S.W.2d 236, 244 (Tex. App.--Texarkana 1992, no writ).

4. Testimony Regarding a Testator's Intent

Expert opinion testimony of an attorney who drafted testatrix's will was admissible as evidence to show what the attorney thought the testatrix intended to do but was inadmissible to show the testatrix's actual intention. *Kaufhold v. McIver*, 682 S.W.2d 660, 667 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

5. Testimony Regarding Whether Conduct is Outrageous

In a suit for intentional infliction of emotional distress, whether certain conduct was outrageous involved no scientific, technical, or other specialized knowledge to which a witness could be qualified as an expert by knowledge, skill, experience, training, or education under Texas Rule of Civil Evidence 702. *Twyman v. Twyman*, 855 S.W.2d 619, 632 (Tex. 1993).

6. Testimony Regarding Title

In trespass to try title actions where documents pertaining to title exist, the testimony of an expert witness, standing alone, constitutes no evidence of titles. *Ramsey v. Jones Enters.*, 810 S.W.2d 902, 905 (Tex. App.--Beaumont 1991, writ denied).

7. Testimony Based on Pure Question of Law

An expert witness may not testify to his opinion on a pure question of law. *Lyondell Petrochemical Co. v. Flour Daniel, Inc.* 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 451 (Tex. App.--Houston [1st Dist.] 1993, no writ).

8. Testimony Based on Mixed Question of Fact and Law

An expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on the proper legal standard. *Lyondell Petrochemical Co.*, 888 S.W.2d at 554; *Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988). For such an opinion to be admissible, the expert must articulate the underlying factual basis of his conclusion. *Lyondell Petrochemical Co.*, 888 S.W.2d at 554; *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.--Corpus Christi 1991, writ denied); *Dieter v. Baker Serv. Tools*, 776 S.W.2d 781, 784

(Tex. App.--Corpus Christi 1989, writ denied). The expert must utilize the proper legal concepts with which to analyze those facts. *Lyondell Petrochemical Co.*, 888 S.W.2d at 554; *Keene Corp. v. Rogers*, 863 S.W.2d 168, 176 (Tex. App.--Texarkana 1993, no writ); *see also Harvey v. Culpepper*, 801 S.W.2d 596, 601 (Tex. App.--Corpus Christi 1990, no writ) (no error to exclude physician's opinion about whether appellant was negligent where he was not asked to assume a legally correct definition of negligence before he was asked the ultimate question).

These cases and circumstances merely represent some of the precedent under Texas law for cases admitting or excluding testimony of certain experts. Given the recent decision of the Texas Supreme Court in *Gammill* and the U.S. Supreme Court decision in *Kuhmo Tire*, trial attorneys will need to be particularly diligent in supporting their expert witness' credentials. Admissibility of experts in a particular field can no longer be assumed – one should always be ready for a challenge in any field.

9. Testimony Regarding Valuation

The testimony of expert appraisal witnesses is admissible so long as it meets the relevance and reliability requirements. *See Kraft*, 77 S.W.3d at 807. In *Kraft*, the Texas Supreme Court held that a trial court abused its discretion in admitting appraisal testimony regarding a condemned easement where the appraiser's "comparable sales" used to calculate value were not actually comparable to the condemned easement. *Id.* at 808. The court stated that "while using comparable sales to find market value in condemnation proceedings is an approved methodology, [the expert's] "bald assurance" that he was using that widely accepted approach was not sufficient to demonstrate that his opinion was reliable." *See id.*

VI. ADDITIONAL PROCEDURAL MEANS TO EXCLUDE EXPERT EVIDENCE

A. Introduction to Motions in Limine

"In limine" means "at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 708 (5th ed. 1979). The term is used in a broad sense to refer to any motion to exclude anticipated prejudicial evidence before the evidence is actually offered. *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). Courts derive authority for motions in limine from the inherent power of courts to manage trial and pretrial proceedings and their general authority to decide evidentiary questions. *Luce v. United States*, 469 at 41, n.4. While they usually seek to exclude evidence, motions in limine may also be brought requesting to have evidence admitted. *See, e.g., Byrd v. Guess*, 137 F.3d 1126, 1134 (9th Cir. 1998); *United States v. Selico*, 1998 U.S. Dist. LEXIS 9832, * 5 (E.D. La. Jun.

29, 1998). Generally, motions in limine are brought before trial; however, motions in limine may be made at any time prior to the introduction of objectionable evidence. A motion in limine may be made in either oral or written form, since the form is not controlled by any rule or case law. A motion in limine should:

1. Request that opposing party be prohibited from referring to or offering the prejudicial evidence either directly or indirectly, including during voir dire, opening statement, questions to or testimony by witnesses, and closing argument.
2. Request that the court prohibit all parties and witnesses as well as counsel from raising the evidence in question.
3. Indicate specifically the particular evidence being challenged.
4. State the grounds on which counsel believes that the opposing party will offer this evidence.
5. State the grounds for moving for exclusion of this evidence.
6. State that no remedial action taken by the court at the time the evidence is offered will counteract the damage caused.
7. Request appropriate relief. Like the rest of the motion, the requested ruling should be broad enough to accomplish the intended results but at the same time, counsel should be careful to insure that the motion does not attempt to cover so much that the judge will be unlikely to grant such a blanket order.

James J. Brosnahan, "Motions in Limine in Federal Civil Trials," ALI-ABA Course of Study Materials, Civil Practice and Litigation Techniques in Federal and State Courts, Volume I (April 2000).

1. Discretionary ruling in federal courts

Despite the widespread use of motions in limine, it has been universally held that such rulings are purely discretionary and the court is not required to rule upon them. *See, e.g., Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1503 (11th Cir. 1985). As such, any in limine ruling is essentially an advisory opinion by the court, subject to change during the course of the trial. *United States v. Allison*, 120 F.3d 71, 75 (7th Cir.) ("There is certainly no per se rule against the district court's changing its view on an evidentiary ruling in the course of the litigation."), *cert. denied*, 118 S. Ct. 455 (1997); *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994) ("A ruling on a motion in limine is no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the [] court ... [which] may change its ruling at trial for whatever

reason it deems appropriate.”), *cert. denied*, 513 U.S. 1182 (1995). However, at least since the Supreme Court's 1999 decision in the *Kumho Tire* case, the failure of a trial court to make an in limine ruling on *Daubert* issues in the summary judgment context may constitute an abuse of discretion. See *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999). See generally *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). However, like other interlocutory rulings, decisions on motions in limine are generally not final appealable orders. See *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342 (9th Cir. 1985), *revised opinion* 773 F.2d 1049 (9th Cir. 1985).

2. The amendment of Rule 103 to address the appealability of in limine rulings

Federal Courts of Appeals have long been divided on whether in limine rulings are appealable. For example, the Fifth Circuit has followed the general rule that ordinarily a motion in limine by itself is insufficient to preserve an issue for review on appeal. *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988). Under this rule, a party whose motion in limine has been overruled must object when the evidence the party sought to exclude is about to be introduced at trial. *United States v. Tannehill*, 49 F.3d 1049, 1057 n.10 (5th Cir.), *cert. denied*, 516 U.S. 859 (1995); *Wilson*, 837 F.2d at 222. The Fifth Circuit has extended this rule to require a party who unsuccessfully opposes a motion in limine to object or offer proof at trial. *United States v. Graves*, 5 F.3d 1546, 1551 (5th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994); *United States v. Estes*, 994 F.2d 147, 149 (5th Cir. 1993).

On December 1, 2000, Federal Rule of Civil Procedure 103 was amended to address this issue. This amendment consists of an additional sentence at the end of subdivision (a), which provides that, “Once 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.” Although the words “in limine” do not appear in revised Rule 103, it is clear that this rule was amended specifically to address the split in the Courts of Appeals.

There are several potential pitfalls inherent in this amendment. First, to preserve error, one must ensure that Court's ruling is “definitive.” If there is any doubt about the state of the record on this score, the only safe course is to renew the objection or proffer on the record at trial. Second, the court can always change its mind. Nothing prevents a party from asking the judge to reconsider an issue in light of the evidence presented at trial. If the issue is reconsidered and the prior ruling reversed, the adversely-affected party must then make

an objection or proffer preserve appealability. Third, with respect to pretrial evidentiary issues decided by magistrate judges, Federal Rule of Civil Procedure 72(a) and 28 U.S.C. §§ 636(b)(1) each impose a ten-day deadline for objecting to the magistrate judge's determinations of “non-dispositive matters” or proposed findings and recommendations to the district judge. Missing that ten-day deadline generally bars appellate review. The 2000 amendment to Rule 103(a) offers no safe harbor in this circumstance. Fourth, the accompanying Committee Note stresses that nothing in this amendment changes the rule in criminal cases laid down in *United States v. Luce*, 469 U.S. 38 (1984), which holds that a criminal defendant who unsuccessfully moves in limine to suppress cross-examination on his prior convictions may not appeal that ruling if he thereafter declines to take the stand and submit to that cross-examination. Fifth, if you have lost a motion in limine to exclude evidence and want to remove the sting by offering it at trial, do you waive your right to appeal the in limine ruling? The Rule is silent on this question, and the Committee Note “does not purport to answer [it].” Rather, the Note cites cases from different Circuits coming down squarely on both sides of the issue.

B. *Lone Pine* Orders: Initial Requirement of Expert Evidence as a Threshold Issue

Federal and state courts have the inherent authority to enter case management orders containing pretrial screening devices commonly referred to as “Lone Pine orders” after the first major case to use such an order, *Lore v. Lone Pine, Inc.* No. 1986 N.J. Super. LEXIS 1626 L 33606-85 (N.J. Super. Ct. Monmouth Cty., Nov. 18, 1986). Courts across the country recognize that litigation involving alleged injuries from low-level exposure to chemicals can be a tremendous burden on the judicial system and enormously expensive for the parties, necessarily consuming scarce resources. See *In re Mohawk Rubber Co.*, 982 S.W.2d 494, n. 1 (Tex. App.—Texarkana, 1998 orig. proceeding) (discussing use of *Lone Pine* Order in companion federal court matter). Therefore, many courts have required plaintiffs to make a *prima facie* showing of exposure to a chemical and resulting illness as a condition of proceeding with their case and prior to requiring a defendant to spend enormous amounts of time and money in defending the case.

1. Legal Issues

In general, *Lone Pine* orders provide for pretrial proffers of *prima facie* evidence aimed at the early elimination of unmeritorious claims. See generally *Manual for Complex Litigation* §§ 33.22 (3d ed. 1995). In the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16.

Acuna v. Brown & Root, Inc., 200 F.3d 335, 340 (5th Cir. Tex. 2000), *cert. denied*, 120 S. Ct. 2658 (U.S. 2000). For example, in the *Acuna* case, the court issued pre-discovery scheduling orders that required plaintiffs to establish certain elements of their claims through expert affidavits. *Id.* Those affidavits had to specify, for each plaintiff, the injuries or illnesses suffered by the plaintiff that were caused by the alleged uranium exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions. *Id.*

In *Lone Pine*, Plaintiffs contended that they had suffered personal injury and property damage as a result of alleged exposure to chemicals. At an early stage of the proceedings, the Court issued a case management order requiring each plaintiff individually to submit documentation of his or her alleged exposure, injury, property damage and causation. The *Lone Pine* court dismissed the case with prejudice when plaintiffs failed to present a prima facie case of personal injury, property damage and proximate cause.

Similarly, in *In Re Love Canal Actions*, 547 N.Y.S.2d 174, 179 (N.Y. 1989), plaintiffs claimed personal injury and property damage due to exposure to chemicals in the Love Canal landfill. The court required plaintiffs to produce documentation of exposure, injury and medical causation before allowing the matter to proceed to additional, expensive discovery. *See also, e.g., Rose Marie and John Orel Dumes, et al. v. Houston Lighting & Power Co., et al.*, S.D. Tx. (10/7/92). In *Dumes*, the Court required plaintiffs to produce detailed experts' reports regarding (i) each physical or mental ailment or injury that each plaintiff claimed was the result of defendants' acts or omissions (ii) the specific method of alleged causation for each alleged physical or mental ailment or injury; (iii) the acts or omissions of defendants that allegedly caused each alleged physical and/or mental impairment or injury; (iv) the quantification of the alleged damages resulting from each alleged physical and/or mental impairment or injury suffered by each plaintiff; (v) property damage that each plaintiff alleged was the result of defendants' acts or omissions; (vi) the specific method of causation for each plaintiffs' alleged property damage; and (vii) the quantification of each plaintiffs' alleged property damage.

2. Texas Law

Texas judges recognize that multi-plaintiff toxic-tort cases present special problems of judicial administration for the court and the parties. *Able Supply Co. v. Moye*, 898 S.W.2d 766, 769 (Tex. 1995) (granting a writ of mandamus ordering the trial court to compel thousands of plaintiffs to identify physicians

who had attributed plaintiffs' alleged injuries to exposure to a particular product manufactured by a specific defendant). The *Able Supply Co.* Court explained that, "Requiring the plaintiffs to answer an interrogatory linking each plaintiff's injuries with a particular product will simplify the case, streamline costs to both plaintiffs and defendants, conserve judicial resources, and aid the trial court in preparing a plan for the trial of these cases." *Able Supply Co.*, 898 S.W.2d at 771. Justice Gonzalez, commenting on *Able Supply Co.*, noted that, "Although the case had been pending for more than eight years, the plaintiffs had never been required to produce evidence or testimony linking their injuries to any of the defendants' products." *CSR Ltd. v. Link*, 925 S.W.2d 591, 598 (Tex. 1996) (Gonzales, J., concurring); *see also Martinez v. City of San Antonio*, 40 S.W.3d 587, 591-92 (Tex. App.—San Antonio 2001, *review denied*) (holding that plaintiffs' compliance with the *Lone Pine* order in a mass tort case did not hinder their ability to conduct the discovery necessary to overcome a no-evidence summary judgment motion).

Managing cases in this fashion has been argued to reduce the drain on judicial resources. Also, the cost of obtaining and reviewing plaintiffs' medical and employment records and deposing all of the plaintiffs is extremely expensive and burdensome for the parties. In order to simplify the complexity and volume of the toxicological, medical, and factual issues involved in this case, defendants can propose a case management order which requires plaintiffs to provide information in a *Lone Pine* Order on expert issues in the case.

Pre-trial exposure and medical statements are not novel in toxic chemical cases. The Texas Supreme Court has expressly recognized that the refusal of plaintiffs in mass toxic-tort cases "to provide a medical link between a particular plaintiff and a particular product . . . puts every defendant in the position of having to defend every case until all are tried, which constitutes a monumental waste of judicial resources." *Able Supply Co. v. Moye*, 898 S.W.2d 766, 771 (Tex. 1995). Judge Abbott entered an order similar to the one proposed by defendants on January 30, 1995, in Cause No. 93-060248; *Julian J. Baptiste, et al. v. Exxon Corporation, et al.*; In the 129th Judicial District Court of Harris County, Texas. The Texas Supreme Court has even overruled a Petition for Writ of Mandamus seeking to overturn a Corpus Christi trial judge's entry of a similar case management order. *Alonzo Abarca, et al. v. The Honorable Mike Westergren, Judge*, No. 96-0911, 40 Tex. Sup. Ct. J. 86 (November 15, 1996). These issues have, however, not been expressly ruled upon by the Texas Supreme Court and leave open the question of their ultimate validity. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217 (Tex. 1999) (discussion of case management orders on individual causation issues). However, in the

recent Texas Supreme Court decision of *In re Van Waters & Rogers, Inc.*, the court conditionally granted defendants writ of mandamus in a seven year old mass tort case involving more than 400 plaintiffs alleging exposure to "toxic soup" where the trial court disallowed defendants' interrogatories designed to establish a link between plaintiffs' symptoms and exposure to defendants' chemicals. 62 S.W.3d 197, 197-198 (Tex. 2001).

3. Language of Proposed Lone Pine Order (Texas law version)

On _____, the Court conducted a hearing concerning the status of this case and the need for a Case Management Order regarding the [] plaintiffs. It appears to the Court from the pleadings, discovery responses on file and arguments of the parties that a Case Management Order is warranted under Texas Rule of Civil Procedure 166 to assist in the disposition of the case without undue expense or burden.

It is, therefore, ORDERED:

1. Each [] plaintiff shall fully answer defendants' interrogatories, respond to their requests for production and authorize release of records by _____, 2007.
2. Each [] plaintiff who is claiming personal injury, including fear of future illness or disease, is required to submit an affidavit from their treating medical doctor or other health care provider who regularly renders diagnosis of illness or injury ("treating physician") supporting his exposure and personal injury claims by _____. Specifically, the treating physician must state under oath that, based on reasonable medical probability, the named plaintiff/plaintiff's illness or injury was caused by alleged exposure to the chemicals from the [] Incident. With regard to the treating physician's opinion, each report must specify:
 - (a) each and every specific illness or injury that the subject plaintiff has suffered as a result of the alleged exposure to the chemical or chemicals and the date on which such illness or injury was first suffered;
 - (b) the chemical or chemicals that, in the opinion of the physician, caused each such illness or injury;
 - (c) the manner in which the subject plaintiff was exposed to each chemical (i.e., ingestion, inhalation, or skin absorption);

- (d) the duration of time over which the subject plaintiff was exposed to each chemical, including the date(s) of exposure and the total amount of time exposed; and
- (e) all medical and scientific data, studies, theories, and facts relied upon by the treating physician in forming his or her opinions regarding the subject plaintiff.

3 Each [] plaintiff claiming real property damage is required to provide reports of a real estate appraiser or other land valuation expert and a chemist, toxicologist, industrial hygienist or other qualified expert supporting each individual plaintiff's real property damage claim by _____, 2007; including:

- (a) the street address of the property allegedly affected;
- (b) the identity, duration, quantity and concentration of the chemical or chemicals that, in the opinion of the expert, allegedly affected the property;
- (c) the value of the property before the claimed date of contamination;
- (d) the value of the property after the claimed date of contamination;
- (e) all data, studies, theories, and facts relied upon by the experts in forming his or her opinions regarding the subject property.

Any plaintiff claiming property damage that does not comply with this requirement by the date specified shall be subject to sanctions.

4. The [] plaintiffs shall designate all expert witnesses and submit written expert reports on or before _____, 2007. The foregoing requirement for submitting expert reports does not apply to:

- (a) treating medical doctors or health care providers who have examined an plaintiff or plaintiffs ("treating physician"), but the treating physician is only exempted from the above report requirement to the extent the treating physician's opinions concern the plaintiff(s) he or she examined;
- (b) medical doctors or psychologists, psychiatrists, or other experts who have performed an independent medical, psychiatric or psychological examination of an plaintiff ("i.m.e.

physician”), but the *i.m.e.* physician is only exempted from the above report requirement to the extent the *i.m.e.* physician’s opinions concern the plaintiff(s) he or she examined;

- (c) real estate appraisers or other land valuation experts (“appraisers”) who have inspected an plaintiff or plaintiffs’ real property, but the appraiser is only exempted from the above report requirement to the extent the appraiser’s opinions concern the real property he or she examined.

The designation of experts shall include the expert’s name, the subject matter on which the expert is expected to testify, and a general statement of the opinions which the expert is expected to give. The written report shall contain a summary of the opinions that the expert is expected to give, the grounds for those opinions, and the facts upon which the opinions are based.

5. Defendants shall designate all expert witnesses and submit written expert reports on or before _____, 2007. The foregoing requirement for submitting expert reports does not apply to:
- (a) treating medical doctors or health care providers who have examined a plaintiff or plaintiffs (“treating physician”), but the treating physician is only exempted from the above report requirement to the extent the treating physician’s opinions concern the plaintiff/plaintiff(s) he or she examined;
- (b) medical doctors or psychologists, psychiatrists, or other experts who have performed an independent medical, psychiatric or psychological examination of a plaintiff (“*i.m.e.* physician”), but the *i.m.e.* is only exempted from the above report requirement to the extent the *i.m.e.* physician’s opinions concern the plaintiff/plaintiff(s) he or she examined;
- (c) real estate appraisers or other land valuation experts (“appraisers”) who have inspected a plaintiff or plaintiffs’ real property, but the appraiser is only exempted from the above report requirement to the extent the appraiser’s opinions concern the real property he or she examined.

The designation of experts shall include the expert’s name, the subject matter on which the expert is expected to testify, and a general statement of the opinions which the expert is expected to give. The written report shall contain a summary of the opinions that the expert is expected to give, the grounds for those opinions, and the facts upon which the opinions are based.

6. The Court reserves judgment as to the schedule, manner, method, and timing of trial of the [] plaintiffs’ claims, including whether the individual plaintiff/ plaintiff’s claims will be tried separately or in groups. The parties shall report to the Court either their joint or individual proposals for the methods and structure under which this case will be tried on or before _____, 2007. In addition, the Court will consider the imposition of other docket control deadlines and a trial setting.

VII. PREPARING TO CHALLENGE AN OPPONENT’S EXPERT WITNESS

A. File Interrogatories and Requests for Production of Documents

Always request information regarding your opponent’s expert witness and his or her opinions regarding the subject matter of the lawsuit as early as possible in the case. Focus on the *Robinson* factors. Request a copy of the expert witness’s curriculum vitae, all written reports regarding the lawsuit, and any supporting documents upon which the expert has relied.

B. Get a Detailed Expert Report

Get a thorough report from your opponent’s expert. If your opponent’s expert does not voluntarily produce a written report, file a motion under Texas Rule of Civil Procedure 166b(2)(e)(4) to get one.

C. Depose Your Opponent’s Expert

Before having your notice of deposition and subpoena duces tecum served on the expert, contact opposing counsel to work out a mutually convenient date. Include in your subpoena duces tecum requests for all documents upon which the witness has relied in forming his opinion, including all published treatises and articles. Ask him for all treatises and articles he has written on the subject matter at issue. During deposition, you should cover completely the following areas:

1. All education and training;
2. All professional affiliations;
3. All prior employment history;

4. *All treatises and articles authored by the expert regarding the subject matter of the lawsuit;*
5. *All persons with whom the expert has discussed the case;*
6. *All contacts and relationships with opposing counsel;*
7. *An explanation of each opinion or theory and the factual basis for each opinion (the Daubert/Robinson factors);*
 - (a) the extent to which the opinion/theory has been or can be tested;
 - (b) the extent to which the technique relies upon the subjective interpretation of the expert;
 - (c) whether the opinion/theory has been subjected to peer review and/or publication;
 - (d) the technique's potential rate of error;
 - (e) whether the underlying opinion/theory or technique has been generally accepted as valid by the relevant scientific community; and
 - (f) the non-judicial uses which have been made of the opinion/theory or technique.
8. *Prior experience as an expert witness, including prior depositions, trials, and consultations with attorneys;*
9. *All articles and treatises upon which the expert has relied; and*
10. *The basis of the expert's fee and the amount of time he has spent on the case.*

D. Methods to Challenge the Opponent's Expert

The method by which you choose to challenge an expert witness and the time at which you make that challenge require both knowledge of the law and strategic planning.

1. Before Trial: Motion to Strike or Motion in Limine

You may file a motion to strike an expert witness or a motion in limine on several bases: (1) opposing counsel failed to timely and properly designate the witness under the Texas Rules of Civil Procedure or a court scheduling order; (2) opposing counsel failed to timely identify the witness and/or the witness's opinions in response to interrogatories and/or to supplement same; (3) opposing counsel failed to produce expert report, curriculum vitae, and/or other relevant documents in response to document request and/or failed to supplement same; (4) the witness will not assist the trier of fact; (5) the witness cannot satisfy some or all of the six *Robinson* factors; (6) the witness

is not qualified; (7) the witness is relying on an improper standard; and (8) the witness is making legal conclusions.

You must put on evidence to support your motion to exclude an expert witness. There are several forms of evidence that a trial judge will consider:

a. Affidavits From Your Own Experts

Your own experts can provide a vital source of evidence regarding the type of qualifications and training needed to render an expert opinion or to perform the type of work at issue.

b. Supporting Documentation

Documents from professional associations and documents produced in the case which call into doubt the expert's qualifications or methodologies should be introduced into evidence. Focus on the *Robinson* factors. Learned treatises and articles which question the methodology used may also be useful in discrediting the expert's testimony and his usefulness of the jury.

c. Live Witnesses

Witnesses may be called live at a hearing on striking or limiting an expert's testimony, although their use should be limited since you give your opponent a free shot at cross-examining your witnesses.

E. At Trial: Direct Examination

If the court does not sustain your motion to strike or motion in limine prior to trial, you must object, object, object. Rule 103(a)(1) of the Texas Rules of Civil Evidence requires that an objection to evidence be specific. Where a specific ground for objection is not stated, a general objection amounts to no objection at all. *Sciarrilla v. Osborne*, 946 S.W.2d 919, 924 (Tex. App.--Beaumont 1997, n.w.h.). A general objection to a unit of evidence as a whole, which does not point out specifically the portion objected to, is insufficient. *Id.* Renew your objection to the expert at the time he is called to testify. Pre-trial motions such as motions in limine do not preserve error for appellate purposes. Objections must be made each time the expert testifies improperly. Generally, prior or subsequent testimony, admitted without objection, waives all error. *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242 (Tex. App.--Corpus Christi 1994, writ denied); *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984). A limited exception *may* exist if the testimony is "so unreliable that it simply is not evidence." *Robinson*, 923 S.W.2d at 558. For example, the *Robinson* court explained:

Even an expert with a degree should not be able to testify that the world is flat, that the

moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no.

Id.

F. At Trial: Cross Examination

If the trial judge permits the proffered expert witness to testify, you should conduct a thorough cross examination of the witness.

1. Educate the Jury

Explain to the jurors early in the case the legal issues involved so that they can evaluate and compare expert opinions to the legal standard.

2. Challenge the expert's credentials

Professional testifiers frequently "inflate" their curriculum vitae. Check on the status of their memberships with professional organizations for active status; check their publications to insure that they in fact appear as authors; obtain through deposition subpoena copies of all materials they claim to have authored, including seminar speeches.

3. Establish bias

Test the expert for bias: (1) from being paid by the side for whom the expert is testifying; (2) from always or usually testifying for the same side; (3) from engaging in some business other than testifying; (4) from testifying frequently and always making the same conclusion; and (5) from a personal interest in the subject matter.

4. Establish Improper Grounds for Opinions

You can argue that the witness is testifying based on his own subjective standard or expectation or that his opinion is full of legal conclusions.

Appendix A: Checklists on Expert Issues

Motion to Exclude/Motion to Strike Experts (Evidence to Use to Support)

- (1) Use Deposition Excerpts**
- (2) Always Attach Affidavits from Your Experts**
 - with attachments – publications, exhibits, etc.
 - criticize reports and methodology
- (3) Utilize Other Discovery**
 - Interrogatories, Requests for Admission, Requests for Disclosure
 - Expert Reports
- (4) Live Testimony Can Be Used At Hearing if Allowed**
- (5) Prior History of Expert Sought to Be Excluded**
 - other orders of courts
 - other depositions
 - other reports/published papers

OFFER OF PROOF IF EXPERT EXCLUDED (ITEMS TO INCLUDE)

- (1) Deposition Excerpts from Your Expert (with Exhibits)**
- (2) Affidavits with Exhibits (Include Expert Report)**
 - Your Expert
 - Other Experts
- (3) Offer Q & A Outside of Jury**
- (4) Offer Stipulation with regard to Evidence that would be offered at trial**
- (5) Other Discovery (Depositions of Other Experts, Interrogatories, Etc.)**
- (6) Other Rulings of Courts on the Experts' Qualifications**