Tips for Navigating Evidentiary Battles in Trial

(Practical tips for your trial toolbox.)

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Tips and Tricks for Navigating Evidentiary Battles in Trial
(Practical tips for your trial toolbox.)

A. Scope of the presentation

This is not an exhaustive survey of the Rules of Evidence or of the many cases addressing, interpreting, and construing the Rules[1]. Instead, it is intended to discuss real life application of the Rules. The applications, examples, and tips are taken from actual trials where the authors were successful (and in a few cases, not so successful) in excluding evidence by objection or in having evidence admitted over objection.

B. Tips (not Tricks)

1. **Anticipate and analyze your objections**.

> In 32 years I have never sat through a trial and watched a Court permit counsel to fumble through minutes and minutes of – impeachment's hard. It's hard to be a trial lawyer. I try to explain it to people. You got to be prepared. You got to be ready. You got to be focused. And this is extremely frustrating.

Defense Counsel in a recent jury trial.

You cannot overprepare. Over 40 years ago Baylor taught me to prepare my jury charge as part of preparing the initial petition or answer to be sure I pleaded what is necessary to recover under a valid cause of action or obtain a verdict under a valid defense. While that is important, it really is just the first step. If, in addition, I outline both the elements of each cause of action or defense, the measure of damages, the evidence that will prove up each element of each claim or defense, and the witness or witnesses who will testify or sponsor documents or tangible evidence for each element, I begin to have an outline for discovery as well as my witness examinations. Once those basic tools are in place, if I list possible objections to the expected evidence, both from our side and from the opposition, and start to gather and assemble case authority and the applicable Rules to convince the court that my objection is well taken, but my opponent's is not, I begin to be prepared for trial.

Over time, this collection of possible objections and supporting authority, for and against, has become a valuable addition to my trial lawyer's toolbox. Because hauling a ton of paper cases around is tiring, I personally keep that information in an electronic file and update it regularly. During hearings and trial I can access it with my computer or pad and, in the case of a pad, hand it to the court to read if a printed copy is not available.

a. <u>Reversal based on evidence admissibility rulings are uncommon</u>.

Preparation is the key to obtaining favorable rulings with the trial court. By being prepared and presenting honest, cogent, articulate, well thought out, and supported objections or responses to objections, you give the trial court a basis for ruling in your favor. Most of the trial court's evidentiary rulings cannot be remedied by appeal, so you need to win in the trial court. Reversing a judgment due to admission or exclusion of evidence is difficult. A trial court's exclusion of evidence is reviewed for abuse of discretion. *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018). Evidentiary rulings are committed to the trial court's sound discretion. *U-Haul Int'l, Inc. v. Waldrip*, 380

[1] Originally presented at the 2023 Spring Meeting of the Texas Association of Defense Counsel, this paper was updated with several cases collected in Ms. Ms. Karen Precella's article published in the June 2023 "News for the Bar."

S.W.3d 118, 132 (Tex. 2012) (citing *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam)). A trial court abuses its discretion when it acts without regard for guiding rules or principles. *Id*. (citing *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)). On appeal, the court must uphold the evidentiary ruling if there are any grounds to support it, even if those grounds were not asserted or cited in the trial court as the basis for the ruling. *K.J. v. USA Water Polo, Inc.*, 383 S.W.3d 593, 610 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). "The trial court has extensive discretion in evidentiary rulings, and we will uphold decisions within the zone of reasonable disagreement." *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 545 (Tex. 2018). The appellate court will uphold a trial court's ruling on the admission of evidence if there is any legitimate basis for the ruling. *See Primoris Energy Servs. Corp. v. Myers*, 569 S.W.3d 745, 762 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (citing *Hooper v. Chittaluru*, 222 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (op. on reh'g)); *see also Malone*, 972 S.W.2d at 43 ("An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling.").

b. Use Running Objections properly.

Judicious use of running objections should be considered. *In Interest of C.F.M.*, No. 05-16-00285-CV, 2018 WL 1704202, at *3 (Tex. App.—Dallas Apr. 9, 2018, pet. denied); *see also Getosa, Inc. v. City of El Paso*, 642 S.W.3d 941, 956 (Tex. App.—El Paso 2022, pet. denied); *Reyna*, 2021 WL 45678, at *3 (objection waived when did not object each time evidence offered and did not obtain a running objection).

A running objection must be specific and unambiguous and clearly identify the source and specific subject matter of the objectionable evidence prior to presentation to the jury. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). A running objection is generally specific to a witness unless extended to a subject matter for additional witnesses. *Ramirez*, 159 S.W.3d at 907 ("objection to the evidence complied with Texas Rule of Appellate Procedure 33.1(a) and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate"); *In re Sawyer*, No. 05-17-00516-CV, 2018 WL 3372924, at *6 (Tex. App.—Dallas July 11, 2018, pet. denied) (running objection allowed "just for this witness"); *Huckaby v. AG Perry & Son, Inc.*, 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied) ("A properly framed running objection can extend to testimony by all witnesses pertaining to the same type of evidence, but such did not exist in this case."). A trial court has the discretion to permit or deny a running objection. *See, e.g., U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 131–32 (Tex. 2012). But "[a] running objection…is waived if the party fails to object to similar evidence that is not covered by the running objection." *Reyna*, 2021 WL 45678, at *3.

c. Shut that door.

Watch for the "opening the door" trap. If a party first "opens the door" to evidence, that earlier evidence (or argument) may waive any objection to the admission of evidence on that issue. *See Perez v. Williams*, No. 02-21-00395-CV, 2022 WL 17351581, at *2 (Tex. App.—Fort Worth Dec. 1, 2022, no pet.) (citing *McInnes v. Yamaha Motor Corp*., U.S.A., 673 S.W.2d 185, 188 (Tex. 1984), and *Campbell v. Pompa*, 585 S.W.3d 561, 585 (Tex. App.-Fort Worth 2019, pet. denied). "A party opens the door to otherwise objectionable evidence offered by the other side when it introduces the same evidence or evidence of a similar character." *Campbell v. Pompa*, 585 S.W.3d 561, 585 (Tex. App.—Fort Worth 2019, pet. denied); *see also Merrill v. Sprint Waste Servs., LP*, 527 S.W.3d 663, 668 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Further, "[t]he general rule is error in the admission of testimony is deemed harmless and is waived if the objecting party subsequently permits the same or similar evidence to be introduced without objection." *Ramirez*, 159 S.W.3d at 907; *see also JNM Express, LLC v. Lozano*, 627 S.W.3d 682, 698-99(Tex. App.—Corpus Christi 2021, pet. filed); *Cravens v. Alisam Enterprises, LLC*, No. 09-19-00020-CV, 2021 WL 278316, at *7 (Tex. App.—Beaumont Jan. 28, 2021, no pet.).

Thus, "a party may not complain on appeal that the opposing side's evidence was improperly

admitted if the party introduced the same or similar evidence. A party may open the door to the admission of otherwise objectionable evidence through a witness's testimony that conveys a false impression." *HNMC, Inc. v. Chan*, 637 S.W.3d 919, 940 (Tex. App.—Houston [14th Dist.] Dec. 20, 2021, pet. filed) (citations omitted). "Once the opposing party has referred to the contested evidence, however, the party objecting to the evidence, without waiving his objection, may thereafter defend himself by explaining, rebutting, or demonstrating the untruthfulness." *Merrill v. Sprint Waste Servs., LP*, 527 S.W.3d 663, 668 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (quotation and citation omitted).

d. Preserve that error.

To preserve error on an evidence admissibility ruling, the trial court must have made a ruling or expressly refused to rule in the first place. If the party does not offer the evidence and obtain a ruling, the party is not entitled to make an offer of proof on the excluded evidence. *See, e.g., Bishop*, 2020 WL 4983246, at *9; *Rangel*, 580 S.W.3d at 680. Similarly, the party complaining about the admission of evidence must timely and specifically object to the evidence and obtain a ruling. *See, e.g., Serv. Corp. Intern.*, 348 S.W.3d at 234; *Martinez Jardon*, 593 S.W.3d at 831. "An instruction to 'move along' is not a ruling." *Nguyen v. Zhang*, No. 01-12-01162-CV, 2014 WL 4112927, at *4 (Tex. App.—Houston [1st Dist.] Aug. 21, 2014, no pet.) (citing *Stevens v. State*, 671 S.W.2d 517, 521 (Tex. Crim. App. 1984)). An order that notes that objections were considered but does not show which objections were sustained and overruled is not a sufficient ruling. *See, e.g., Balderas v. Zurich Am. Ins. Co.*, No. 14-20-00262-CV, 2022 WL 1257041, at *5 (Tex. App.—Houston [14th Dist.] April 28, 2022, no pet.). And if the trial court refuses to rule, the complaining party must object to that refusal. Tex. R. App. P. 33.1; *see, e.g., Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018).

"To preserve error after inadmissible evidence is allowed before the jury, a party must sequentially pursue an adverse ruling from the trial court by: (1) objecting to the complained-of evidence, (2) moving the court to strike the evidence from the record, (3) requesting the court to instruct the jury to disregard the evidence, and (4) moving for a mistrial." *One Call Systems, Inc. v. Houston Lighting and Power*, 936 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (emphasis added).

If admissible evidence is excluded after objection, request an instruction to disregard the question or answer. *State Bar of Tex. v. Evans*, 774 S.W.2d 656, 658 n.6 (Tex. 1989). If the instruction is refused it is an adverse ruling preserving error preserved for appeal. *Id.*; *see also In re OZO*, No. 14-14-00768-CV, 2015 WL 5093198, at *2 (Tex. App.—Houston [14th Dist.] Aug. 27, 2015, no pet.) ("Absent an adverse ruling, nothing is preserved for appellate review."). If the request for an instruction is refused, the issue on appeal is whether the instruction could have cured the error. *In re Wyatt Field Serv. Co.*, 454 S.W.3d 145, 160-62 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). If the instruction is given, a party should move for mistrial to preserve a complaint on appeal that related to the factfinder hearing the inadmissible evidence. *OZO*, 2015 WL 5093198, at *2 (collecting cases). A mistrial is proper only if the complaining party can show that "the evidence was so harmful that it could not be cured by a limiting instruction [or instruction to disregard], and that its admission was calculated to cause and probably did cause the rendition of an improper judgment." *Collins v. Sunrise Senior Living Mgmt., Inc.*, No. 01-10-01000-CV, 2012 WL 1067953, at *23 (Tex. App.—Houston [1st Dist.] March 29, 2012, no pet.).

Failing to explain the substance of the objection or the response to the objection on admissibility to allow the trial court to exercise its discretion also fails to preserve error. *See, e.g., Estate of Abraham*, 662 S.W.3d 541, 545-46 (Tex. App.—El Paso 2022, no pet.) (citing *Gilbert v. Kalman*, 650 S.W.3d 135, 143 (Tex. App.—El Paso 2021, no pet.) (failure to explain why summary judgment evidence not hearsay failed to preserve error on exclusion); *Lubbock Cnty.*, 2021 WL 45678, at *3 (objection must identify the objectionable evidence, rule or legal principle that bars admission and explain how the evidence violates that rule or principle).

While Rule 33.1(a) (2) permits preservation by an implicit ruling reasonably inferred from something else in the record, the fact that the judgment went against you is not adequate to

demonstrate an implied ruling. *Trevino v. City of Pearland*, 531 S.W.3d 290, 300 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (a trial court's ruling on objections to evidence at a bench trial or on a motion to exclude this evidence is not implicit in its judgment on the merits after the bench trial; it is not reasonable to conclude that the trial court sustained or overruled the objections or granted or denied the motion to exclude based on the trial court's judgment on the merits.). The implication must be clear. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018). Docket entries, emails, and argument are not usually considered implicit rulings. *Goins v. Discover Bank*, No. 02-20-000128-CV, 2021 WL 1136077, at *1 n.3 (Tex. App.—Fort Worth Feb. 5, 2021, pet. denied) (citing *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding)); *Brown v. Underwood*, No. 11-20-00138-CV, 2022 WL 1670693, at *4 (Tex. App.—Eastland May 26, 2022, no pet.) (e-mail from trial court not filed of record but attached to appellate brief as an appendix is not part of appellate record and does not constitute an express or implied appealable ruling on objections to summary judgment evidence); *Hibernia Energy III, LLC v. Ferae Naturae, LLC*, ___ S.W.3d ___, 2022 WL 17819744, at *11 (Tex. App.—El Paso 2022, no pet.) (argument regarding objections on the record insufficient without express written or oral ruling).

e. Burden on appeal.

Even if a trial court abuses its discretion by excluding evidence, the error is not reversible unless it "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a)(1). In making this determination, the court must "evaluate the entire case from voir dire to closing argument, considering the evidence, strengths and weaknesses of the case, and the verdict." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 236 (Tex. 2011). "The role that the excluded evidence played in the context of the trial is important." *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009) Your best opportunity of reversal is if the excluded evidence is both (i) controlling on a material issue in the case and (ii) would not have been cumulative of other evidence in the case. *Gilbreath v. Horan*, No. 01-17-00316-CV, 2023 WL 3011614, at *21 (Tex. App.—Houston [1st Dist.] Apr. 20, 2023, no hist.); *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

f. Offer of proof.

In the case of excluded evidence, you have to make a record of the excluded evidence in order to show the appellate court that it was both controlling and not cumulative. TEX. R. EVID. 103(a)(2); *Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 438 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "To show that the trial court abused its discretion in excluding evidence, a complaining party must preserve error by actually offering the evidence and obtaining an adverse ruling from the court." *Matter of Marriage of Rangel*, 580 S.W.3d 675, 679 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *accord Collins v. D.R. Horton-Tex. Ltd.*, 574 S.W.3d 39, 49 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *In re JCK*, No. 14-17-00082-CV, 2018 WL 2012382, at *3 (Tex. App.—Houston [14th Dist.] May 1, 2018, no pet.) (bench brief and related discussion did not preserve error when evidence never offered, and no trial court ruling on admissibility).

Making an offer of proof enables an appellate court to determine whether the exclusion of the evidence was erroneous and harmful. "[O]nce a proponent secures an exclusionary ruling, she must preserve the evidence in the record by an offer of proof to complain of the exclusion on appeal." *Matter of Marriage of Rangel*, 580 S.W.3d at 680; *see also Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018) ("If a court ruling excludes evidence, a party must preserve error by filing an offer of proof informing the court of the substance of the excluded evidence.").Because it also allows the trial court to reconsider its ruling in light of the actual evidence, reoffer the evidence after making the offer. *Emami v. Emami*, No. 02-21-00319-CV, 2022 WL 3273603, at *3 (Tex. App.—Fort Worth Aug. 11, 2022, no pet.) (secondary purpose is to allow the trial judge to reconsider his ruling in light of the evidence.").

The Rules require only a "short, factual recitation of what the [evidence] would show" but you should play it safe and also state why it is relevant to preserve the issue for appeal. *Jones v. Mattress Firm Holding Corp.*, 558 S.W.3d 732, 736 (Tex. App. —Houston [14th Dist.] 2018, no pet.). And the failure to allow question-and-answer form is

not necessarily error if it is allowed in summary format. *See, e.g.*, *Bank of Tex. N.A. v. Collin Cent. Appraisal Dist.*, No. 05-19-00568-CV, 2021 WL 2548711, at *5 (Tex. App.—Dallas June 22, 2021, no pet.). TEX. EVID. RULE 103(c).

"[W]hether it is the testimony of one's own witness or that of the opponent, the appellant must make an offer of proof or a bill of exception to show what the witness's testimony would have been." *Hernandez v. Moss*, 538 S.W.3d 160, 166 (Tex. App.—El Paso 2017, no pet.); *see also Bank of Am. v. Ochuwa*, No. 01-19-00368, 2020 WL 5269416, at *4 (Tex. App.—Houston [1st Dist.] Sept. 3, 2020, no pet.) ("Texas accepts two types of offers to preserve [exclusion of evidence] errors: an offer of proof (formerly an informal bill of exception) and a formal bill of exception."); *Fitzgerald v. Water Rock Outdoors, LLC*, 536 S.W.3d 112, 121 (Tex. App.—Amarillo 2017, pet. denied) ("To preserve an objection to the exclusion of evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception."). An offer of proof need not be in question-and answer form unless either party or the court specifically requests that it be so.

"The offer of proof nonetheless must inform the court of the substance of the evidence unless the substance is apparent from the context." *Rangel*, 580 S.W.3d at 680. "Counsel should reasonably and specifically summarize the evidence and state its relevance unless already apparent." *Jones v. Mattress Firm Holding Corp.*, 558 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.], no pet). "The offer must include 'the meat of the actual evidence' rather than a general, cursory summary, so that the appellate court can meaningfully assess whether the exclusion of the evidence was erroneous and harmful." *Rangel*, 580 S.W.3d at 680 (quoting *Mays v. State*, 285 S.W.3d 884, 890-91 (Tex. Crim. App. 2009)); *see also Ackermann v. Preservation Pest Control Houston , LLC*, No. 14-20-000162-CV, 2022 WL 456705, at * 2 (Tex. App.—Houston [14th Dist.] Feb. 15, 2020, no pet.) (offer of proof did not show "course and scope of employment" as argued to show error on appeal); *Jones*, 558 S.W.3d at 736-37 ("Despite not presenting a formal offer of proof, Jones made the substance of the evidence apparent to the trial court and included it in the record. Thus, Jones properly preserved the issue for appeal.").

In the heat of trial, with thousands of decisions, concerns, and distractions, and with opposing counsel trying her best to cause you to fumble and waive error, presenting a complete offer of proof is challenging. The outline prepared that identifies the elements to be proven, the evidence that will prove each element, and the authority to address objections, is a good roadmap for any needed offers of proof to help you be concise by comprehensive.

2. **Obtain express rulings on discovery disputes before trial**.

Recently I was able to second chair a jury trial with Ms. Beene, the co-author of this paper, in an East Texas District Court. The morning of trial, Plaintiff complained of discovery, sought leave to supplement her discovery, and asked for a continuance.

> take any depositions, I haven't received any discovery responses, not even the ones that you've compelled over and over, and say that -- that I am to not designate any

The Court declined to rule.

> THE COURT: I'm not going to make a ruling at this time. I'm going to carry this motion. We need

After considerable additional argument over witnesses, discovery, and Plaintiff's continuance motion, all of which the Court declined to rule and took under advisement, the Plaintiff announced "ready."

> THE COURT: Members of the jury panel, the case that will be presented for your consideration this week is Numbered CV20-0038-392. Now I'll call for announcements. What says the plaintiff?
> [redacted]: I'm ready, Your Honor.

Once you announce ready for trial, it is too late to complain about or address discovery deficiencies or disputes that were known before trial began. *Reyna v. Reyna*, 738 S.W.2d 772, 775 (Tex. App.—Austin 1987, no writ) (announcement of ready waives the right to seek subsequently a delay based upon any facts which are, or with proper diligence should have been, known at the time); *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex.1993) (failure to obtain a pretrial ruling on

discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct); *Meyer v. Cathey*, 167 S.W.3d 327, 333 (Tex. 2005) ("Meyer was clearly aware of Cathey's discovery misconduct before trial: he obtained pretrial deposition testimony that directly contradicted Cathey's deposition testimony and other discovery responses. Accordingly, by not objecting prior to trial, Meyer waived his sanctions claim.")

On the other hand, if pretrial discovery abuse is not revealed until after the trial has begun, or even after trial, a party cannot be said to have waived a claim for sanctions. *Remington Arms* at 170. But the test is "aware" of the deficiency – if you wait until you have conclusive evidence you waive the sanction claim. *Meyer* at 332-33.

3. **Triple Check Discovery Responses, Yours and the Opposition's**

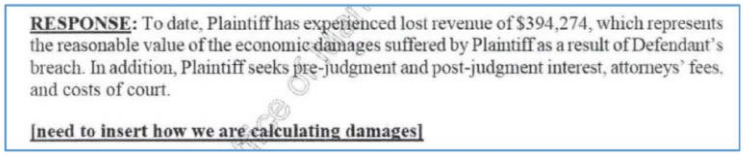
Evidence at trial is not just controlled by the Rules of Evidence; the Rules of Civil Procedure also play an important role. Two Rules of Civil Procedure that should be familiar and in the front of trial lawyers' minds are Rules 193 and 248.

193.6. Failing to Timely Respond--Effect on Trial

> (a) **Exclusion of evidence and exceptions**. A party who fails to make, amend, or supplement a discovery response, including a required disclosure, in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
>
> (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.
>
> (b) **Burden of establishing exception**. The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.
>
> (c) **Continuance**. Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

One of the most serious consequences of failing to comply with discovery rules is the exclusion of evidence not timely disclosed. While some courts and parties characterize the automatic exclusion as a sanction, it is more accurately understood to be a consequence, because the court is not required to consider lesser sanctions. *Ashmore v. JMS Constr., Inc.*, No. 05-15-00537-CV, 2016 WL 7217256, at *7 (Tex. App.—Dallas Dec. 13, 2016, no pet.)

We were in a case recently involving multiple defendants where the Plaintiff asserted claims for breach of contract, fraud, breach of fiduciary duty, and tortious interference. Plaintiff served Disclosure Responses which, addressing "the amount and any method of calculating economic damages," stated:


RESPONSE: To date, Plaintiff has experienced lost revenue of $394,274, which represents the reasonable value of the economic damages suffered by Plaintiff as a result of Defendant's breach. In addition, Plaintiff seeks pre-judgment and post-judgment interest, attorneys' fees, and costs of court.

[need to insert how we are calculating damages]

Less than three weeks before the scheduled jury trial and nine months after the discovery deadline passed, Plaintiff amended its Disclosure

Responses. The trial court granted our Motion to Strike and Exclude, and the court of appeals denied Plaintiff's Mandamus Petition. Plaintiff spent a significant amount of time and effort seeking to ameliorate this self-inflicted injury, all of which could have been avoided.

One takeaway is to avoid inserting notes to yourself in drafts or documents that will be filed or served on opposing counsel– use a separate electronic document (or for those of us who still use paper, 3M Post-it Notes) instead.

A more universal application of this example is to carefully track, calendar, and follow up on all discovery, yours and other parties, and supplement, supplement, supplement, "as soon as practicable." Note that "timely" disclosure does not mean "30 days before trial." *In re Staff Care, Inc*., 422 S.W.3d 876, 881 (Tex. App.—Dallas 2014, orig. proceeding) ("there is no presumption that an amended disclosure made more than thirty days prior to trial is timely"); *Snider v. Stanley*, 44 S.W.3d 713, 715 (Tex. App.—Beaumont 2001, pet. denied) (although rule includes presumption that supplement made less than thirty days before trial is untimely, there is no opposite presumption that supplement made more than thirty days before trial is timely). The current Rules of Civil Procedure do not tie the automatic exclusion of untimely evidence to a fluid trial date. *Fort Brown Condominiums III v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009) ("The former pretrial discovery rules established a fluid deadline for discovery disclosure, which could be modified based on a change in the date of trial….However, the new discovery rules establish a date certain for the completion of discovery, which depends on the discovery plan level and not on the trial date.").

Under Rule 193.6, when a party fails to timely supplement a discovery response, absent a narrow exception, the untimely disclosed evidence is excluded. TEX. R. CIV. P. 193.6(a*); see Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). Exclusion is mandatory and *automatic* unless the court finds that there was good cause for the failure to amend or supplement, or the failure will not unfairly surprise or prejudice the other party. TEX. R. CIV. P. 193.6(a); *Morrow v. H.E.B., Inc*., 714 S.W.2d 297, 297–98 (Tex. 1986) (per curiam); *Good v. Baker*, 339 S.W.3d 260, 271 (Tex. App.—Texarkana 2011, pet denied); *In re Staff care, Inc.*, 422 S.W.3d 882. The party seeking to introduce the evidence has the burden of establishing good cause or lack of unfair surprise or prejudice. TEX. R. CIV. P. 193.6(b); *Good v. Baker*, 339 S.W.3d 260, 271 (Tex. App.—Texarkana 2011, no pet.) The trial court has discretion to determine whether the offering party has met its burden to show good cause or lack of unfair surprise or prejudice but the record must support such finding, TEX. R. CIV. P. 193.6(b); *Baker*, 339 S.W.3d at 271. Moreover, the following factors, standing alone, do not constitute good cause: inadvertence of counsel, lack of surprise, or uniqueness of the excluded evidence. *Alvarado*, 830 S.W.2d at 915; *see Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex.1990) (per curiam).

> The purposes of Rule 193.6 are threefold: (1) to promote responsible assessment of settlement, (2) to prevent trial by ambush, and (3) to give the other party the opportunity to prepare rebuttal to expert testimony. *See In re Kings Ridge Homeowners Assoc., Inc.*, 303 S.W.3d 773, 783 (Tex. App.—Fort Worth 2009, orig. proceeding) (first two purposes) (citing Alvarado, 830 S.W.2d at 913–14); *Norfolk S. Railway Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.) (third purpose) (citing *Exxon Corp. v. W. Tex. Gathering Co*., 868 S.W.2d 299, 305 (Tex. 1993)). Accordingly, in order to establish the absence of unfair prejudice, the party seeking to call an untimely disclosed witness or introduce untimely disclosed evidence must establish that, notwithstanding the late disclosure, the other party had enough evidence to reasonably assess settlement, to avoid trial by ambush, and to prepare rebuttal to expert testimony.

In Int. of D.W.G.K., 558 S.W.3d 671, 680 (Tex. App.—Texarkana 2018, pet. denied).

4. **Utilize Rule 248, TEX. R. CIV. P. in Jury Trials.**

> Rule 248**.** Jury Cases
>
> When a jury has been demanded, questions of law, motions, exceptions to pleadings, and other unresolved pending matters shall, as far

as practicable, be heard and determined by the court before the trial commences, and jurors shall be summoned to appear on the day so designated.

Consider what pretrial issues can be addressed in a Rule 248 hearing for your jury cases. Summary judgment is useful, but it has strict requirements for notice and opportunity to respond. A Rule 248 Motion cannot take the place of a no evidence motion for summary judgment, but it is a useful tool to address legal issues, such as the appropriate measure of damages, the construction of an unambiguous document, a determination that a document is not ambiguous, or if it is, what the multiple reasonable interpretations are. A Rule 248 motion can be heard as part of the pretrial, with very limited notice. A motion requesting that the Court rule on pending unresolved legal issues is an appropriate manner of presenting these issues for ruling by the Court. *Rodriguez v. JPMorgan Chase Bank, N.A.*, 2015 WL 3772110, at *7 (Tex. App.—San Antonio 2015, pet. denied) ("A trial court maintains discretion to manage its docket and trial in a way to promote the greatest efficiency. JPMorgan's motion filed on the day of trial was a simple vehicle used to present a question of law that required disposition prior to trial. Rule 248 directs the trial court determine questions of law "as far as practicable" before trial commences.") (emphasis supplied).

In *Mickens v. Longhorn DFW Moving, Inc*., 264 S.W.3d 875, 880 (Tex. App.—Dallas 2008, pet. denied), the Appellants argued on appeal that the summary disposition of their claims prior to trial violated their right to due process. The Court of Appeals held that "Texas Rule of Civil Procedure 248 directs the trial court to resolve pending matters 'as far as practicable' before a jury trial commences," and because the case involved the question of whether a contract is legally enforceable – a question of law for the court and not a fact issue for the jury – it was "not error for the trial court to determine the enforceability of the liability limitation of sixty cents per pound by pretrial order." The Court held that a "constitutional right to jury trial depends on the existence of an issue of material fact," and because the Appellants failed to identify any fact issue that they were prevented from presenting to a jury," the issue was resolved against them.

5. **Utilize Rule 166(g), Tex. R. Civ. P. in Nonjury Trials**

Rule 166. Pre-trial Conference

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All pending dilatory pleas, motions and exceptions;

(b) The necessity or desirability of amendments to the pleadings;

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

(j) Agreed applicable propositions of law and contested issues of law;

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;

(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

(n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(p) Such other matters as may aid in the disposition of the action.

The court shall make an order that recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

Rule 166 assists "in the disposition of the case without undue expense or burden to the parties." TEX. R. CIV. P. 166; *JPMorgan Chase Bank, N.A. v. Orca Assets GP, LLC*, 546 S.W.3d 648, 653 (Tex. 2018). Under subsection (g), the trial court may consider "[t]he identification of legal matters to be ruled on or decided by the court" and it "authorizes trial courts to decide matters that, though ordinarily fact questions, have become questions of law 'because reasonable minds cannot differ on the outcome.'" TEX. R. CIV. P. 166(g); *Orca Assets*, 546 S.W.3d at 653. Dismissal of individual claims "at a pretrial conference is allowed in limited situations when determination of a legal question is dispositive." *Stamatis v. Methodist Willowbrook Hosp.*, No. 14-14-00492-CV, 2015 WL 3485734, at *4 (Tex. App.—Houston [14th Dist.] June 2, 2015, no pet.); *see also Provident Life & Acc. Ins. Co. v. Hazlitt*, 216 S.W.2d 805, 806–07 (Tex. 1949) (articulating the purpose of Rule 166(g) and showing that it can be used to resolve discrete claims or issues).

If a trial court's order granting a Rule 166(g) motion disposes of the plaintiff's claims, "the order is akin to a summary judgment or directed verdict, and review is de novo." *Orca Assets*, 546 S.W.3d at 653 (citations omitted). Doing so is consistent with the policy in Texas that courts are empowered to promote the sound and efficient administration of justice. *In re State ex rel. Skurka*, 512 S.W.3d 444, 452 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.) ("[E]very court has the inherent power, exercisable in its sound discretion, consistent with the constitution and statutes, to control the disposition of cases on its docket with economy of time and effort.").

Note that Rule 166 is expressly discretionary, while Rule 248 requires the Court "as far as practicable" to determine questions of law, motions, exceptions to pleadings, and other unresolved pending matters before the trial commences. In at least one case, a party proceeded under Rule 248 in a nonjury case and, because the other party did not object, the court of appeals upheld the trial court's actions.

AIC Mgmt. Co. v. AT & T Mobility, LLC, 2018 WL 1189865 (Tex. App.—Houston [1st Dist.] Mar. 8, 2018, pet. struck) involved Rule 248 used in a bench trial. The trial court held that the Appellant's correction deed was invalid and that the Appellee was the legal owner of the real property at issue. The Appellant complained that the trial court, "[i]n essence," treated Appellee's "Rule 248 motion as a motion for summary judgment without the procedural protections." However, the Court noted that the record reflected that the trial court treated the Appellee's motion, not as a summary-judgment motion, but as a request for a determination of a question of law prior to trial. At the pre-trial hearing, the Appellant agreed that the issue of the validity of its correction deed involved only a question of law. The Court noted that nothing in the record reflected that the trial court prevented Appellant from presenting argument or evidence to support its position. The Court further noted that the trial court's written order and final judgment also reflect that the trial court acted pursuant to Rule 248 and – as requested by both parties – ruled on a specific question of law. Thus, the Court of Appeals held that the Appellant had waived any error.

6. **Pretrial admissibility rulings can be beneficial.**

A motion in limine has no bearing on the ultimate admissibility of the evidence and does not preserve any eror. *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d 746, 760 (Tex. 2013) ("a protective limine order alone does not preserve error"); *see also In re Pansky*, No. 01-20-00110-CV, 2021 WL 627036, at *2, (Tex. App.—Houston [1st Dist.] Feb. 18, 2021, no pet.); *Givens v. Anderson*, 608 S.W.3d 65, 79-80 (Tex. App.—San Antonio 2020, pet. denied); *Collins v. D.R. Horton-Tex. Ltd.*, 574 S.W.3d 39, 49–50 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.); *Guerroro v. Cardenas*, No. 01-20-00045-CV, 2022 WL 210152, at *16 (Tex. App.—Houston [1st Dist.] Jan. 25, 2022, pet. denied); *Westview Drive Invs., LLC v. Landmark Am. Ins. Co*., 522 S.W.3d 583, 600 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

A pretrial ruling on the admissibility of evidence is, however, effective to preserve error. *In re Hightower*, 580 S.W.3d 248, 253–54 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *accord Matter of Marriage of Harrison*, 557 S.W.3d 99, 122 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *see also Theis v. Goodyear*, No. 03-16-00266- CV, 2017 WL 5145869, at *2 (Tex. App.—Austin Nov. 3, 2017, no pet.) ("A party can preserve a complaint that the scientific evidence is unreliable by objecting to the evidence before trial or when the evidence is offered.") (citation and quotation omitted). When the court hears evidence objections in a pretrial proceeding or during trial outside the jury's presence, and makes a definitive admissibility ruling, error is preserved for appeal without renewing the objection when the evidence is offered before the jury and party need not renew an objection to preserve a claim of error for appeal. *In re Hightower*, 580 S.W.3d at 253–54; *see also Pena v. Guerrero*, No. 04-19-00874-CV, 2020 WL 7232136, at *8 (Tex. App.—San Antonio Dec. 9, 2020, no pet.) ("a limine ruling preserved an evidentiary complaint where the record show[s] the parties and the court treated that ruling as evidentiary"); *In Interest of D.W.G.K.*, 558 S.W.3d 671, 683 (Tex. App.—Texarkana 2018, pet. denied) ("Mother's specific request to strike the witnesses was a motion to exclude the Department's witnesses rather than a motion in limine."); *Austin v. Weems*, 337 S.W.3d 415, 423 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("A motion to exclude, in effect accomplishes the same thing as a running objection: It eliminates the need to repeat the objection each time evidence is admitted on a topic.").

After a pretrial evidence ruling it may be wise to still object to the exclusion and re-offer the evidence at trial if circumstances open the door. *See, e.g., JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 160 (Tex. 2015) (after pretrial ruling excluding evidence, party re-offered evidence when testimony "opened the door" and made offer of proof on second exclusion ruling).

7. **Recognize the Difference Between Impeachment, Rehabilitation, and Bolstering**

The Texas Rules of Evidence address general impeachment in Rule 404, character for truthfulness (or untruthfulness) in Rule 608 and bolstering with prior consistent statements in Rule 613(c).

Rule 404

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for an Accused.

…

(B) In a civil case, a party accused of conduct involving moral turpitude may offer evidence of the party's pertinent trait, and if the evidence is admitted, the accusing party may offer evidence to rebut it.

(3) Exceptions for a Victim.

…

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense, and if

the evidence is admitted, the accusing party may offer evidence of the victim's trait of peacefulness.

(4) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(5) Definition of "Victim." In this rule, "victim" includes an alleged victim.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

…

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if:

(1) the crime was a felony or involved moral turpitude, regardless of punishment;

(2) the probative value of the evidence outweighs its prejudicial effect to a party; and

(3) it is elicited from the witness or established by public record.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the conviction, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:
(1) the witness is a party in a proceeding conducted under title 3 of the Texas Family Code; or
(2) the United States or Texas Constitution requires that it be admitted.

(e) Pendency of an Appeal. A conviction for which an appeal is pending is not admissible under this rule.

(f) Notice. Evidence of a witness's conviction is not admissible under this rule if, after receiving from the adverse party a timely written request specifying the witness, the proponent of the conviction fails to provide sufficient written notice of intent to use the conviction. Notice is sufficient if it provides a fair opportunity to contest the use of such evidence.

Rule 613. Witness's Prior Statement and Bias or Interest
…

(c) Witness's Prior Consistent Statement. Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

Rule 801(e)(1)(B). Statements That Are Not Hearsay.

A statement that meets the following conditions is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying ….

a. Methods of impeachment

The Texas Court of Criminal Appeals wrote an informative opinion on impeachment, rehabilitation, and bolstering in *Michael v. Stat*e, 235 S.W.3d 723, 725–26 (Tex. Crim. App. 2007). The Court noted that at the outset, every witness is assumed to have a truthful character. If that character is attacked, Evidence Rule 608(a) allows the presentation of evidence of that witness's good character, but not all impeachment is an attack on a witness's character for truthfulness.

The Court identified five major forms of impeachment:

1. impeachment by prior inconsistent statements (also known as self-contradiction);

2. impeachment by another witness;

3. impeachment through bias or motive or interest;

4. impeachment by highlighting testimonial defects; and

5. impeachment by general credibility or lack of truthfulness.

Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truthteller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X). *Id.*

Impeachment by a prior inconsistent statement (or "self-contradiction") is normally just an attack on the witness's accuracy, not his or her character for truthfulness and rehabilitation evidence should be admissible only when a witness's credibility has been attacked directly. Impeachment that indicates the witness was mistaken, for example, while it might allow an inference that the witness could be mistaken in other parts of her testimony, does not amount to a direct attack allowing rehabilitation by character evidence of truthfulness.

"This possibility of other errors, however, is not attributable to any specific defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character. Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause." *Id.* at 726, quoting WIGMORE ON EVIDENCE, § 1108(A) (James H. Chabourn rev.1972). Allowing supporting evidence for the witness's character for truthfulness would, in that case, be improper bolstering.

On the other hand, if the cross-examiner's intent and method clearly demonstrate that he is not merely attacking the conflict in the witness's testimony between one or more specific facts, but mounting a wholesale attack on the general credibility of the witness, the inconsistent statement is used to show that the witness is of "dishonest character," and the opposing party should be allowed to rehabilitate this witness through testimony explaining that witness's character for truthfulness. *Id.* at 726.

The Court concluded: "we hold that the question for the trial judge is whether a reasonable juror would believe that a witness's character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements)." *Id.* at 728.

b. How to impeach with prior inconsistent statement and evidence of bias

Evidence Rule 613 gives the requirements for presenting impeachment evidence. Whether using a prior inconsistent statement of evidence of bias or interest, the witness must be told (i) the contents of the statement; (ii) the time and place of the statement; and (iii) to whom the statement was made. While the witness need not be shown the written statement, it must be shown to counsel upon request. The witness is given an opportunity to explain or deny the statement, and if the witness unequivocally admits making the statement, no extrinsic evidence of the statement is permitted (or needed). Rule 613, TEX. R. EVID.; *Hill v. Consol. Concepts, Inc.*, No. 14-05-00345-CV, 2006 WL 2506403, at *5 (Tex. App.—Houston [14th Dist.] Aug. 31, 2006, pet. denied). At that point, the impeachment is completed and the court should sustain objections to efforts to continue and impeach the prior testimony. *Id.*

c. Impeachment by prior acts.

In general, the Evidence Rules prohibit bolstering and impeachment by prior acts. Rule 404(b), TEX. R. EVID. Rule 404 was promulgated in recognition of the fact that "[p]rior acts by one of the parties with other persons are irrelevant, immaterial and highly prejudicial." *First Southwest Lloyds Company v. MacDowell*, 769 S.W.2d 954, 956 (Tex. App.—Texarkana 1989, writ denied). Rule 404(b), TEX. R. EVID. prohibits injecting evidence of other acts into the trial to show that a party acted in conformity with those acts. *Nix v. H. R. Management Co.*, 733 S.W.2d 573, 576 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

A witness's credibility can be attacked by either opinion or reputation evidence. Evidence Rule 608(a). The evidence, however, must relate only to the witness's character for truthfulness or untruthfulness. Rule 608(b) explicitly prohibits impeaching a witness's testimony by inquiring about specific acts of the witness other than criminal convictions as provided by rule 609. *Serv. Lloyds Ins. Co. v. Martin*, 855 S.W.2d 816, 823 (Tex. App.—Dallas 1993, no pet.). In *Martin*, the carrier attempted to show that Martin had lied on an unrelated job application. The Court noted that the carrier did not offer this evidence as proof of such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, so it was not admissible under Evidence Rule 404(b). Therefore, the attempt to impeach on a collateral matter to prove Martin's character in an effort to show that he acted in conformity therewith violated the prohibitions of rule 608(a) and (b).

The Texas Supreme Court addressed this concept in depth in *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241–42 (Tex. 2010). The case arose out of a tragic traffic accident where several persons were killed when their vehicle crossed the center line and collided with an eighteen-wheel tractor-trailer rig heavily loaded with gravel. At trial, the plaintiff attempted to introduce evidence that the truck driver was an illegal immigrant who had lied on his driver's license application. The Supreme Court held that

immigration status was a collateral matter: a matter that was "not relevant to proving a material issue in the case" because it was not something the plaintiffs had to prove to prevail. This collateral matter merely served to contradict the driver on facts irrelevant to issues at trial, thus it was inadmissible impeachment evidence.

The Supreme Court further held that this immigration-related evidence was also inadmissible under Evidence Rule 608(b). The Court explained that Evidence Rule 608(b) "reflects a general aversion in Texas to the use of specific instances of conduct for impeachment. For over 150 years, 'Texas civil courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness.'" *Id* at 242 (internal citations omitted).

d. Rehabilitation after impeachment

A witness's truthful character, when attacked, can be rehabilitated by opinion or reputation evidence of her truthful nature. Evidence Rule 608(a). The rehabilitation proof is limited to reputation and opinion testimony, and the rehabilitating witness may be cross examined about specific acts of impeached witness that are inconsistent with a truthful nature. *See Wilson v. State*, 71 S.W.3d 346, 351 (Tex. Crim. App. 2002) ("the incidents inquired about must be relevant to the character traits at issue").

e. Bolstering with prior consistent statements

Bolstering occurs when evidence admissible only to rehabilitate a witness is offered before the witness has been impeached or her credibility attacked. The Evidence Rules do not permit a witness to bolster her testimony with evidence of specific acts of truthful character. Evidence Rules 404 and 608; *Gutierrez v. State*, 630 S.W.3d 270, 281 (Tex. App.—Eastland 2020, pet. disc. review denied) (express or implied charge of recent fabrication or improper influence or motive required); *Hammons v. State*, 239 S.W.3d 798, 808–09 (Tex. Crim. App. 2007) (To qualify for admission as a prior consistent statement, the witness must have made the statement before her ostensible motive to fabricate or other improper motive arose.).

These rules came into play in the recent jury trial with Ms. Beene. Apparently, one of the defendants stated in a deposition that the plaintiff acted inappropriately in a separate, unrelated incident. The plaintiff argued that she should be able to offer this testimony in evidence in order to impeach it with testimony from a witness who would disagree that she acted inappropriately.

> PLAINTIFF: But I should be able to bring it up and ask her and impeach her because it does lend credibility to me saying that they're making this up about me when they again make something up about me that's verifiable. And how else am I going to show who's credible and who's not if I can't impeach her on this issue that once again under oath she said that I did something that I did not do?
>
> THE COURT: My ruling at this point is that it's premature
>
> …
>
> PLAINTIFF: Charges were filed but then she dropped them. I think I at the very least should be able to refresh her recollection because she said … This goes directly to her character for truthfulness.
>
> THE COURT: But if we do that, we're going to inject matter that's not relevant.
>
> MR. ZEIGER: The rules specifically say you can't impeach character for truth with that type of stuff. It's in the rule.
>
> PLAINTIFF: No, it does not say …
>
> Mr. Zeiger: it's in the rule. Read the stinking rule.
>
> THE COURT: The objection is sustained.

Not my finest presentation, but the court understood the gist of the objection.

Plaintiff then attempted to introduce her prior consistent statement to corroborate her trial testimony.

PLAINTIFF: And what about the video of me at the –

THE COURT: Police station?

Plaintiff: -- police station?

THE COURT: For what purpose are you presenting that?

PLAINTIFF: Well, I had -- it is a statement made by me. I'm not asserting it as, you know, evidence of the truth, but it is – corroborates and lends credibility that I have stayed consistent in my assertions. And I see also face a situation that I know is delicate and I want to respect on the other side that testimony here -- it is a good form of testimony as to what, you know, my testimony was at the time, what my impressions were at the time. It corroborates what I say now and I say all along, so I think it is important testimony in there about my prior statements.

THE COURT: Well, let's see how the testimony develops. It may be admissible at some point but not right now.

Plaintiff's bolstering effort was directly prohibited by Evidence Rule 613(c). Unless the prior consistent statement is offered to disprove a charge of recent fabrication (Evidence Rule 801(e)(1)(B)) the statement is not admissible.

8. Applying the Best Evidence Objection to Recordings

Rule 1002. Requirement of the Original

> An original writing, recording, or photograph is required in order to prove its content unless these rules or other law provides otherwise.

The best evidence rule requires the document be introduced when the party is attempting to prove the contents of the document. *Parkway/Lamar Partners, L.P. v. Tom Thumb Stores, Inc*., 877 S.W.2d 848, 850 (Tex. App.—Ft. Worth 1994, writ denied). However, with video recordings, the rule seems to be that a participant or observer of the scene video recorded can testify from his or her recollection of the event. *Matute v. State*, No. 03–13–00601–CR, 2014 WL 6845585, at *3–5, (Tex. App.–Austin Nov. 26, 2014, pet. ref'd) (mem. op., not designated for publication); *see Cox v. State*, No. 05-11-00687-CR, 2012 WL 2692189, at *3 (Tex. App.—Dallas July 9, 2012, pet. dism'd) (not designated for publication). In *Cox*, the witness testified concerning what he observed on the closed-circuit television monitor as it occurred. The court reasoned this was testimony of what the witness observed in real time and was not dependent on the video recording. *Id*.

When the witness was not a participant, though, testimony relaying (or interpreting) the video would likely justify exclusion under the best evidence rule where the witness can only testify based on the recording. And, of course, the jury is equally competent to view and listen to the recording, so expert testimony interpreting should also be excluded. "Expert testimony is required when an issue involves matters beyond jurors' common understanding." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). "In some cases, expert testimony may not be required. Whether expert testimony is required depends on whether the issue involves matters beyond 'the general experience and common understanding of laypersons.' " *Driskill v. Ford Motor Co.*, 269 S.W.3d 199, 204 (Tex. App.—Texarkana 2008, no pet.) (quoting *Tamez*, 206 S.W.3d at 583). "Proof other than expert testimony will support a jury finding only when the jurors' common understanding and experience will allow them to make that finding with reasonable probability." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 348 (Tex. 2015). "Whether expert testimony is necessary to prove a matter or theory is a question of law." *Tamez,* 206 S.W.3d at 583.

9. Objections to Expert Testimony do not end at the Pretrial Gatekeeper Hearing

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) and *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) require the trial court to act as a gatekeeper, limiting expert testimony to that which is relevant to issues in case and is based upon a reliable foundation. *Robinson*, 923 S.W.2d at 554. Expert testimony assists the trier of fact when the expert's knowledge and experience on a relevant issue are beyond that of an average juror and the testimony helps the trier of

fact understand the evidence or determine a fact issue. *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 97 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Fact witnesses who are not qualified as experts should not give opinion testimony. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). The role of the trial court in qualifying experts is to ensure "that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion." *Id.* at 152. If a witness is not qualified to testify as an expert on a topic, that disqualification extends to all matters about which he or she would testify by giving his expert opinion. *Missouri-Kansas-Texas Railroad Company v. Alvarez*, 703 S.W.2d 367,371 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In particular, a fact witness cannot give opinion inferences drawn from hearsay. *Id.*

In my experience the trial court usually performs its gatekeeper duties in a pretrial hearing; rarely does the trial court make the jury sit in the jury room to conduct a *Robinson* admissibility hearing. Nevertheless, even when an expert witness is deemed qualified by the court to give opinions, be vigilant in (i) objecting to previously undisclosed opinions and (ii) opinions that invade the province of the jury.

The rule requiring disclosure of the expert's testimony before trial is intended "to provide adequate information about the expert's opinions to allow the opposing party the necessary information to prepare to cross-examine the expert and to rebut this testimony with its own experts." *Exxon Corp. v. W Tex. Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993). Failure to respond to a request for the mental impressions and opinions of the expert and their bases is a complete failure to respond, triggering the automatic exclusion under Rule 193.6, TEX. R. CIV. P. *$27,877.00 Current Money of United States v. State*, 331 S.W.3d 110, 122 (Tex. App.-Fort Worth 2010, pet. denied).

An expert, even if qualified to render opinions, should only be allowed to opine in those matters "beyond jurors' common understanding." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d at 583. That a witness has knowledge, skill, expertise, or training does not necessarily mean that the witness can assist the trier-of-fact. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony. *Id.* testimony from an expert, no matter how credentialed, as to a matter within the common knowledge of jurors almost by definition can be of no assistance. *Id*.

This played out in the same jury trial with Ms. Beene. After a surveillance video recording was admitted, the plaintiff attempted to have law enforcement witnesses opine as to what was shown in the video. Those officers had no personal knowledge of the event recorded, and their only source of knowledge was the recording, so the jury was in an equal position to view the video and determine what it portrayed. The trial court correctly excluded the plaintiff's evidence.

10. Testify of the Intent of Another Person is Inadmissible

I was a bit surprised with how often this evidence issue arises. For some reason, attorneys expect to put their witness on the stand and testify that the opposing party intended to be evil, mean, and unlawful. It is simply not admissible. *Glenn v. Pack*, No. 02-09-00204-CV, 2011 WL 167254, at *6 (Tex. App.—Ft. Worth Jan. 13, 2011, no pet.); *citing Armstrong–Berger, Inc. v. Dickson/Wells Architects, Inc.*, No. 05–94–01225–CV, 1995 WL 464283, at *2 (Tex. App.—Dallas July 31, 1995, writ dism'd w.o.j.) (not designated for publication) (stating that a "witness cannot testify to another person's intent or motive"); *Found. Reserve Ins. Co. v. Starnes*, 479 S.W.2d 330, 334 (Tex. Civ. App.—Fort Worth 1972, no writ) (indicating a witness should neither testify to the significance or propriety of another's conduct nor be permitted to state his opinion with respect to another's intent, motive, or purpose); *Medina v. Sherrod*, 391 S.W.2d 66, 69 (Tex. Civ. App.—San Antonio 1965, no writ) (same)

11. If you Forget Something, Don't Forget Rule 270

Rule 270. Additional Testimony

When it clearly appears to be necessary to the due administration of justice, the court may

> permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

Rule 270 allows the Court to grant a mulligan when "it clearly appears" necessary to the due administration of justice. I have seen this used to present attorney fee evidence, most recently when the party seeking fees failed to segregate recoverable fees from unrecoverable fees. Reopening to admit additional evidence is discretionary with the Court, but when you rest your case and then discover that a crucial piece of evidence was omitted, it can't hurt to make the request.

The Court should consider whether (1) the moving party showed due diligence in obtaining the evidence; (2) the proffered evidence is decisive; (3) reception of such evidence will cause undue delay; and (4) granting the motion will cause injustice. *Rollins v. Texas Coll.*, 515 S.W.3d 364, 371 (Tex. App.—Tyler 2016, pet. denied). You should, if you can, show diligence in attempting to produce the evidence in a timely fashion. *Id*. To show diligence, you establish either that the evidence was previously unavailable or that the party had no opportunity to present the proof to the court before judgment. *Id.*; *see Int'l Installation, LLC v. Madera Millwork, Ltd*., No. 04-20-00343-CV, 2023 WL 1425515, at *4 (Tex. App.—San Antonio Feb. 1, 2023, no pet.) (trial court did not abuse its discretion in denying Rule 270 motion when party marked exhibit but did not admit into evidence during trial).