MASTER OF THE UNIVERSE:
THE EXPERT WITNESS IN MEDICAL MALPRACTICE CASES

PAUL N. GOLD, *Houston*
Aversano & Gold

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CHAPTER 2

PAUL N. GOLD

AVERSANO & GOLD

"CUTTING EDGE JUSTICE"™

933 Studewood, 2nd Floor

Houston, Texas 77008

(713) 746-5600

pgold@agtriallaw.com

www.cuttingedgejustice.com

Mr. Gold is a partner in the firm of Aversano & Gold, a trial law firm that concentrates in medical malpractice and catastrophic injury cases all over the State of Texas. Mr. Gold graduated from the University of Texas-Austin with high honors and obtained his law degree from Southern Methodist University. He is board certified by the Texas Board of Legal Specialization in Personal Injury Trial Law and by the National Board of Trial Advocacy. He is an Associate Member of the American Board of Trial Advocates and has received the AV Preeminent Rating by Martindale Hubbell. He is a member of the Multi-Million Dollar Advocates Forum and a Platinum Member of Elite Attorneys of America, having obtained recoveries over $2,000,000.00 in more than twenty cases. He has been voted a Super Lawyer by his peers every year since the inception of the designation in 2003 (2003 - 2018). He has been selected as a member of Best Lawyers in America for Personal Injury (2013- 2018) and for 2019 has been voted Best Personal Injury Litigation Attorney in Houston by his peers. Mr. Gold served on the Texas Supreme Court Advisory Board Subcommittee on Discovery Reform. He is a Fellow of the State Bar of Texas College of the State Bar. He has served as Chairman of the State Bar of Texas Administration of Justice Committee and as Chairman of the State Bar of Texas Litigation Section. He also was a member of the Vol. 2 (Medical Malpractice, Product Liability and Premises Liability) Pattern Jury Charge Committee from 1984 – 1988. He is a Sustaining member of The American Association for Justice and a member of the Southern Trial Lawyers Association. He is a Past President of the Dallas Trial Lawyers Association. He has served as a Director of the Houston Trial Lawyers Association (2000-2018) and was awarded Director of the Year in 2010. He is a Director and Sustaining Member of the Texas Trial Lawyers Association, which in 2009 awarded Mr. Gold the John Howie Award for Mentorship. Mr. Gold also is the 2007 recipient of the State Bar of Texas Gene Cavin Award for outstanding contributions to continuing legal education in Texas, the 2010 recipient of the Dan R. Price Award by the Texas Bar Foundation for excellence and contributions to continuing legal education in Texas, and the 2010 recipient of the College of the State Bar of Texas Jim D. Bowmer Professionalism Award. He is most proud of the fact that notwithstanding his success as a trial attorney for over 40 years, he has been married to the same incredible woman for 44 years, has two wonderful children who are well-adjusted, successful and happy, four phenomenal grandchildren and a fabulous Golden Retriever, BoBo.

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933 STUDEWOOD

HOUSTON, TEXAS 77008

WWW.CUTTINGEDGEJUSTICE.COM

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PAUL N. GOLD

Mr. Gold: Is it true, sir, that you know more about diabetes than any other doctor in the Universe.

[LONG PAUSE]

Dr.____: No, Mr. Gold, not the Universe, maybe just the World.

Mr. Gold: Thank you for that clarification.

1. INTRODUCTION:

The goal of this paper is to focus on the use and discovery of testifying experts in medical malpractice and expert witness practice following 120 days after filing suit through trial. It is intended as a primer, or overview. Since it is being presented at a seminar focused on medical malpractice practice in Texas, it is anticipated that there will be other papers specifically dealing with the requirements of a Chapter 74 expert report. Therefore, this paper will only touch on that particular topic. The paper will generally discuss ***Daubert/Robinson***, but it will not provide an exhaustive analysis of this area of the law. For a much more exhaustive analysis of ***Daubert/Robinson*** and its impact on medical malpractice litigation in Texas, the author commends Brown and Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 Hous L. Rev. 1 (2014-0215).

If, when, and how to challenge an expert witness are now critical strategic and tactical considerations, which this paper will attempt to explore. What experts must be revealed? When must be they be revealed and to what extent? What experts are exempt from discovery? What must be disclosed about a testifying expert or an expert whose mental impressions a testifying expert has reviewed? What privileged information, if any, may be revealed to a testifying expert and still retain its privileged protection from discovery? How much may a party learn about an opposing testifying expert and by what means? These are all often areas of dispute. This paper will attempt to provide insights on all these issues.

The expert witness plays an integral role in medical malpractice litigation. In fact, there probably is no other area of personal injury law or even the broader universe of civil litigation in which the expert witness plays such a crucial role. In short, medical malpractice litigation is expert-dependent. Not much meaningful happens in a medical malpractice case without good, qualified experts, whose opinions are fact based, scientifically reliable and relevant.

My interest in this topic dates to the virtually to the beginning of my practice of law, when I became involved in an epoch case that subsequently became a landmark medical malpractice case in Texas. It was 1979, when my law partner at the time, Frank Branson, asked me to assist him in ***Birchfield v. Texarkana Memorial Hospital***. The litigation spanned 13 years from the year of Kellie Birchfield's birth, 1974, in Texarkana to 1987, when the Texas Supreme Court handed down its opinion in ***Birchfield v. Texarkana Memorial Hospital***, 747 S.W.2d 361 (Tex. 1987). The opinion is still significant and relevant on many issues in medical malpractice litigation, but issues dealing with expert witnesses and expert witness testimony are most pertinent to this paper. The opinion illustrates how the use of experts and application of expert testimony has transformed in Texas over the last thirty-five years. In ***Birchfield***, one of the hotly contested issues was whether an expert witness could address an ultimate issue and what the expert could rely upon in doing so. It was a simpler time. If the attorney provided the expert the definition of negligence and proximate cause, the expert could opine simply that the defendant was negligent (or not) and that the negligence was a proximate cause (or not) of the plaintiff's alleged injuries. That was it. Further, so long as the expert testified that what the expert relied upon was customarily relied upon by experts in the field, then the underlying basis for the conclusions was essentially established. The expert also could testify that a writing in the field was "authoritative" and if that opinion was expressed, the writing could be used to support the expert's opinions or impeach the opinions of an opposing expert. Six years later, in 1993**,** the U.S. Supreme Court handed down its opinions in ***Daubert v. Merrell Dow Pharmaceuticals***, 113 S.Ct. 2786 (1993). Two years later, the Texas Supreme Court handed down its opinion in ***E.I. du Pont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549 (Tex. 1995). The use of experts in civil litigation, and particularly medical malpractice, was changed dramatically by these opinions. Much of what will be discussed

in this paper is informed by these landmark decisions.

2. INITIAL CONSIDERTATIONS

A. OVERVIEW:

When considering the role of experts in medical malpractice case, one must consider a structured analysis: 1) Is expert testimony needed and appropriate; 2) is the expert qualified to offer the testimony being offered, 3) is the opinion based on a reliable foundation 4) is the testimony factually based or conclusory; 5) is the testimony relevant or is there too large an analytical gap; and 6) is the testimony based on reasonable probability. See, Harvey Browns analysis of **eight** gates. Brown and Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 Hous L. Rev. 1 (2014-0215).

B. THE EXPERT TESTIMONY MUST ASSIST THE TRIER OF FACE

Expert testimony, first and foremost, must assist the trier of fact. Tex. R. Evid. 702 states: "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." S*ee also* ***Gammill v. Jack Williams Chevrolet***, 972 S.W.2d 713, 718 (Tex. 1988).

C. THE EXPERT MUST PROVIDE OPINIONS ON AN ISSUE OUTSIDE THE JURY'S COMMON UNDERSTANDING

Expert testimony not only has to assist the jury, the subject matter on which the expert is offering testimony must be beyond the common knowledge or wisdom of the jury. ***K-Mart v. Honeycutt*** 24 S.W.3d 357, 360 (Tex. 2000). If the opinion is common knowledge or is common sense then expert testimony presumably is unnecessary.

D. MEDICAL MALPRACTICE CLAIMS REQUIRE EXPERT TESTIMONY

What is unique about the role of expert witnesses in medical malpractices cases is the presumption that medical malpractice and causation are beyond the common knowledge of the jurors. A Plaintiff cannot make a viable claim without the assistance of an expert witness setting out the applicable standard of care, how the standard of care was violated and how the violation of the standard of care was a proximate cause of the alleged injuries and damages. More specifically, the jury cannot reach a valid determination of duty, negligence and causation without the support of credible, reliable expert testimony. ***Morrell v. Finke***, 184 S.W.3d 257, 282 (Tex. App. – Ft. Worth 2005).

> In medical malpractice cases, the general rule is that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. ***Jelinek v. Casas***, 328 S.W.3d 536, 533 (Tex. 2010) (quoting ***Guevara v. Ferrer***, 247 S.W.3d 662, 665 (Tex. 2007).

To further emphasize how expert-dependent medical malpractice litigation is consider the bystander cause of action. Texas recognizes a bystander cause of action in most circumstances in which a close family member perceives the injury by negligence to another family member. However, that is not the case with medical malpractice claims. It has been held that an individual who does not have medical expertise, cannot have a claim for perceptional emotional trauma because the individual because the individual lacks the experts to know whether the injury results from medical negligence. ***Edinburg Hospital Authority v. Trevino***, 941 S.W.2d 76, 81 (Tex. 1996).

> We believe that the better-reasoned approach is not to permit bystander recovery in medical malpractice cases. The very nature of medical treatment is often traumatic to the layperson. Even when a medical procedure proves to be beneficial to the patient, it may shock the senses of the ordinary bystander who witnesses it. A bystander may not be able to distinguish between medical treatment that helps the patient and conduct that is harmful. A physician's primary duty is to the patient, not to the patient's relatives. Guided by these policy concerns, we hold that Texas' bystander cause of action precludes bystander recovery in medical malpractice cases.

In a medical malpractice case, more often than not, the expert on liability is going to be a medical doctor, if the issue is about medical care, and always regarding causation. The jury has to have an expert provide the jury a basis for their ultimate decision. Just because an expert meets all the Daubert/Robinson criteria and is certified or recognized by the court as an expert, however, does not mean the jury have to accept the testimony as gospel. ***Hunter v. Ford Motor Co***., 305 S.W.3d 202,208 (Tex. App. – Waco 2009). So, while the jury decision must be informed by expert testimony, the jury still has the power and discretion to decide which expert testimony to believe.

> Uncontroverted expert testimony may be regarded as conclusive if the nature of the subject matter requires the factfinder to be guided *solely* by the opinion of experts and the evidence is otherwise credible and free from contradictions and inconsistency. ***Uniroyal Goodrich Tire Co. v. Martinez,*** 977 S.W.2d 328, 338 (Tex. 1998). An expert's testimony may be contradicted by the testimony of other witnesses or by cross-examination of the expert witness. ***Gober v. Wright***, 838 S.W.2d 794, 797 (Tex. App. – Houston [1st Dist.] 1992, writ denied), *abrogated on other grounds*, ***State Farm Fire & Cas. Co. v. Morua***, 979 S.W.3d 615 (Tex. 1998).

For a jury to reach a decision not based on or supported by expert testimony could likely expose a judgment for plaintiff to an appellate finding of "no evidence," resulting in reversal and rendition. The jury therefore has to believe an expert or at least the opinion of an expert has to support the jury's findings. ***Morrell v. Finke***, 184 S.W.3d 257, 282 (Tex. App. – Ft. Worth 2005).

> In a battle of competing experts, it is the sole obligation of the jury to determine the credibility of the witnesses and to weigh their testimony. *See* ***Welch v. McLean****, 191 S.W.3d 147 (Tex. App. – Ft. Worth June 2, 2005, no pet. h.)*; ***Warner v. Hurt***, 834 S.W.2d 404, 408-09 (Tex. App. – Houston [14th Dist.] 1992, no writ). It is particularly within the jury's province to weigh opinion evidence and the judgment of experts. ***Cruz v. Paso Del Norte Health Foundation,*** 44 S.W.3d 642 at 647 (Tex. App. – El Paso 2001) (citing ***Pilkington v. Kornell***, 822 S.W.2d 223, 230 (Tex. App. – Dallas 1991, writ denied)). The jury decides which expert witness to credit. *Id.*

Notably, there is precedent for the situation in which the plaintiff's expert's opinions that support the judgment have been found on appeal to be conclusory, constituting "no evidence," resulting in reversal and rendition. ***Gharda USA, Inc. v. Control Solutions, Inc.,*** 464 S.W.3d 338, 352 (Tex. 2015).

> However, our holding that the plaintiffs must have supported their causation theory with expert testimony prohibits the jury from inferring causation based on this circumstantial evidence. Because the rules of evidence bar us from considering the plaintiffs' expert testimony and a rule of law prohibited the jury from inferring causation based on circumstantial evidence alone, there is no evidence of an essential element of the plaintiffs' negligence and manufacturing defect claims.

See also ***Whirlpool Corp. v. Camacho,*** 298 S.W.3d 631, 638 (Tex. 2009).

E. THE EXPERT MUST BE QUALIFIED

The expert must be qualified as an expert in the area in which the expert is offering opinions. But does the expert actually have to practice in the field in which she is offering opinions? Maybe not. Qualification is not exclusively dependent on hands on experience. *See,* ***Tenet Hosps., Ltd. v. De La Riva,*** 351 S.W.3d 398, 406 (Tex. App. – El Paso 2011, no pet.).

> a medical expert from one specialty may be qualified to testify if he has practical knowledge of what is customarily done by practitioners of a different specialty under circumstances similar to those at issue in the suit.

See also, Roberts. v. Williamson, 111 S.W.3d 113, 120-122 (Tex. 2003) (the Texas Supreme Court found that a board-certified pediatrician was qualified to give expert testimony on a child's neurological injuries sustained shortly after birth because the pediatrician had experience and expertise regarding the specific causes and effects of the child's injuries).

On the other hand, just because the expert may be a medical doctor, does not qualify the expert to offer opinions

about every aspect of medical care or about causation. ***Broders v. Heise***, 924 S.W.2d 148, 152 (Tex. 1996). A medical degree does not make an expert's opinion on an issue even in a field in which the expert is an authority valid unless the opinion is supported by facts and the opinion is shown to be relevant to the facts in the case. ***Broders,*** 924 S.W.2d at 152.

3. STRATEGY:

As a plaintiff's attorney, I know that one of the first things I have to do when I have a medical negligence claim is locate top tier experts who can assist me in analyzing the medical records and identifying areas of potential negligence and causation, and who then can effectively teach the jury. Most importantly, the expert must be a knowledgeable and effective teacher. A good expert is a pedantic expert who is engaging.

Expense is always a consideration in litigation. This is particularly true in medical malpractice litigation in Texas since 2013, when caps were placed on various categories of damages and limits on recoveries. It is important to decide early the number of experts that are going to be needed and the amount of time and energy that is going to be required of each. What to provide to the testifying expert and when to provide it are very important tactical considerations. The litigant does not want to waste time and money providing the expert information that is irrelevant to the expert's role and opinions, but by the same token, the litigant wants to avoid the optic of the testifying expert conceding that she did not receive or consider particular data, especially if it turns out such data may have been relevant to the expert's opinions.

Sometimes it may be necessary to have one set of experts to provide the initial Chapter 74 reports, and a separate set of experts to provide testimony as experts at trial. This is a decision driven by pragmatics of the particular situation, as it may result in more expense than if only one set of experts were used throughout the case.

While the Chapter 74 report is a "threshold" type report, which does not have to marshal all the plaintiff's evidence, rule out all other potential causes of the alleged injuries, or set out all theories of liability against a particular defendant, the expert must still meet the statutory qualification requirements and the report must still meet the factual requirements of ***American Transitional Care Centers of Texas, Inc. v. Palacios,*** 46 S.W.3d 873 (Tex. 2001)**.** Another important consideration regarding the Ch. 74 report is that it cannot otherwise be used or referenced in the litigation. That is unless the Plaintiff chooses to offer the Ch. 74 report as a testifying expert report to meet its designation requirements. Then, arguably, the bases and assumptions underlying the Ch. 74 report might be exposed to discovery. It could be argued that the situation is similar to when a consulting expert subsequently is designated as a testifying expert. The question then becomes whether the communications with and work done by the expert during the period that the expert was a consulting only expert are discoverable. An argument can be made that the consulting expert exemption is waived and that the entire period of the expert's involvement in the case is open to discovery.

Oftentimes, medical malpractice litigation is described as a "battle of the experts." ***Magee v. Ultery***, 993 S.W.2d 332 (Tex. App. – Houston [14th] 1999, no pet.). Given the importance of experts in medical malpractice litigation, this is an understandable characterization. But the term is broader than merely the optic of "hand to hand" combat, one expert's opinions versus the opinions of another expert with opposing views. The more cynical concept is that "numbers win." If one expert is good, a lot of experts on the same point must be better. If Plaintiff has one expert who expresses one opinion and the defendant produces three experts with opposing opinions on the same issue, does defendant win? The specious argument is "yes, Plaintiff has not proven her case by a preponderance of the evidence. The defendant produced more expert witnesses therefor the defendant wins." Fortunately, this is not how litigation often works. It is not just the quantity of evidence, (size and quantity in this instance does matter) but also the quality, and credibility of the evidence. Also, there is the ever-present danger when having multiple experts on the same point that the experts will contradict each other. And if they don't, there is the potential for the jury to believe (rightfully) that the argument is "too orchestrated."

There is a unique tension in medical malpractice cases because of the importance of expert testimony and how expert testimony is treated by the rules of procedure and evidence. Typically, a pleading is required to provide fair notice of a claim or a defense. In a medical negligence case, a plaintiff, in addition to having to put the defendant on fair notice in the plaintiff's pleading about the plaintiff's claims of injury and legal theories, the plaintiff must provide an expert report against each defendant within 120 days of filing suit, setting out the standard of care applicable to the defendant, specifically how the standard of care was violated and how the violations of the standard of care were a proximate cause of the plaintiff's alleged injuries. Ch. 74.351 Civ Prac. & Rem. Code. Arguably, this report fleshes

out the "general factual bases" of at least some of the legal theories against the defendant. Does the plaintiff initially have to provide more information in response to a request for disclosure or other discovery request such as an interrogatory, request for production or oral deposition? I submit that the answer is one of timing.

While "contention interrogatories" are permissible under Texas practice, the question becomes whether a plaintiff should have to reveal information early in the case about legal theories and the factual bases for them when to do so clearly would implicate either consulting expert opinions, which are exempt from discovery, or testifying expert opinions that under Rule 195.1 may only be obtained through oral deposition of the expert, reports or disclosure, all of which are premature prior to designation of experts. At present, there is no clear resolution for this quandary; however, the best practice would appear to be defer the response until time of expert designation.

Defendant healthcare providers face a similar issue regarding affirmative defenses. Arguably, however, unlike most plaintiffs who are not going to qualify as medical experts, the defendant may be an expert on her own behalf. Does the defendant, if qualified as an expert, have to assert a consulting only status, or can a defendant be required to express expert opinions prior to being designated as a testifying expert? These are problematic issues without clear guidance from the courts.

A different situation arises when the plaintiff requests the defendant healthcare provider to state what the healthcare provider *at the time of the incident* thought was the standard of care that he, she, it was complying with at that the time of the incident. Factually, what did the defendant at the time of the incident believe was the standard of care applicable to the care and treatment defendant provided at the time of the incident? This is not opinion testimony. Rather it is a request for facts. Facts are never protected from discovery. Is there a dichotomy between facts and opinion and if so in this setting does it make a difference? *See,* ***Abel Supply Co. v. Moye***, 898 S.W.2d 766 (Tex. 1995).

Sometimes, a party may want to rely on the opinions and mental impressions of a treating, "non-retained" physician as an expert. This is possible, but it potentially opens a can of worms. First, is the treating physician qualified to offer opinions? Second, has the treating physician had the benefit of all the documents and testimony that the forensic experts are going to have? Third, are the treating physician's opinions and mental impressions set out fully and clearly in her records? While a non-retained expert does not have to produce a report, the expert's opinions are going to be limited to those circumscribed by the non-retained expert's records. Tex. R. Civ. P. 194.2(f)(3). If the non-retained expert offers opinions outside her clinical observations and records, then she may be considered a specially employed expert, which then could greatly expand the discovery about and from her, including requiring a report, at least regarding the opinions formulated for litigation and perhaps as to all the expert's opinions.

A party might want to simply rely on the treating physician's opinions contained in the medical records obtained through discovery in the case. It is not enough that the records meet the business records exception to the hearsay rule, the opinions of the physician must meet the ***Daubert*** criteria, just as do any testifying expert's opinions. ***Burroughs Wellcome Co. v. Crye,*** 907 S.W.2D 497,500 (Tex. 1995).

> This rule applies whether the opinion is expressed in testimony or in a medical record, as the need to avoid opinions based on speculation and conjecture is identical in both situations. *See* Wendorff, *The 1984 Texas Rules of Evidence Amendments*, 37 BAYLOR L. REV. 81, 102-03 (1985); see also, ***Hooper v. Torres***, 790 S.W.2d 757, 760 (Tex. App. – El Paso 1990, writ denied).

The important consideration is the "opinions" that are presented to the jury. It does not make any difference whether those opinions appear in print or are vocalized as testimony. The opinions must meet the ***Daubert*** criteria for reliability and relevance.[1] The party who is not prepared for this type of challenge could be seriously outflanked.

As will be discussed below, there are the risks and benefits of the defendant healthcare provider designating herself as a testifying expert. If the defendant does not designate herself as an expert, the jury is going to have serious concerns about her qualifications, and more importantly about the quality of the care she provided. If she does designate herself as a testifying expert, she arguably is open to the same scope of discovery as a retained testifying expert, or perhaps even broader. If the defendant is designated as a testifying expert and the defendant has reviewed

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[1] *See* ***Daubert v. Merrill Dow Pharmaceuticals, Inc.,*** 113 S.Ct. 2768 (1993); ***Kumho Tire Co. Ltd. v. Carmic*****hael**, 526 U.S. 137 (1999); ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, (Tex. 1995).

the mental impressions of consulting experts hired on her behalf, would the consulting expert exemption be waived, making the consultant/s involvement and work product in the case discoverable? And there is the question of whether a defendant who designates herself as a testifying expert is subject to ***Daubert.*** I have not seen anything that would exclude a defendant offering opinions from this requirement.

4. CATEGORIES OF EXPERTS

A. OVERVIEW

In formulating a successful and effective expert strategy, it is important to have a good grasp of the various categories of experts, how they may be used in the litigation and the discovery requirements and scope of discovery as to each.

Rule 192.7 defines two types of experts:

1. A *testifying expert* is an expert who may be called to testify at trial.

2. A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

While the above definitions are the only two *official* definitions, there are in fact other categories of experts. A clear understanding of the distinctions among these types of experts is important for reducing stress in this area. The definition of testifying expert should not be interpreted literally. Just because an expert may be called as a testifying expert arguably does not actually make the expert a testifying expert until he or she is "designated" as such. The Texas Supreme Court has recognized that an expert who ultimately may be designated as a testifying expert may retain the characterization and protective cloak of a consulting expert until the time it is appropriate to designate expert witnesses.[2] In this regard, the ambiguous and problematic concept of designating "as soon as practicable" arguably has been eliminated and replaced with a definite time for "designation" under Rules 194 and 195.[3] I say arguably, because at least one case decided soon after the adoption of the 1999 amendments has held that the "as soon as practicable" factor still is relevant.[4]

Notwithstanding the definition of a "consulting expert," even after designation, a "consulting only" expert can be subject to the same scope of discovery as a testifying expert if his or her mental impressions or opinions have been reviewed by a testifying expert.[5] So effectively, there is the "consulting only" or "pure consultant" and the "aiding and abetting consultant."

B. TESTIFYING EXPERTS

1) **Tex. R. Civ. P. 192.7(c)** defines testifying expert as **"**an expert who may be called to testify as an expert witness at trial."

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[2] See ***Loftin v. Martin***, 776 S.W.2d 145 (Tex. 1989).

[3] See for example, ***Mentis v. Barnard***, 870 S.W. 2d 14 (Tex. 1994)**,** interpreting "as soon as practicable requirement, prior to January 1, 1999.

[4] ***Snider v. Stanley***, 44 S.W.3d 713 (Tex. App. – Beaumont 2001, pet. denied) The Court found that the defendant did not designate his testifying expert **as soon as he was retained**, **employed, or otherwise in their control,** but that he instead waited until thirty days before trial. The Court therefore held that the defendant's expert was not disclosed reasonably promptly and upheld the expert's exclusion.

[5] See **Rule 192.3(e).**

2) It is important to know who is or might be a testifying expert for purposes of disclosure, designation, and discovery requests. Most scheduling orders require that testifying expert witnesses be designated a certain number of days before trial. The rules make clear that the following types of individuals may be considered testifying expert witnesses: parties, retained experts, specially employed experts and experts otherwise under the control of a party.[6] With regard to these types of experts, a party must comply with scheduling orders requiring designation of expert witnesses, and with Rule 194, regarding disclosure. This portion of the paper will discuss the above types of "testifying experts."

3) Tex. R. Civ. P. 192.3(e) sets out the scope of discovery for testifying experts, which will be discussed in detail in another section of this paper. The rule provides a great deal of latitude for discovery pertaining to testifying expert witnesses. The same scope of discovery pertains to consulting experts whose mental impressions or opinions are reviewed by a testifying expert. The limitation on discovery imposed by Rule 195 pertains to what discovery devices or tools may be used to obtain the discovery.

4) The disclosure requirements of Rule 194 pertain only to a "testifying expert." See Rule 194.2(f). If the testifying expert is "retained by, employed by, or otherwise subject to the control of the responding party," then the responding party must produce documents provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and the expert's current resume and bibliography. If a party intends to call as a testifying expert an individual who is *not* retained, employed by or otherwise under the party's control, these disclosure requirements do not pertain to such an individual. Instead, the disclosure requirement for such experts is satisfied by producing "documents reflecting such information." An example would be the office or clinical records of a treating physician.

I believe there is still is an open question regarding whether the disclosure requirements apply to a consulting expert whose mental impressions and opinions are reviewed by a testifying expert. The above rule specifically applies to "testifying experts." However, Rule 192.3(e) provides that the same scope of discovery that applies to a testifying expert also applies to a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. This could become an issue if a defendant doctor chose not to be a testifying expert on her own behalf, but her mental impressions or opinions were reviewed by a testifying expert which almost certainly would always occur.

5) Rule 195 deals with discovery regarding testifying expert witnesses. This rule should be read in conjunction with Rule 192. The latter defines the scope of discovery, while the former discusses more the means by which discovery may be obtained. Rule 195 provides that only the following tools may be used to obtain discovery of testifying experts: request for disclosure under Rule 194, oral depositions and requests for reports. Interestingly, Comment 1 to Rule 195 makes clear that the rule does not pertain to consulting experts whose work product has been reviewed by a testifying expert.

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

I have been unable to reconcile why the scope of discovery for a consulting expert whose work product has been reviewed is the same as that for a testifying expert, but the limitations on discovery methods are not similarly applicable. *See* ***In re TIG Insurance Company***, 172 S.W.3d 160 (Tex. App.—Beaumont 2005, no pet.) which holds that Rule 195.1 limitations do not apply to consulting plus experts (consultants whose mental impressions or work product have been reviewed by a testifying expert).

C. RETAINED EXPERTS

[6]See **Rule 195.3**

1) Retained experts is not a term defined in the Texas Rules of Civil Procedure. As one appellate court has noted, the term is interpreted broadly. ***In the Interest of M.H.S.H. and G.H. Children***, 319 S.W.3d 137, 145 (Tex. App. – Waco 2010).

> Our research has not disclosed a rule, statute or case explicitly defining who a "retained expert" is. But the Rules of Civil Procedure appear to view the term rather broadly because the rules treat similarly any expert "retained by, employed by, or otherwise subject to the control of [a party]." *See* TEX. R. CIV. P. 194(2)(f), 195.3, 195.6.

It is fair to infer that any expert that the Court finds to be under the express or implied control of a party in any regard, may be considered "retained." This will be further illustrated in consideration of the "specially employed" expert below.

2) For a retained expert Rule 194.2(f)(3) requires the expert to disclose "the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them."

3) The definition of "retained" is important because of Rule 195.7 dealing with **Cost of Expert Witnesses**. This rule states that when a party takes the oral deposition of an expert witness *retained* by the opposing party, all reasonable expenses of the expert must be paid by the party that retained the expert. I have heard anecdotal reports of defense attorneys noticing the plaintiff's treating physicians and then trying to obtain a court order requiring the plaintiff to pay all the physicians reasonable charges. This is not what was contemplated by the rules committee or the rules. Simply because a plaintiff retains the services of a physician as a care provider does not automatically mean that the plaintiff, as a party to the litigation, has retained the services of the physician as an expert witness. Similarly, simply because there is a patient/physician relationship between the plaintiff and his treating physician does not mean that for purposes of deposing the physician that he is considered "under the control" of the plaintiff. Absent further direction from the Texas Supreme Court or the appellate courts, I believe that "retained" in this context means that separate and apart from fees paid for care and treatment, the party and/or his attorney or representative has paid (or promised some form of remuneration to) the care provider to participate in the litigation as an expert witness. Otherwise, the physician should be treated as a non-retained expert, not under the control of any party. In this regard, if the non-retained expert is to be treated as an expert witness and not as a fact witness, the party noticing the deposition of the non-retained expert should be responsible for paying any reasonable fees and expenses submitted by the witness. Rule 191.1 permits a trial court for good cause to modify the allocation of fees and expenses.

D. CONSULTING EXPERTS

1) **Tex. R. Civ. P. 192.7(d)** defines consulting expert as follows: **"**an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert."

2) Consulting only experts are exempt from discovery. Tex. R. Civ. P. 192.3(e). Neither the consultant's identity or mental impressions are discoverable. Consultants serve a valuable purpose. They afford the litigant candid information that allows the litigant to make informed decisions about strategy.

3) The consulting expert designation cannot protect facts. ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990). See also, Tex. R. Civ. P. 192.3 (c) (experts as individuals with knowledge of facts if knowledge is first hand). *See also* ***In re Energy Transfer Partners, LP***, 2009 WL 1028056, fn. 3 (Tex. App. – Tyler 2009):

> Because the consulting expert privilege does not protect the firsthand knowledge of relevant facts Jones acquired when he conducted the sound tests, the trial court properly held that the raw data from the sound tests is discoverable. *See* TEX. R. CIV. P. 192.3(e).

4) However, notwithstanding that facts known by a consulting expert cannot be protected from discovery, the consultant's knowledge of facts cannot be leveraged to obtain information otherwise protected by privilege. ***In re Culp***, Not Reported in S.W.3d, 2010 WL 3259990 at *2 (Tex. App. Beaumont 2010)

5) "Information that may be discovered from a fact witness does not, however, include information about an opponent's litigation strategies, attorney work product, or other information exempted from discovery by the attorney-client privilege." ***In re Bell Helicopter Textron, Inc***. 87 S.W.3d 139, 150 (Tex. App. – Fort Worth 2002, orig. proceeding).

6) A physician who has provided treatment cannot be protected from discovery under the consulting expert exemption. ***Teran v. Longoria***, 703 S.W.2d 300, 301 (Tex. App. – Corpus Christi, 1985).

7) The consulting expert exemption from discovery can be waived. A consulting expert who provides an affidavit in support of a motion has been held to lose the consulting expert exemption from discovery with regard to the opinions expressed in the affidavit. ***In re Mendez,*** 234 S.W.3d 105, 111 (Tex. App.-El Paso 2007). It is important to emphasize that the Court limited the waiver, however, only to the opinions expressed in the affidavit. The consultant's opinions regarding other matters not expressed in the affidavit could retain their exemption from discovery.

> On these facts, we are compelled to find waiver of the privilege with respect to those matters stated in the affidavit. Our opinion should not be read as holding that Mendez waived the consulting expert privilege with respect to other opinions and mental impressions held by Dr. Doone which are not stated in the affidavit.

8) Further, as discussed below, if a consulting expert's mental impressions are reviewed by a testifying expert, then the discovery exemption is lost, and the consulting expert becomes discoverable similar to a testifying expert.

E. CONSULTING PLUS EXPERTS

1) **"**Consulting plus" expert is not a term you will find in the Texas Rules of Civil Procedure. It is a concept created by circumstances rather than by declaration. A consulting plus expert is a consulting expert whose mental impressions are reviewed by a testifying expert. Tex. R. Civ. P. 192.3(e).

> The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.

If the consulting expert's mental impressions are reviewed, (they don't have to be relied upon) then the identity and mental impressions of the consulting expert become discoverable the same as for a testifying expert. Tex. R. Civ. P. 192.3(e):

> A party may discover the following information regarding a testifying expert *or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert*. . . [emphasis added]

2) It is very important to note that a testifying expert does not have to "rely" on the opinions, impressions or report of a consulting expert for the consulting expert exemption from discovery to be waived. A testifying expert merely having "reviewed" the consulting expert's opinions is enough to waive the exemption. ***In re Robins & Morton Group***, Not Reported in S.W.3d, 2016 WL 2584526 at *4 (Tex. App. – San Antonio 2016)

> Despite real parties' repeated assertion that none of the experts ***relied upon*** Nardella's opinions in reaching their own, the rule clearly permits discovery with respect to a consulting expert whose opinions have been ***reviewed by*** others who may testify at trial. TEX. R. CIV. P. 192.3(e).
>
> Because the mandamus record reflects that Nardella's report and opinions were reviewed by other testifying experts in this suit, we conclude relators are entitled to further discovery regarding Nardella under rule 192.3(e), and the trial court's order thus constitutes an abuse of discretion. *See* ***Martin v. Boles***, 843 S.W.2d 90,92 (Tex. App. 1992, orig. proceeding) (granting mandamus to allow deposition of defense consulting expert where expert's opinions about the case were reviewed by plaintiffs testifying expert).

3) It is worth noting that in ***Robins*** the appellate court rejected the relator's argument that federal case law should inform the court's determination because of the difference between the federal rule and the Texas Rule. The federal rule allows for the discovery of a consulting only expert's opinions upon a demonstration of exceptional circumstances. ***Robins v. Morton Group***, supra at *3. *See also*, FED. R. CIV. P. 26(b)(4)(D).

4) A question that I not believe has been discussed in a reported case is whether a consulting expert who becomes a consulting plus expert may testify at trial. An argument can be made that if the consulting plus expert is not properly and timely designated as a testifying expert, even though the expert is identified and discovery about the expert is allowed, the expert should not be allowed to testify, at least for the party who retained the expert in the first instance.

F. IN-HOUSE EXPERTS

1) Under Rule 194.1(f)(4), an in-house expert who is going to be a testifying expert presumably would be a testifying expert who is "employed by, or otherwise subject to the control of the responding party." Therefore, in addition to the information required of all testifying witnesses, the party would also have to produce for this expert all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony and the expert's current resume and bibliography. This could arise when a healthcare association, facility or institution has an in-house expert.

2) ***Barker v. Dunham***, 551 S.W.2d 41, (Tex. 1977), involved the question of whether an officer and regular employee of a party defendant should be treated as an expert witness. The Texas Supreme Court held that the rules do not draw a distinction between an expert who is a regular employee and one who is temporarily specially employed to aid in the preparation of a claim or defense***.*** ***Barker v. Dunham***, 552 at 43; S*ee also* ***Jones & Laughlin Steel, Inc. v. Schattman***, 667 S.W.2d 352 (Tex. App.–Fort Worth 1984, orig. proceeding). This holding is essentially carried over and codified in the 1999 amendments to the Texas discovery rules.

3) There are similar tensions that exist with regard to the in-house expert as with respect to the party expert. As with the party expert witness, the facts known by the "in-house expert" cannot be shielded from discovery. Rule 192.3(e)(3) provides that a party may discover from a testifying expert the facts known by the expert that relate to or form the basis or the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, *regardless of when and how the factual information was acquired*. Therefore, a party cannot shield facts known by an in-house expert by claiming she is a consultant. ***Giffin v. Smith,*** 688 S.W.2d 112 (Tex. 1985) (per curiam); S*ee also* ***Dallas v. Marion Power Shovel Co.***, 126 F.R.D. 539 (1989); ***Lapenna v. Upjohn Co.***, 110 F.R.D. 15, 20 (1986), and Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.R. 895, 942.

G. NON-RETAINED - PERCIPIENT EXPERTS

1) The non-retained expert is an individual such as a treating health care professional who is qualified to offer scientifically reliable expert opinions, or opinions based upon extensive experience, but who is not "otherwise under the control" of any party. As stated above, with regard to this type of expert Rule 194 provides the requirement to disclose their identity, the subject matter of their testimony, their impressions and opinions and a brief summary of the basis for them may be satisfied by producing "documents reflecting such information." Rule 194 does not address depositions of non-retained experts and the comments to Rule 195 specifically state that the rule does not pertain to non-retained experts.

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

2) The issue that remains to be sorted out in this regard is whether a party has a duty to disclose the non-retained expert's opinions and impressions of which he is aware, but which are not in the individual's documents (i.e. notes and/or reports). For instance, what happens if a party designates a non-retained expert on subject matters that are not reflected in the records that are disclosed for that expert (i.e. a treating physician is designated on

the subject of causation, but no information is provided about the substance of the opinions and nothing is contained in the treating physician's records regarding causation). Presumably, subject to comment 1 to Rule 195,[7] an opposing party might be able to move under Rule 195.5 to have the opinions of the non-retained expert that are not "reflected" in the expert's records reduced to tangible form:

> **195.5 Court-Ordered Reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

3) While the prudent practice is to designate non-retained care providers, whose impressions and diagnoses appear in the medical records, there is case law holding that such impressions and diagnoses are factual and that since the care provider is not being "called" physically to testify at trial, the physician does not need to be designated as a predicate to allowing the opinions in the medical records to be admissible. In ***National Standard Ins. Co. v. Gayton***, 773 S.W.2d 75 (Tex. App.--Amarillo 1989, no writ), it was held that a party was not precluded from using the opinions of physicians contained in medical records admitted into evidence pursuant to TEX. R. CIV. EVID. 902(10), *even though the physicians had not been seasonally designated as testifying experts*, because the physicians were not "called" as witnesses at trial. TEX. R. CIV. P. 166b(6)(b). The court restrictively interpreted "called" as contemplating only live testimony. ***Gayton***, creates a trap for the unwary. It is arguably technically correct, but in practice it appears to be restrictive and counterproductive. However, it has yet to be overruled or criticized by another court. *See* David W. Holman et al., *Entering The Thicket? Mandamus Review of Texas District Court Witness Disclosure Orders*, 23 ST. MARY'S L.J. 365, 375 n.36 (1991).

4) Another issue that will no doubt arise concerns is whether and/or when a non-retained expert ceases to be non-retained. In other words, if a non-retained expert agrees to offer opinions that aid a particular party, although such opinions are not part of the individual's notes or records generated in the ordinary course of his practice or business, should the witness still be considered as not under the control of any party? Is "retained" solely a function of the exchange of money?

5) Rule 195.6 provides that when a party takes the oral deposition of an expert witness "retained" by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert. This rule only pertains to "retained" experts, and presumably does not pertain to parties, specially employed experts, or experts otherwise under the control of a party.

H. THE SPECIALLY EMPLOYED EXPERT:

While attorneys are supposed to be zealous advocates, sometimes pushing the envelope can result in unintended adverse consequences. A non-retained expert does not have to prepare and produce a report so long as the non-retained expert is offering opinions that were formed in connection with the treatment she provided, and the opinions are set out in the non-retained expert's clinical records. However, the status of the non-retained expert can change if the attorney attempts to extract opinions from the non-retained expert that are not contained in the expert's clinical records or that were formed not during treatment but in connection with litigation. If the non-retained expert crosses this line, then the non-retained expert can become a "specially employed" expert. The discovery requirements for a specially employed expert are virtually the same as for a testifying expert. This means that if the non-retained expert attempts to offer opinions beyond the opinions formulated during clinical treatment and contained in the non-retained expert's records, she can become a specially employed expert who is required to produce a report and if the report is not produced, the expert's opinions are vulnerable to being stricken. A very informative opinion on this matter, notwithstanding it is a federal case, is ***Spears v. United States***, 2014 WL 258766, Not Reported in F. Supp. 3d (W.D. Tex. San Antonio Div. 2014). The defendant argued that a treating physician could not be a testifying expert, only a fact witness. The Court found that a treating physician could qualify as a testifying expert, but the treater then would become a specially employed expert requiring that the expert produce a report, which the treater would not have to have prepared if the treater only testified to the observations set forth in the treater's records.

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[7] The comment says that the deposition rules do not apply to non-retained experts, but it leaves open whether the report requirement similarly does not apply.

> It is well-settled that treating physicians can provide expert opinions aside from opinions related to their treatment as long as they comply with the written-report requirement of Federal Rule of Civil Procedure 26(a)(2)(B). *See, e.g.*, ***Meyers v. Nat'l R.R. Passenger Corp.***, 619 F.3d 729, 734-35 (7th Cir. 2010) (holding that a treating physician *who has offered to provide expert testimony* as to the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment, is required to submit an expert report under Rule 26(a)(2)); ***Kim v. Time Ins. Co.***, 267 F.R.D. 499, 502 (N.D. Tex. 2008) ("[W]here a treating physician has prepared his opinions in anticipation of litigation or relies on sources other than those utilized in treatment, courts have found that the treating physician acts more like a retained expert and must comply with [the report requirement of] Rule 26(a)(2)(B)."); ***Lowery v. Spa Crafters, Inc.,*** No. Civ. A. SA03CA0073-XR, 2004 WL 1824380, at *2 (W.D. Tex. Aug. 16, 2004) ("[W]hen a physician's proposed opinion testimony extends beyond that care of treatment, and the physician's specific opinion testimony is developed in anticipation of trial, the treating physician becomes an expert from whom an expert report [under Rule 26(a)(2)(B)] is required."); ***Martin v. Geico Gen. Ins. Co***., Civil Action No. 3-01CV0572-BC, 2002 WL 34370891, at *1 (N.D. Tex. Apr. 15, 2002) (holding that where proffered expert testimony extended beyond scope of doctors' "personal knowledge as treating physicians," doctors must fully comply with Rule 26(a)(2))).

The additional question is whether once the non-retained expert is deemed to be a specially employed expert full disclosure, including a report, of all the expert's opinions must be produced or just full disclosure, including a report, for the opinions that are not set out the expert's clinical records. I have not found a case directly on point and can see both sides of the argument having merit. Another interesting holding in ***Spears*** is that "retained" is not determined by whether a treater accepts money or volunteers. The focus is on whether the treater has gone beyond her clinical impressions and formulated opinions in anticipation or in aid of litigation. ***Spears,*** *supra* at *8.

I. THE DUAL CAPACITY EXPERT

1) In ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990), the Texas Supreme Court distinguished two types of experts: (1) the specially employed in-house expert whose experience has been in the area giving rise to the complaint; and (2) the specially employed in-house consultant whose area of experience is unrelated to the matters giving rise to the lawsuit. In the first instance, the Court held that an active participant in the events or activities material to the subject matter of the lawsuit *may never be a "consulting only expert*," and therefore his opinions and factual knowledge are both subject to discovery. In the latter instance, the employee whose area of experience is unrelated to the activities giving rise to the lawsuit may serve as a "consulting only expert," but even then, the facts of which he has knowledge are discoverable. ***Facts are never protected***, whether they are known by a testifying or consulting only expert. ***Griffin v. Smith***, 688 S.W.2d 112 (Tex. 1985); ***In re American Home Products,*** 985 S.W.2d 68, 74 (Tex. 1997).

2) ***In re Bell Helicopter Textron,*** 87 S.W.3d 139 (Tex. App. – Fort Worth 2002, orig. proceeding) dealt with a motion to disqualify plaintiff's lawyers because they had retained as a consulting expert an ex-employee of Bell Helicopter who had been involved in the company's litigation decision-making. Plaintiffs claimed that the individual previously had been designated as a testifying expert on behalf of Bell and any privilege that Bell might have had was waived. The court found that this argument would only be true if the consultant had been designated as a testifying expert with regard to the model helicopter involved in the pending litigation. There was no evidence that the individual previously had been designated as a testifying expert with regard to the model helicopter in issue and therefore there was no waiver. The court held that law firm had to be disqualified because there was no way to wall off knowledge that the consultant might have had based on confidential communications while working for Bell. Noteworthy for this discussion is the court's holding that even though the consultant could not testify as a testifying expert, the witness could offer testimony as a fact witness about facts that were gained first hand that were not protected by the attorney client privilege:

> Accordingly, while factual information about the model 412 aircraft that Vale knows first-hand because of her employment with Bell may be discoverable because she has been or should be designated as a fact witness, Vale's knowledge about Bell's litigation strategies, attorney work product, and privileged communications is not discoverable based on her fact-witness status.

In re Bell Helicopter Textron, 87 S.W.3d supra at 151.

3) ***In re Energy Transfer Partners, L.P.*** Not Reported in S.W.3d, 2009 WL 1028056 (Tex. App.-Tyler 2009) involved a compressor station built by Energy. Some neighbors complained about the noise. Energy responded that it would investigate the complaint. Upon receiving a promise from Energy that the "results" of the testing would be shared with them; the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbor's property. The testing was conducted, but the results were never shared. A group of neighbors filed suit against Energy and sent a request for production that sought "reports relating to sound at or around the subject pump station." Defendant agreed to produce non-privileged documents responding to the request. The production did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant's conclusions therefore were protected. The trial court found that the "raw data" was discoverable but not the consultant's opinions that were formulated in anticipation of litigation.

The appellate decision centers first on whether the consultant was a consulting expert. The court conducts a ***National Tank Co. v. Brotherton*** analysis and finds that in examining the "totality of the circumstances", [8]Energy proved that it anticipated litigation when it hired the consultant and that the consultant's work was done in anticipation of litigation (even if there were other ostensible purposes for the report). Energy conceded that the consultant was a "dual capacity witness," one who possessed both expert opinions and knowledge of relevant facts. ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d 550, 555 (Tex. 1990). Interestingly, the appellate court uses this concession to overrule plaintiffs' argument that Energy had waived the consulting expert exemption by identifying the consulting expert.

The opinion next focuses on the implied finding that Energy had waived the consulting expert privilege by "agreement/consent" in that Energy had agreed to share the "results" of the testing. The appellate court concludes that there was no agreement to share the specific sound test or the consultant's conclusions drawn from the test.

> Moreover, Energy Transfer's promises to provide "what we find" and that "the results" of the sound tests are not sufficiently definite to encompass the privileged report and information.

There is one argument that does not appear to be raised or considered by the appellate court. In ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d supra at 555 (which is cited by the appellate court as authority for the "dual capacity" rule, see above) the Texas Supreme Court upheld a trial court finding that individuals designated as consultants could not be deposed about their conclusions; however, they could as fact witnesses, be deposed about the facts they possessed.

> Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition to the condition of Axelson's relief valve. The trial judge limited the scope of discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. In ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d supra at 555.

Similarly, in this instance, one could ask why in Energy the trial court was found to have abused its discretion in allowing discovery of the "raw data" which arguably would be considered the core "factual" data compiled by the consultant. It is not easy to reconcile this holding with the holding in ***Axelson.***

J. PARTIES AS EXPERTS

1) A party, especially a health care professional in a medical malpractice lawsuit, may be an expert witness on the party's own behalf. ***Rodriguez v. Pacificare of Tex., Inc.,*** 980 F.2d 1014 (5th Cir. 1993) (citing as an e.g. ***Milkie v. Metni***, 658 S.W.2d 678 (Tex. App.--Dallas 1983, no writ)). In such an instance, at least one court has recognized that the party should be treated the same as a retained expert. (See ***Tinkle v. Henderson,*** 777 S.W.2d 537, 539 (Tex. App.–Tyler 1989, writ denied).)

[8] 851 S.W.2d 193 (Tex. 1993)

> Appellees also failed to properly identify either of the defendants, Dr. B.W. Henderson or Dr. A.W. Jorgenson, as expert witnesses. We are aware of no exception for parties to the general rule of exclusion of the testimony of unnamed experts. Therefore, this testimony, in the absence of a showing and a finding by the trial court, also should have been automatically excluded until such time as the trial court found that good cause existed for its admission. We conclude that the improper admission of the expert testimony was an error of such a nature as would reasonably cause, and probably did cause, rendition of an improper verdict.

If the above holding in ***Tinkle v. Henderson*** is correct (and there has been no opinion in the nearly twenty years since it was handed down holding that it is not) what are its consequences? Should the designation period be different for a party expert, should the designation requirements be different, should the defendant have to produce a report for any of the defendant's mental impressions or opinions, if a report requirement is applied should it be limited; what should be the effect on the deposition schedule of designating a defendant as an expert; should the defendant be deposed in a bifurcated manner as a fact witness and then as an expert; should the opposing party be denied the benefit of full disclosure of the defendant's opinions before being forced to take the defendant's deposition; should the scope of discovery from a defendant designated as a testifying expert be modified to protect work product and communications otherwise protected by the attorney client privilege or should it be accorded a special category of testifying expert, with certain limitations.

2) See also, Gold, *"Questioning God": Issues and Tactics When A Party is Designated as a Testifying Expert*. (State Bar of Texas, Advanced Medical Malpractice Seminar, 2010)

K. REBUTTAL EXPERTS

In general, rebuttal witnesses, whose use reasonably could have been anticipated, are not exempt from the scope of the discovery rules. ***Moore v. Mem'l Hermann Hosp. Sys., Inc.*** 140 S.W.3d 870, 875 (Tex. App. – Houston [14th Dist.] 2004, no pet.); ***Am Bank of Waco v. Waco Airmotive, Inc***., 818 S.W.2d 163, 177 (Tex. App. – Waco, writ denied); ***Walsh v. Mullane***, 725 S.W.3d 263, 264-65 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e).

L. ADVERSE MEDICAL/PSYCHOLOGICAL EXAMINERS

A party whose medical/psychological condition is put into issue may be subject to having a medical/psychological examination conducted under Tex. R. Civ. P. 204. The examining physician or psychologist may be selected by the opposing party or by the Court. Just because a party obtains an adverse examination does not make the examiner automatically a testifying expert. The examining physician/psychologist may be used as a consulting only expert or as a testifying expert. If a party intends to use the examiner as a testifying expert, the examiner still has to be timely and properly designated. However, the same rules apply to examining physicians as do other testifying and consulting experts, depending on whether they are to be testifying experts or consulting only experts.

5. CHAPTER 74 REPORTS

A. OVERVIEW:

1) Since 2003, Texas has required that plaintiff meet a threshold requirement to demonstrate that the plaintiff's claim is meritorious and not frivolous. This has been a very contentious and controversial requirement, resulting in numerous hearings and interlocutory appeals. After fifteen years, the bench and bar appear to have refined and clarified the stature's requirements to the point that it "seems" the controversy and contentiousness have abated somewhat; however, this is still a very active area of dispute. It remains the first battle in most medical malpractice cases.

2) Chapter 74.351 Tex. Prac. Rem. Code requires that for each defendant the plaintiff must within 120 days of the defendant filing an answer to the against such defendant serve an expert report setting out the standard of care applicable to that defendant's care relevant to the incident in question, factually how the defendant violated the standard of care and factually how the violations were a proximate cause of the plaintiff's alleged injuries. Only limited discovery is allowed until and unless such a report is served. The report must be a good faith effort. It does not have to marshal all the plaintiff's evidence, it does not have to rule out all other potential causes of the injuries and it does

not have to set out all potential theories of liability against the defendant. It need only meet the basic, threshold requirements, but it must do so factually. The experts must be qualified to offer the opinions they provide, in compliance with the statutory requirements for qualification relevant to providing opinions on standard of care and causation. The defendant has twenty-one days to challenge the report. The challenge typically is to the qualifications of the expert, whether the report is improperly conclusory and the factual underpinning of the expert's opinions. Since the report is being served before any meaningful discovery is done, the report is not subject to a Daubert standard. If the plaintiff's first report is found to be deficient, but a good faith effort, the plaintiff is entitled to an additional thirty days to amend and correct the deficiencies. The plaintiff may rely upon multiple experts to meet the stature's requirements. Ch. 74.351(j) Tex. Civ. Prac. Rem. Code. The report may not be referred to by any party during the course of the action for any purpose, and is not admissible at trial.

3) **LIMITATION ON USE OF CH. 74 REPORTS**

a) **Tex. Civ. Prac. & Rem. Code § 74.351(k) and (t) limit the use of Ch. 74 reports:**

(k) Subject to Subsection (t), an expert report served under this section:
(1) is not admissible in evidence by any party;
(2) shall not be used in a deposition, trial, or other proceeding; and
(3) shall not be referred to by any party during the course of the action for any purpose.

* * *

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

b) There is little caselaw on this provision, but one case is informative. ***In re Alere Women's & Children's Health, LLC***., 357 S.W.3d 809 (Tex. App. – Houston [14th Dist.] 2011). In this case, all of the defendant's experts reviewed the Plaintiff's expert's Ch. 74 report. Plaintiff sought to strike all of these experts for violating § 74.351(k) and (t). The practical problem was that while the defendant's experts had reviewed the preliminary report, none of them had referred to it. Plaintiff was concerned that one or more of these experts however would refer to the report at trial. An agreement was reached that no substantive reference to the report's contents would be made. Given this agreement, the Court found no basis for sanctions, especially death penalty sanctions.

B. EXPERT QUALIFICATIONS

1) The qualification of a witness as an expert is within the trial court's discretion. ***E.I. du Pont de Nemours and Co. v. Robinson***, 923 S.W.2d 549 (Tex. 1995). It is the burden of the party offering the expert testimony to demonstrate that it will assist the jury on the topic on which it is being offered. ***Broders v. Heise,*** 924 S.W.2d 148, 152-3 (Tex. 1995)

> After all, the proponent of the testimony has the burden to show that the expert "possess[es] special knowledge as to the very matter on which he proposes to give an opinion." [citations omitted]

2) The statute requires that physician be "practicing medicine." This is a determination for the court based upon evidence. ***Benge v. Williams***, 548 S.W.3d 466, fn. 12 (Tex. 2018) (*See* TEX. CIV. PRAC. & REM. CODE §74.401(b) (defining "practicing medicine" to "include[ ] ... training residents or students" and "serving as a consulting physician to other physicians"). Merely having the expert testify that he/she is "practicing medicine" is insufficient. ***Benge****, supra* at 471-472

> In giving that testimony, Dr. Patsner was not asked whether he was "practicing medicine" as defined by the TMLA. Even if he had been asked that question, the application of the statutory definition is a legal issue for the court, not a witness. An expert under the TMLA need not be engaged in patient care.

3) Many of the disputes arising from the Ch. 74 report requirement stem from the expert qualification requirement. The first challenge is usually that the expert is not qualified to assert opinions about the

standard of care applicable to a particular field of practice or that the expert is not qualified to offer an opinion on causation. The disputes are very reminiscent of the "same school" and "locality rule" common law arguments that pervaded medical malpractice litigation in the 50's 60's and most of the 70's. These common law arguments have now been judicially rejected. See, ***Porter v. Puryear,*** 262 S.W.2d 933, 939 (Tex. 1953) (same school); ***Peterson v. Shields***, 652 S.W.2d 929, 931 (Tex. 1983) (locality rule).

4) Ch. 74.351(r) defines **expert** as follows:

5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401 (see below);

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402 (see below);

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, ***a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence***; [emphasis added]

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

5) **Section 74.401: Qualifications of Expert Witness in Suit Against Physician:**

(a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care **only if the person is a physician who:**

(1) **is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;**

(2) **has knowledge of accepted standards of medical care** for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; **and**

(3) **is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.**

(b) For the purpose of this section, "practicing medicine" or "medical practice" includes, but is not limited to, **training residents or students at an accredited school of medicine or osteopathy** or **serving as a consulting physician**

to other physicians who provide direct patient care, upon the request of such other physicians.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is board certified or **has other substantial training or experience in an area of medical practice relevant to the claim**; and

(2) is **actively practicing medicine** in rendering medical care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the physician departed from accepted standards of medical care, **but may depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony**. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. **This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.**

(f) This section does not prevent a physician who is a defendant from qualifying as an expert.

(g) In this subchapter, “physician” means a person who is:

(1) licensed to practice medicine in one or more states in the United States; or

(2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association only if testifying as a defendant and that testimony relates to that defendant's standard of care, the alleged departure from that standard of care, or the causal relationship between the alleged departure from that standard of care and the injury, harm, or damages claimed.

6) **Ch.74.402: Qualification of Expert Witness in Suit Against Health Care Provider**

(a) For purposes of this section, “practicing health care” includes:

(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or

(2) **serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.**

(b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:

(1) **is practicing health care** in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;

(2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

(2) is actively practicing health care in rendering health care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the defendant health care provider departed from accepted standards of health care but may depart from those criteria if, under the circumstances, the court determines that there is good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) This section does not prevent a health care provider who is a defendant, or an employee of the defendant health care provider, from qualifying as an expert.

(f) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

7) **Causation:**

a) **74.403: Qualifications of Expert Witness on Causation in Health Care Liability Claim**

(a) Except as provided by Subsections (b) and (c), in a suit involving a health care liability claim against a physician or health care provider, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed **only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.**

(b) In a suit involving a health care liability claim against a dentist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a dentist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(c) In a suit involving a health care liability claim against a podiatrist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a podiatrist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(d) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

b) Under Chapter 74, only physicians can render opinions on causation. *See,* ***Columbia Valley Healthcare System, L.P. v. Zamarripa,*** 526 S.W. 3d 453 at 461 n. 33 (Tex. 2017) (citing Tex. Civ. Prac. & Rem Code Ann §74.351(r)(5)(C).

8) **Tex. R. Evid. 702: Testimony by Expert Witness**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

9) One of the seminal cases dealing with qualifications of an expert to offer opinions is ***Broders v. Heise,*** 924 S.W.2d 148 (Tex. 1995). The opinion is very straight forward, but it is amazing how often it is misinterpreted or misconstrued. Simply put, just because someone has M.D. after his/her name does not make that individual an expert on all facets of medicine. Medicine is a highly technical, specialized profession. To be able to provide guidance to a jury on a particular area of medicine (standard of care or causation) an expert must demonstrate that expert's knowledge through training, education or experience in or about that area. In Broder's the expert on emergency care simply failed to demonstrate that he had knowledge in the area of causation to assist the jury with informed, non-speculative testimony. The case does not, as often wrongly argued, stand for the proposition that an emergency room physician can never render opinions on neurology or causation. To the contrary, the Court notes

numerous examples of physicians in one specialty or school being qualified through experience, education, or training to give reliable expert testimony in field or practice outside the expert's specialty.

> Our holding does not mean that only a neurosurgeon can testify about the cause in fact of death from an injury to the brain, or even that an emergency room physician could never so testify. What is required is that the offering party establish that the expert has "knowledge, skill, experience, training, or education" regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.

C. EXPERT OPINIONS: REPORT REQUIREMENTS and BASES:

1) What litigants often lose sight of is that the report requirement is not supposed to be a high bar, but actually a low bar. The reports are merely to demonstrate that the claim has merit, not that it will prevail at trial. One or more experts are being asked to provide opinions about standard of care and causation with limited facts. Often all that is available are the medical records, as only limited discovery is allowed before the report deadline. For this reason, courts do not impose a ***Daubert*** standard or a summary judgment standard. ***Tenet Hospitals, Ltd v. Garcia***, 462 S.W.3d 299, 306-308 (Tex. App. – El Paso 2015):

> But we think it premature at this early stage of a case to impose all of the additional requirements in Rules 702 and 703 concerning relevance and reliability. We take the language in Section 74.351 (r)(5)(C) at face value that the reference to the Texas Rules of Evidence pertains to qualifications, and not to the opinion itself. Otherwise, every report challenge would turn into a mini-***Daubert-Robinson*** hearing. Because the Texas Supreme Court has limited the preliminary expert report inquiry to the four corners of the report itself, it is inappropriate at this early stage to attempt to apply ***Robinson*** and its progeny to the process. [footnotes deleted]

2) The question is not whether the expert has set out the proper standard of care, but only that the expert has set out a standard of care that is factually based and an expert gives a factually based explanation about how in reasonable probability the failure to comply with the stated standard care was a proximate cause of the alleged injuries. the expert must explain the basis of the opinion so as to link the conclusion to the facts of the case. ***Bowie Memorial Hosp. v. Wright***, 79 S.W. 3d 48, 52 (Tex. 2002). *See also,* ***Peabody and St. Luke's Lakeside Hospital, L.L.C,*** --- S.W.3d ---, 2018 WL 6836864(Tex. App. – Houston [14th Dist.] 2018)

3) No matter how qualified, an expert's opinions must be factually based. A report based upon conclusory opinions will be found inadequate. ***Senior Care Centers, LLC v. Shelton and Taylor***, 450 S.W.3d 753, 759-60 (Tex. App. – Dallas 2015).

> An expert's conclusion not accompanied by a rational explanation demonstrating why the other possibilities are inferior to the expert's chosen conclusion is a conclusory opinion based solely on the ipse dixit of a credentialed witness.

4) The expert cannot simply speculate or stack inference upon inference. ***Cooper***, ***M.D. v. Arizpe***, 2008 WL 940490 at *3 (Tex. App. – San Antonio 2008)

> Liability in a medical malpractice suit cannot be made to turn upon speculation or conjecture. ***Hutchinson v. Montemayor***, 144 S.W.3d 614, 61 (Tex. App. – San Antonio 2004, no pet.). In ***Murphy v. Mendoza***, 234 S.W.3d 23, 28 (Tex. App. – El Paso, no pet.), the appellate court held that an opinion was speculative and conclusory where the expert's opinion was not supported by the facts because the expert relied upon an assumption. Similarly, in this case, Dr. Varon's report relies on the assumption that the ED Chart and Dr. Skeete's notes were with the floor chart.

5) An expert report "need not anticipate or rebut all possible defensive theories that may ultimately be presented." ***Owens v. Handyside***, 478 S.W.3d 172, 187 (Tex. App. – Houston [1st Dist.] 2015, pet. denied).. Nor must the report "rule out every possible cause of the injury, harm, or damages claimed." ***Baylor Med. Ctr. at Waxahachie, Baylor Health Care Sys. V. Wallace***, 278 S.W.3d 552, 562 (Tex. App. – Dallas 2009, no pet.).

But while an expert report does not have to eliminate all other potential causes, if there are multiple inferences that may be drawn from the facts, the expert must at a minimum explain why the expert's inferences are more probable than the other inferences.

> When facts support equal inferences from which different conclusions could be drawn regarding whether or not a health care provider's act or omission fell below an identified standard of care, it is incumbent on the expert to explain to a reasonable degree of medical probability how the expert eliminated the possibilities not chosen and derived his conclusion that the health care provider was negligent. ***Jelinek v. Casas***, 328 S.W.3d 526, 536 (Tex. 2010).

6) The required basis for the expert's opinions can be a little tricky. The expert's opinions must be factually based. The expert is free to rely upon information customarily relied upon by experts in the field. This includes reliance upon information and data that might not otherwise be admissible, such as statements, declarations and affidavits. ***See, In re Jorden, M.D***., 249 S.W3d 416, 424 (Tex. 2008)

> But in any event, nothing hinders plaintiffs from telling what happened to their own experts, who can use those statements to file a report as quickly as a plaintiff wants.

While an expert may rely upon affidavits of individuals with knowledge of relevant facts. However, the affidavit must be based on personal knowledge and it must state facts, not merely beliefs. An affiant's beliefs about what the facts are does not make those beliefs facts nor constitute personal knowledge of the believed facts. *See* ***Kerlin v. Arias***, 274 S.W.3d 666, 668 (Tex. 2008)

D. FEDERAL COURT

The Fifth Circuit, in ***Passmore v. Baylor Healthcare System*** 823 F.3d 292, 297 (5th Cir. 2016) has ruled that Ch. 74.351 Tex. Prac. & Rem. Code mandating dismissal of a health care liability suit if the plaintiff fails to serve an expert report with 120 days of the defendant's answer does not apply in federal court.

> The combined operation of Rules 26 and 37 therefore answers the disputed question differently than section §74.351 does. Section 74.351 therefore directly collides with these Federal Rules.

6. EXPERT DISCOVERY TOOLS:

A. OVERVIEW:

When I first start practicing in mid-70's, discovery of expert witnesses was a virtual "blood sport." Experts were free game for massive volumes of interrogatories and requests for production, some designed specifically to intimidate the expert from continuing to be involved in the litigation. Then finally came the judicial blowback. Today, we have a more structured and limited approach to discovery of experts.

B. TEX. R. CIV. P. 195.1

The Texas rules since 1999 allow for discovery of expert witnesses only through specified discovery tools: disclosure, oral depositions (along with accompanying requests for production of documents not produced in disclosure), and reports. An interesting case that discusses the limited nature of discovery of experts in Texas is ***In re National Lloyds Insurance Company,*** 532 S.W.3d 794, 814 (Tex. 2017), which also will be discussed elsewhere regarding the scope of discovery of experts. The majority in ***In re National Lloyds Company***, points out that not only was the discovery sought irrelevant and exempt from discovery, Plaintiffs had not complied with Rule 195.5 in seeking discovery about the testifying expert regarding attorney fees. Therefore, the exceptions to the work product rule found in Tex. R. Civ. P. 192.3 (i.e. waiver of the work product exception) were in fact not waived. Footnote 92 of the opinion is informative:

> *See* TEX. R. CIV. P. 195.1 ("A party may request another party to designate and disclose information concerning testifying expert witnesses *only* through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule." (emphasis added)). Via requests for

disclosure, as authorized by Rule 195.1, a party is entitled to limited expert-witness document discovery, including "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony." TEX. R. CIV. P. 194.2(F)(4); *see also* TEX. R. CIV. P. 192.3(c) (delineating the scope of expert discovery), 195.4 ("In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify ... and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.").

C. DISCLOSURE

1) OVERVIEW:

a) Expert designation or disclosure is one of the critical inflection points in a medical malpractice case. Texas practice differs significantly from federal court regarding how experts are disclosed. In Texas, absent a directive in a Discovery Control Order, there is no requirement that parties produce reports. The decision whether to produce a report is left to the discretion of the party seeking affirmative relief. The parties not seeking affirmative relief are not required to produce a report even if the parties seeking affirmative relief do so, absent a court order. Federal court on the other hand requires the production of an expert report in the initial disclosure under Fed. R. Civ. P. 26(a). This is a significant difference. In Texas the attorney can choose to narratively set out the subject matter, general substance and data reviewed or provided to the expert, without relying on the skills of an expert in drafting a proper report. In federal court this is not an option. Either the expert's opinions are set out in the report or the likelihood of the opinions being stricken are significant.

b) Experts must be timely and completely disclosed in conformance with Rules 190, 194 and 195. Failure to timely or completely designate an expert could result in the expert being barred or the expert's testimony limited, absent a demonstration of good cause or absence of prejudicial surprise. Tex. R. Civ. P. 193.6.

c) Tex. R. Civ. P. 194 addresses what constitutes proper designation for retained testifying experts and non-retained experts. The requirements are different. For the retained expert the disclosure must set out the subject matter of the expert's opinions, the general substance of the opinions, and the things reviewed or provided to the expert in formulating the expert's opinions. Tex. R. Civ. P. 194.2(f). The requirement for a non-retained expert are less stringent. For the non-retained expert, the party need only produce the records generated by the expert that circumscribe the expert's opinions formulated in the expert's ordinary practice or exercise of the expert's job. Tex. R. Civ. P. 194.2(f)(3).

d) When the expert must be designated and how the expert should be designated are dictated by Rule 190 by default, unless the Court issues a Discovery Control Order, or Scheduling Order that addresses these matters. The parties, in a level 3 case, also may enter agreements regarding designation of experts, subject to the Court's approval.

e) As stated above, in Texas reports are favored but not required by the rules of civil procedure. Rather than requiring production of a report, the rule explains what happens if a Plaintiffs properly and timely produces reports at time of designation and the consequences of not producing such reports. Tex. R. Civ. P. 195.5. The trial court also may sua sponte require the production of reports in Discovery Control Order. Absent a court order requiring a report, Tex. R. Civ. P. 195.5 is available to a party to request a report.

f) Supplementation of expert opinions is disfavored to the extent an expert offers new opinions not disclosed in the original designation. This is true for Texas and for federal court. While Texas allows "refinements" to opinions, there has to be a showing of good cause or absence of prejudicial surprise to allow an expert to supplement adding new opinions.

2) DISCLOSURE MUST BE REQUESTED

It is hard to conceive that now, nearly 15 years after the Texas Rules of Civil Procedure were amended to add a disclosure requirement, litigants still do not understand how to utilize Rule 194 or fail to utilize it effectively. The startling fact, however, is that there are still some litigants that do not understand that in order to

derive the benefits of the disclosure rule that requests for disclosure must be propounded. That is the lesson from ***In re C.C, M.C., L.O., and H.P.,*** *476 S.W.3d 632* (Tex. App. – Amarillo 2015, no writ). In that case, the appellant argued that the Trial Court had erred in allowing an expert to testify who had not been timely designated. The Court observed that there is a close relationship between Rule 194 and 195:

> Here, Dr. Keel was called as an expert witness by the intervenors (that is, the foster parents to two of the children) even though the intervenors had not designated her as a testifying expert. Yet, the record reveals **that no one had propounded any discovery requests upon the intervenors. Thus, a condition precedent to the application of Rule 195.2 never occurred.** That is, no one requested that the intervenors disclose their testifying experts under Rule 194.2(f). Nor do we find of record an order obligating the parties to disclose their testifying experts by any date irrespective of whether another party sought their disclosure. So, the intervenors had no obligation to disclose Keel before trial, and the Trial Court did not err in permitting her to testify. . . **Unless a Trial Court has ordered a deadline, the deadline to furnish information requested under 194.2(f) defaults to the deadlines provided in 195.2.** [emphasis added]

In re C.C., M.C., L.O., and H.P., *476 S.W. 3d at* 634.

3) TIMELINESS OF DISCLOSURE

Tranum v. Broadway, 283 S.W.3d 403, 425-426 (Tex. App. – Waco 2008 pet. denied) **provides** an excellent discussion of the requirement to timely designate expert witnesses and consequences of failing to do so.

> An expert witness who is not timely identified during discovery will not be permitted to testify unless the court finds good cause for the proponent's failure to timely identify the expert or finds that the opposing party is not unfairly surprised or prejudiced by the expert's testimony. ***In re Toyota Motor Corp.,*** 191 S.W.3d 498, 501 (Tex. App. – Waco 2006, no pet.) see TEX. R. CIV. P. 193.6.

Merely identifying a potential testifying expert as an individual with knowledge of relevant facts or as a consulting expert does not properly designate a testifying expert and therefore such a designation is not timely.

4) INCOMPLETE DISCLOSURE

a) One of the more frustrating responses to requests for disclosure is a responding party's expert disclosure that merely states the topics that the expert is expected to address. For reasons that are never completely clear, the responding party simply ignores the requirement that the "general substance" of the expert's opinions be disclosed. And the response, "will supplement further," is totally unacceptable. A response that merely states the subject matter of the expert's opinions is incomplete and vulnerable to the attack that it constitutes a failure to respond. This is a lesson to be drawn from the recent opinion in ***Bailey v. Respironics***, 2014 WL 3698828 (Dallas, 2014).

Bailey involved a death case due to a failure to properly ventilate a patient. The issue was whether there was negligence in using the ventilator or whether the ventilator was defectively designed. The litigation was very protracted and there were various agreements to delay discovery and continue the trial of the case. The issue that is pertinent for our review arose when the designation deadline finally was reached. Plaintiff designated an expert, but did not completely disclose with regard to that expert. Plaintiff's designation of its expert merely stated that the expert is "expected to testify generally about the ventilator and its role in the incident made the basis of this lawsuit." Subsequently, thirty days before trial, Plaintiff in response to the ventilator manufacturer's motion for summary judgment served a 42-page affidavit from its expert. The manufacturer complained that the affidavit should be stricken because Plaintiff had not fully disclosed timely with regard to her expert. The Trial Court agreed and struck the affidavit. The Appellate Court found no abuse of discretion:

> Bailey's vague disclosure of the substance of Reese's testimony did not comply with the requisites of rule 194.2(f). *See* ***Bexar Cnty. Appraisal Dist. v. Abdo***, 399 S.W.3d 248, 256-257 (Tex. App. – San Antonio 2012, no pet.) (Trial Court did not err in excluding expert when "disclosure" regarding expert only vaguely stated expert may testify "about what is and what is not usable land and/or what is or is

not in the floodplain ... and/or matters associated therewith"). A party who fails to respond to or supplement his response to a discovery request shall not be entitled to offer testimony of a witness having knowledge of a discoverable matter unless the trial court finds good cause sufficient to require admission or determines the other party will not be unfairly surprised or prejudiced. TEX. R. CIV. P. 193.6(a).

b) It is very important to note that the disclosure rule194 requires that a party disclose multiple things regarding a testifying expert. These include the subject matter of the expert's expected testimony, the general substance of the expert's opinions and the data that the expert has compiled, been provided, considered, or reviewed in formulating his opinions. Even more important to note is that the failure to disclose with regard to each of these elements could result in a finding that the responding party has failed to disclose which can result in sanctions under Rule 193.6. This is the take away from In the ***Interest of D.W. and K.W,*** Not Reported in S.W.3d, 2015 WL 1262820 (Tex. App. – Ft. Worth 2015)**.** In this case, the appellant complained that the Trial Court had allowed the appellee's expert to testify, even though the appellant timely challenged the disclosure as being incomplete for want of having provided the general substance of the expert's opinions and the data that the expert had compiled, or that had been provided to or reviewed by him in formulating his opinions. The Appellate Court found that the appellee had failed to make discovery and the Trial Court had abused its discretion in allowing the expert to testify at trial.

Rule 194.2(f)(2) requires a party to request disclosure of "the subject matter on which the expert will testify." Tex. R. Civ. P. 194.2(f)(2). The parties are not disputing Appellee complied with subsection (2) of rule 194.2(f). Rule 194.2(f)(3) permits a party to request disclosure of "the **general substance** of the expert's mental impressions and opinions and **a brief summary of the basis for them."** Tex. R. Civ. P. 194.2(f)3); ***VingCard A.S. v. Merrimac Hospitality Sys. Inc***., 59 S.W.3d 847, 855 (Tex. App. – Fort Worth 2001, pet. denied) Additionally, when the expert is employed by the other party, as in this case, the party **may request disclosure of "all documents, tangible things, reports, models or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony**." Tex. R. Civ. P. 194. 2(f)(4)(A). [emphasis added]

The failure to respond to a request for the mental impressions and opinions of the expert is a complete failure to respond, which triggers the automatic exclusion under rule 193.6. ***$27,877 v. State***, 331 S.W.3d 110, 120 (Tex. App. – Fort Worth 2010, pet. denied); ***VingCard, A.S.,*** *supra* at 856.

We conclude Appellee completely failed to comply with rule 194.2(f)(3), as distinguished from simply giving an incomplete answer, which would have required Appellant to take additional measures to compel fuller compliance. *Compare* ***VingCard, A.S.***, 59 at 856 (finding complete failure to respond), *with* ***$27,877***, 331 S.W.3d at 121 (holding response was sufficient to allow meaningful cross-examination). We sustain Appellant's first issue.

c) In ***Kingsley Properties, LP v. San Antonio Title Services of Corpus Christi LLC,*** 501 S.W.3d 344 (Tex. App- Corpus Christi 2016) the Trial Court was found to have been within its discretion to disallow specific expert testimony. The expert had testified in deposition that he did not review various city ordinances. Later, without supplementation, the expert at trial attempted to offer opinion testimony based upon his review of the ordinances. While the Appellate Court intimates that it considered the testimony a refinement on disclosed opinions, it could not say that the Trial Court abused its discretion in disallowing the testimony based upon a failure to fully provide the basis for the expert's opinions. Tex. R. Civ. P. 195.6. Also, the Appellate Court noted that the offering party did not help its cause by failing to show good cause or absence of prejudicial surprise.

5) EXPERTS NOT UNDER THE CONTROL OF A PARTY

Comment 2 to Tex. R. Civ. P. 195 is informative:

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

6) *ERSEK* RULE

a) ***Ersek v. Davis & Davis***, 69 S.W.3d 268 (Tex. App. – Austin 2002) involved a summary judgment ruling. The opinion basically stands for the proposition that in order to be able to supplement, a party must first comply with the court's scheduling order for designating experts. The case arose from a legal malpractice action. The trial court issued a scheduling order requiring the parties to designate experts by certain dates. The plaintiff did not comply with this deadline. The defendant then filed a motion for summary judgment. In response to the defendant's motion for summary judgment, plaintiff produced an affidavit from an expert. The trial court excluded the affidavit. The Austin Court of appeals affirmed the ruling of the trial court, rejecting the plaintiff's interesting argument that it had complied with the court's scheduling order by not designating an expert. The appellate court observed that the rules required a designation. Further, assuming the plaintiff had preserved the right to supplement, he had not supplemented "reasonably promptly."

b) The above holding was reiterated and reinforced by the Texas Supreme Court in ***Fort Brown Villas III Condo Ass'n, Inc. v. Gillenwater***, 285 S.W.3d 879, 881 (Tex. 2009).

> In this premises liability case, we decide whether Texas Rules of Civil Procedure 193.6, which provides for the exclusion of evidence due to an untimely response to a discovery request, applies in a summary judgment proceeding. We hold that it does. . .

7) EXPERTS IN SUPPORT OF NON-DISPOSITIVE MOTIONS

While experts must be timely designated for dispositive motions such as motions for summary judgment, which are considered the same as a trial, experts do not have to be disclosed in conformance with Rule 194 to be able to offer testimony in support of a pre-trial motion. ***Hoyt v. Van Frank***, Not Reported in S.W.3d, 2012 WL 3219136 * 4 (Tex. App.-Corpus Christi 2012)

> The rules of civil procedure regarding expert disclosure, such as Rule 190.4 that a plaintiff's expert must be designated either 90 days before the end of the discovery period or as otherwise ordered by the court, apply to actual trial settings. *See* TEX R. CIV. P. 190.4. They do not apply to preliminary hearings in a chapter 74 setting. *See* ***Spectrum Healthcare Res., Inc. v. McDaniel,*** 306 S.W.3d 249, 253 (Tex. 2010).

8) CANNOT RELY ON CATCH-ALL DESIGNATIONS or DESIGNATIONS OF OTHER PARTIES:

Although there is case law going back decades holding that one party may not rely on the designations of other parties to satisfy its designation obligation, it is apparent in daily practice that many attorneys still embrace the catch-all designation as an illusory life preserver. The opinion in ***First Bank v. DTSG, Ltd***. 472 S.W.3d 1, *8-10 (Tex. App. – Houston [14th Dist.] 2015) rev'd on other grounds, ***First Bank v. Brumitt***, 519 S.W.3d 95 (Tex. 2017) reminds us that it is imperative that if a party is going to call an individual as a testifying expert at trial that a party timely and completely disclose the testifying expert. The consequence of not doing so can be significant. In this case, DTSG failed to timely designate a testifying expert on its attorneys' fees. As a result, it lost its attorneys' fees on appeal under Tex. R. Civ. P. 193.6. In an act of cleverness or desperation, it sought to call the testifying expert of another party, who had been timely designated by that party, as DTSG's testifying expert on attorneys' fees. It relied on two arguments in support of this maneuver: 1) it had provided the opposing party its attorney fee invoices; 2) it had contended throughout the trial that it was seeking attorneys' fees and 3) it had a catch-all designation that it may possibly use the expert testimony of adverse parties. The Appellate Court rejected each of these arguments. First, merely providing attorney fees' invoices does not declare to the other side that the party intends to call an expert to testify that the fees are reasonable and necessary, or that the invoices reflect that reasonable fees would be more or less what it is reflected in the invoices. Second, merely alleging that a party seeks attorneys' fees does not provide the other side notice of an intention to call an expert on attorneys' fees. Third, the following catch-all phrase has been rejected by earlier opinions, holding that a party must make its own designation and cannot rely on the expert designation of another party:

> DTSG] express[es] [its] intention to possibly call witnesses associated with adverse parties and any other party's experts.

....
[DTSG] hereby designate[s], as adverse parties, potentially adverse parties, and/or as witnesses associated with adverse parties, all parties to this suit and all experts designated by any party to this suit....

We conclude that this language was insufficient to designate Brumitt's counsel as an expert regarding attorney's fees or to satisfy DTSG's obligations to update its responses to First Bank's requests for disclosure. See ***American Cyanamid Co. v. Frankson***, 732 S.W.2d 648, 655-56 (Tex. App. – Corpus Christi, 1987, writ ref'd n.r.e.) (concluding that an expert designation in which a party reserved the right to call all experts designated to testify as witnesses by other parties was insufficient).

9) EXPERT OPINIONS WITHIN MEDICAL RECORDS:

The question arises often whether physicians who render opinions or diagnoses in medical records should be identified at least as non-retained experts. The safest practice is to do so as opposed to believing that the opinions will be admissible if the records are proved up as business records. Merely proving records up as business records establishes the reliability of the records. However, arguably, expert opinions have to be disclosed just as there must be an exception to the hearsay rule to allow hearsay in the business records to be admissible. While the issue was raised in ***In Interest of K.M. – J***., Not Reported in S.W.3d., 2015 WL 5451010 (Tex. App. – Houston. [1st Dist. 2015), the Appellate Court really failed to address the issue head on, instead finding that because the case was continued for a number of months after the medical records were introduced that the opposing party was on notice. The Court was dealing with a compelling case and it is obvious that they did not wish to reverse on such a technical point.

10) REBUTTAL EXPERTS

As discussed above regarding the different types of expert classifications, rebuttal experts too must be timely designated if the party is or should be aware of the issue for which the rebuttal expert is offering testimony. ***Rankin v. FPL Energy, LLC***, 266 S.W.3d 506, 514-515 (Tex. App. – El Paso 2008):

The trial court did not abuse its discretion. Plaintiffs learned during discovery that FPL was advocating a 55 dB noise standard and that it claimed this was an EPA recognized noise level. Therefore, Plaintiffs knew before trial that, if they disagreed with this noise level, they would have to rebut FPL's expert testimony. Accordingly, Plaintiffs were obligated to disclose Kiteck's opinion testimony on the proper application of the Levels Document, and their failure to do so is sufficient basis for exclusion. *See* ***Moore v. Mem'l Hermann Hosp Sys., Inc.*** 140 S.W.3d 870, 875 (Tex. Ap. – Houston [14th Dist.] 2004, no pet.) (when a party reasonably anticipates the need to rebut the testimony of an opposing expert, the failure to disclose is not excused by characterizing the witness as a rebuttal witness). Issue Three is overruled.

D. DEPOSITIONS

1) In federal court there is a reduced need to take an expert's deposition because Rule 26(a) requires that all opinions and what the expert considered in reaching those opinions be set out in the testifying expert's report. However, as pointed out above, there is not an expert report requirement in Texas and even when Texas courts require the production of reports, there does not seem to be the same strict restriction on opinions outside the report. Therefore, to obtain a thorough explication of a testifying expert's opinions in Texas prior to trial, it is probably advisable to take the expert's deposition.

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2) At one point, I thought that Rule 195 restricted discovery to only oral depositions; however, a close reading of the rule reveals that the rule does not say that. The rule only reference "depositions," which implies that discovery may be obtained from an expert both by oral deposition and by depositions on written questions. Ironically, depositions on written questions would effectively serve the same purpose as interrogatories, which are not allowed under the rule, but would be even more effective because it would actually be the expert answering the questions under oath and not the party on the expert's behalf. Depositions on written questions often are used to obtain medical records in admissible form; however, if the notices were actually served on the care provider as opposed to the care provider's medical records custodian, additional substantive questions arguably could be propounded to the care provider, including questions about causation. The question that would then be begged is whether by propounding

questions to a care provider that presumably are not answered by the care provider's records and appear to be opinions formulated in connection with litigation, the witness is still considered a non-retained expert who does not have to produce a report and whose designation only requires the production of records. As a practical matter, the parties might be able to merely refer to the answers to written questions as setting out the subject matter and supplemental opinions of the non-retained expert.

3) Another reason to take a testifying expert's deposition in Texas is that it (an oral deposition or a deposition on written questions) allows an opportunity to request and obtain documents, data and things by way of a request for production served in conjunction with the notice that otherwise could not be obtained because independent, free-standing requests for production to testifying experts are not allowed under Tex. R. Civ. P. 195.1.

E. REPORTS

1) OVERVIEW

a) Unlike the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure do not require that parties produce reports of testifying experts at time of disclosure. Compare Texas Rule Civ. P. 194 with Fed. R. Civ. P. 26(a). Even though Texas rules of civil procedure do not require expert reports at time of disclosure (which should be distinguished from a trial court requiring the production of reports in a Discovery Control Order, it is generally recognized that testifying expert reports can be effective and efficient discovery devices. They provide a concise and comprehensive outline of the expert's opinions and the bases for them. This helps focus cross examination of the expert and it can reduce the cost of litigation by reducing or eliminating the need for deposing testifying experts. A party may simply choose to rely on the report rather than deposing the expert. While this sounds laudable and elegant in theory, it does not exactly work this way in practice, particularly in Texas state courts. While Federal courts are very strict in making the testifying expert conform to what is stated in the expert's report, Texas courts appear to be more forgiving, which unfortunately often reduces one of the goals of expert reports, reducing costs. Rather than reduce cost, the reports can sometimes unfortunately lead to increased costs.

b) Parties and Courts should coordinate early in the litigation and set the requirements for and parameters of testifying expert reports. For instance, as will be discussed below, the party seeking affirmative relief has a choice about whether to produce reports or not, if there are no Discovery Control Plan requiring reports at designation. However, regardless of this party's choice, there is no requirement that the party's not seeking affirmative relief serve reports. I believe that it is a good practice when preparing the Discovery Control Plan to require that *if* the party seeking affirmative relief produces a testifying expert report for a particular expert, the opposing party at time of its designation shall for each counter expert produce a like-kind report.

2) SCOPE AND EFFECT OF REPORTS

While the general rule in Federal Court is if substantive opinions are not contained in the testifying expert's report, the expert will be precluded from offering such opinions, (*See,* ***Honey- Love v. United States***, 664 Fed. Appx. 358 (5th Cir. 2016)) Texas Courts do not treat reports as rigidly. This is probably because Texas disclosure of expert witnesses is not focused on the expert's report, unless ordered by the Court, but instead focuses on the narrative designation provided by the attorneys. However, even when a court requires reports, it appears that there is greater tolerance in Texas state courts than federal court in allowing opinions outside what is contained in the reports. In ***Plunkett v. Christus St. Michael Health System, et al***, Not Reported in S.W.3d, 2016 WL 7335872 (Tex. App. – Texarkana 2016) the Defendant's expert did not reveal in his report that he believed that the cause of death may have been a pulmonary embolus. Almost a year later, during his deposition, he offered this opinion and conceded that it was not in his report. The Appellate Court found that the Trial Court was within its discretion in allowing the testimony and observed that the testimony was provided within a reasonable period prior to trial.

> Here, it is undisputed that Koch was timely designated as an expert witness, and his report was timely provided to Plunkett. Plunkett was able to explore the basis of Koch's opinion regarding pulmonary embolism in detail during Koch's deposition, which took place more than thirty days before the commencement of trial on October 19, 2015. ***Although the better practice is to include all expert opinions in a report that is timely provided***, we cannot say that the Trial Court's decision to allow Koch to testify as to an opinion which was not included in his report—that Curtis may have suffered from a pulmonary embolism—in any way unfairly surprised or prejudiced Plunkett. We find no abuse

of discretion with respect to the timely-disclosure question. [emphasis added]

Supra at *6.

It is noteworthy that, at trial, the expert reportedly did not offer the opinion, instead opining that a different condition was the probable cause of death.

3) RETAINED EXPERTS – FEDERAL COURT

Federal Rule Civil Procedure 26 requires a party to disclose the identity of any expert witness it may use at trial. FED. R. CIV. P. 26(a)(2)(A). The disclosure must be accompanied by a written report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(B). The report must contain, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them." FED. R. CIV. P. 26(a)(2)(B)(i). The disclosure and report must be made "in the sequence that the court orders." FED. R. CIV. P. 26(a)(2)(C). Failure to meet this requirement can result in sanctions under Fed. R. Civ. P. 27. ***Cutler v. Louisville Ladder***, 2012 WL 2994271 at *5 (S.D. Tex. Houston Div. 2012) and ***Samuel v. Signal International L.L.C***, 2015 WL 12748648 at *3 (E.D. Tex. Beaumont Div. 2015).

4) NON-RETAINED EXPERTS – FEDERAL COURT

a) Expert reports are not required of non-retained experts, such as treating physicians. Rule 26(a)(2)(B):

> The requirement of a written report in paragraph (2)(B) ... applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. **A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. [emph. added]**

b) If a non-retained expert becomes a "specially employed expert," a report might be required regarding the new opinions not contained in the specially employed expert's records, or the court might require a report regarding all the specially employed expert's opinions. *See* ***Kim v. Time Insurance Co***., 267 F.R.D.499 502, 503 (S.D. Tex. Houston Div. 2008):

> Conversely, where a treating physician has prepared his opinions in anticipation of litigation or relies on sources other than those utilized in treatment, courts have found that the treating physician acts more like a retained expert and must comply with Rule 26(a)(2)(B). *See, e.g.*, ***Fielden v. CSX Transport***, 482 F.3d 866 at 870-72 (6th Cir. 2007) (noting that "[s]ome courts have accordingly concluded that when the nature and scope of the treating physician's testimony strays from the core of the physician's treatment, Rule 26(a)(2)(B) requires the filing of an expert report from that treating physician" and collecting cases.).
>
> To the extent that Dr. Sussman was asked to opine on documents that he did not rely upon in treating Mrs. Kim, however, those opinions are not confined to knowledge he derived as a treating physician.

See also, ***Spears v. U.S***., 2014 WL 258766 at *8 (W.D. Tex., San Antonio Div. 2014)

5) USING CH. 74 REPORTS AS RULE 194 EXPERT REPORTS

The legendary University of Texas football coach Darrell Royal once famously observed that three things could happen when you pass the football and two of them are bad. The same observation can be made about using Chapter 74 expert reports as Disclosure Reports. While it is completely permissible to use the Chapter 74 report as the Disclosure Report for a testifying expert, one has to ask why would a Plaintiff do so? The Chapter 74 report presumably is prepared on limited information (often only the applicable medical records) before discovery and without reference to any scientifically reliable literature or studies. The Chapter 74 report is given significant latitude because of this. It for instance does not have to meet a Daubert standard and does not have to rule out all other probable causes of the alleged injury. In other words, the Chapter 74 report is often not a complete exposition of the expert's

opinions or the bases for the opinions. So, in a pinch, and in the interest of economy one might use the Chapter 74 report as the Expert Disclosure Report; however, it is not without risks and probably not best practice. Also, once the report is used in the litigation, the exemption afforded the Chapter 74 report under §74.351 is waived. §74.351 (k) and (t) Tex. Civ. Prac. & Rem. Code. This means that the Chapter 74 report could be used to impeach the testifying expert or expose bias for having reached conclusion without consideration to all the pertinent facts that had been developed through discovery after the Chapter 74 report was written and served.

6) WHEN NO REPORTS PRODUCED

a) While it is customary for a Discovery Control Plan to require the production of reports, or for parties to agree to the production of expert reports in a Level 3 Control Plan, Tex. R. Civ. P. 194 and 195 do not require the production of reports. Instead, the party seeking affirmative relief has the option to produce reports or not. Tex. R. Civ. P. 195.3. The carrot to producing a report is that the opposing side cannot require the deposition of the expert unless or until the opposing side designates its experts. However, if the party seeking affirmative relief chooses not to produce a report, then that party must make the testifying experts available for deposition promptly, at the risk of extending the deadline for the opposing party to designate its experts. Tex. R. Civ. P. 195.3. Comment 3 to the rule explains the intent of the rule:

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

b) As mentioned above, if a party chooses not to produce reports but does not promptly produce its testifying experts for depositions, sanctions could be imposed under Tex. R. Civ. P. 193.6. *See* ***Duerr v. Brown***, 262 S.W.3d 63, 75-76 (Tex. App. – Houston [14th Dist.] 2008).

7) TEX. R. CIV. P. 195.5: COURT-ORDERED REPORTS

If there is not a Discovery Control Plan that requires the production of reports, a party may move for an order compelling a testifying expert to reduce to tangible form the expert's opinions. Tex. R. Civ. P. 195.5 provides as follows:

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

8) ADVERSE EXAMINATION REPORTS

a) Tex. R. Civ. P. 204.2 provides that ***upon request*** (no motion or order is required) of the person ordered to be examined, the party causing the examination to be made ***must*** deliver to the person a copy of a ***detailed report*** of the examining physician or psychologist setting out the following:

> (a) the findings, including results of all tests made;
> (b) diagnoses and conclusions,
> (c) together with like reports of all earlier examinations of the same condition.[9]

[9] This phrase always has struck me as odd. What exactly is meant by "reports of all earlier examinations of the same condition"? It does not make sense that the examiner would have to produce reports that presumably already are in the examinee's possession. It does not state that the examiner must produce all reports of the same condition that he/she had reviewed or relied upon. There is a

If a physician or psychologist fails or refuses to make a report, the court may exclude the testimony if offered at the trial.

b) Tex. R. Civ. P. 204.2(b) states that unless an agreement expressly provides otherwise, the right to a report spelled out in Rule 204.2(a) applies whether there is an agreement for an examination or an order. Also, providing a report does not preclude the discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

c) While an order is not required to activate the examiner's responsibility to produce a report, it is probably wise to obtain an order. There is always the concern that a party might obtain the examination, find that it does not help that party (and may even help the examinee) and decide to try to designate the examiner as a consulting only expert. (See further discussion about this tactic below). This could then result in a dispute about whether 1) the examiner could be designated as a consulting only expert; 2) whether the examiner could be deposed as a fact witness, even if the examiner's opinions were beyond the scope of discovery because the examiner had been designated as a consulting expert. *See*, ***Axelson v. McIhaney***, 798 S.W.2d 550 (Tex. 1990). And there is the issue of whether an expert's opinions may be protected from discovery, once a report has been published, setting out those opinions. *See* ***Matosky v. Manning, M.D***, 2009 WL 10680997 (W.D. Tex.- S.A. Div. 2009).

d) If the examinee requests a report, the examinee, after receipt of the report, and upon request by the examining party, must produce a like report of any examination made before or after the ordered examination of the same condition unless the person examined is not a party and the party shows that the party is unable to obtain it. What does this mean? For instance, if before or after the compelled psychological exam, the examinee was tested by her own psychologists, then the examined party would have to obtain and deliver reports (just like the one that the examiner produced) from those psychologists to the party that obtained the examination.[10] This could be an important consideration in the examinee's determination about whether to request a report from the examiner. If the examinee chose not to request a report, presumably there would be no basis for the examinee to have to produce the reports of her examining physicians or psychologists. The Plaintiff could merely notice the examiner's deposition and serve it with a subpoena *duces tecum*. There is no requirement that the examinee produce reports if she obtains the deposition of the examiner. The rule specifically states that providing a report does not preclude the discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. A fair interpretation of this provision also could be that if the Plaintiff sought a report under Tex. R. Civ. P. 195.5 that it would not activate the requirement that the examinee produce a like kind report.

e) The rule also provides that the court upon motion may limit delivery of a report on such terms as are just. One of the important things to note about the report requirement is that the party causing the examination to be made must produce a report (subject to the above proviso) regardless of whether it subsequently designates the examining physician or psychologist as a consulting expert, as the report requirement is independent of the disclosure requirements under Rules 194 and 195. This is concept is worth examining from a tactical perspective. Predictably, the defendant is going to request an extended time during which to allow its examining expert to prepare a report. The examinee should be prepared for this tactic and move that the report and the underlying data (especially including all written and electronic notes taken in conjunction with the interview, examination, testing and drafting of the report) be delivered to the examinee within ten (10) days. In this regard, it is useful for the examinee to conduct an investigation of other cases in which the expert has been involved and provide the court with affidavit testimony that it is feasible for the expert to produce a report within ten (10) days because s/he has done so in the past.

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virtual dearth of discussion or history regarding this phrase. One interpretation that would make sense, however, is that the phrase is referring to other reports the examiner had written regarding other examinees complaining about the same condition. These reports would likely reveal a bias. Also, they would not be protected because there would not have been a patient/physician relationship between the examiner and examinee.

[10] It would seem this requirement would trump the consulting expert privilege, although this author has found no case authority on this point. It does not seem that the provision applies only to designated testifying experts because if it did, it would be a redundancy since the party would have to produce such reports of its testifying experts in response to requests for disclosure, if the reports were already created. However, the disclosure rule does not require that the experts to reduce opinions to reports or that the plaintiff produce them. The plaintiff has options in this regard.

f) If the party causing the examination to be made produces a report and then designates the examining physician or psychologist as a consulting only expert, the question is begged whether the party may prevent use at trial of the examining physician's or psychologist's report or the findings contained within it.[11] First, the Plaintiff conceivably could designate the examining expert as a testifying expert, which raises the question whether that action would trump the action of the party who requested the examination in designating the expert as a consultant. In other words would the Plaintiff's act of designating the examining physician or psychologist as a testifying expert make the report and findings admissible at trial? The answer to this question is unclear, but likely. See In ***Hooper v. Chittaluru, M.D. et al***, 222 S.W.3d 103, (Tex. App. Houston. [14th Dist.] 2006, pet. denied).[12]

g) Also, there is the problem about sharing the examination with the Defendant's other testifying experts. (See discussion of consulting plus experts, above). If the Defendant (usually, but not always, the party requesting the examination) designates the examiner as a consultant but the testifying experts review the examiner's report or findings, then the consultant becomes discoverable the same as a testifying expert. Tex. R. Civ. P. 192.3(e) and comment 1 to Tex. R. Civ. P. 195.[13] This would once again put the party requesting the examination in a box. Either such party would have to offer the prejudicial report at trial or be faced with having to explain why none of its testifying experts reviewed or relied upon the report. Even then, it is arguable that the examinee's testifying experts could review the report and either comment about it or state that it supports their opinions.

h) Production of the report can be a problematic issue. Rule 35 does not set out a specific time period for producing the report. One federal court has rejected Plaintiffs' request for the report to be produced within three (3) days after the examination finding instead that defendants need only produce the report a reasonable time after they receive it and the supporting data. ***Rodriguez v. Pictsweet Co***. 2008 WL 2019460 at *3 (S.D. Tex. – Brownsville 2008).

i) May a court compel a party to produce the report of its adverse examiner before the deadline to designate experts? At least one court has answered the question, yes. ***Garayoa v. Miami-Dade County***, 2017 WL 2880094 at *7 (S.D. Fla. 2017).

j) Tex. R. Civ. P. 204.2(b) states that unless an agreement expressly provides otherwise, the right to a report spelled out in Rule 204.2(a) applies whether there is an agreement for an examination or an order.

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[11] See, ***In re Doctors Hospital of Laredo,*** 2 S.W.3d 504 (Tex. App. --San Antonio 1999). Rule 192.3(e) prevents discovery of a consulting expert's opinion, provided the opinion has not been reviewed by a testifying expert. Tex.R. Civ. P. 192.3(e). A "testifying expert [may] be 'de-designated' as long as it is not part of 'a bargain between adversaries to suppress testimony' or for some other improper purpose." ***Castellanos v. Littlejohn***, 945 S.W.2d 236, 240 (Tex. App.--San Antonio 1997, orig. proceeding) (distinguishing ***Tom L. Scott, Inc. v. McIlhany***, 798 S.W.2d 556 (Tex.1990)). It is probably an abuse of discretion and may be reversible error to allow one side to offer the deposition testimony of a de-designated expert (i.e. a consulting expert) at trial. *See* ***Rendon v. Avance***, 67 S.W.3d 303 (Tex.App.-Fort Worth,2001).

[12] In this case, the Fourteenth Court of Appeals, disregarding defendant's lament that "you cannot hijack her expert," found that where plaintiff had timely cross designated defendants' expert following defendants' designation of the expert, the court knew of no precedent that disallowed plaintiff from calling defendants' expert in plaintiff's case in chief at trial. Finding that obtaining testimony from the opposing side's expert could be particularly damning at trial, the court held that the disallowance of the testimony was an abuse of discretion requiring a remand of the case.

[13] ***In re TIG Insurance Company***, 172 S.W.3d 160 (Tex. App.—Beau, 2005) discusses the issue about discovery of and from consulting experts whose work product or opinions have been reviewed or relied upon by a testifying expert. It is unquestionable that discovery of purely consulting experts is proscribed under the Texas Rules of Civil Procedure. (See, ***comment 1*** to Rule 195). Similarly, the 1999 amendments to Rule 195.1 make clear that discovery of testifying experts only may be obtained through disclosure, reports or deposition. The open question since the 1999 amendments has been whether information about "consulting plus" experts is within the scope of permissible discovery. This decision suggests that it is. TIG holds that information regarding consulting expert discovery is not governed exclusively by Tex. R. Civ. P. 195.1. Moreover, ***comment 1*** to Rule 195, states as follows:

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

I can think of no legitimate reason why an examinee would ever enter into an agreement that expressly relinquishing the right to request a report.

k) Failure or refusal of the physician or psychologist to provide a report (as ordered or agreed) may be a basis for the court excluding the testimony if offered at the trial. See, Tex. R. Civ. P. 204.2(a). If the physician or psychologist fails to completely comply with the order or agreement (fails to provide all the information required under Tex. R. Civ. P. 204.2(a)) the examinee should point out the deficiencies and if not corrected immediately, should file a motion to strike the testimony of the physician or psychologist as a failure to respond. This would be similar to a motion to strike under Tex. R. Civ. P. 193.6 or under Tex. R. Civ. P. 215.1(b).

7. ADVERSE MEDICAL/PSYCHOLOGICAL EXAMINATIONS

A. In Texas, if a Plaintiff's medical/psychological condition has been put in issue and the Plaintiff intends to call a medical physician or psychologist as a testifying expert at trial, retained or unretained, the Texas Supreme Court has held that the defendant is entitled to level the playing field by obtaining an adverse examiner to examine the Plaintiff and provide consultation or testimony at trial. ***In re H.E.B.***, 492 S.W.3d 300 (Tex. 2016).

B. A Plaintiff, however, may place her medical or psychological condition in issue through her allegations. See ***Beamon v. O'Neill***, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding). A party's mental condition may be placed in controversy by proof that the party to be examined has designated a psychologist to testify or has disclosed a psychologist's records for possible use at trial. TEX. R. CIV. P. 204.1(c). ***In re Transwestern Pub. Co., L.L.C.*** 96 S.W.3d 501 (Tex. App.–Fort Worth, 2002).

C. Tex. R. Civ. P. 204 provides as follows:

> **(c)** ***Requirements for obtaining order.*** The court may issue an order for examination only for good cause shown and only in the following circumstances:
>
> (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
>
> (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

D. For a more comprehensive discussion of adverse medical/psychological examinations, see Gold, "*Dancing With Wolves in Drag: A Texas Plaintiff Attorney's Perspective on Tactics and Strategy Involving Adverse Mental and Physical Exams*" (State Bar of Texas 2018).

8. SUPPLEMENTATION AND REFINEMENTS

A. OVERVIEW:

1) Supplementation of expert reports and testimony can be very contentious and perilous. A party is required to fully and completely disclose testifying expert testimony at the time of designation. This includes setting out the subject matter of the expected testimony, the general substance of the expert's opinions that are expected to be offered, the bases of the expert's opinions and what the expert has been provided or reviewed in formulating the expert's opinions.

2) Tex. R. Civ. P. 193.5 requires a party to supplement discovery. This rule also applies to experts retained or specially employed by parties, under Tex. R. Civ. P. 195.6, which also requires the supplementation of deposition testimony of experts retained or specially employed by a party.

3) Arguably, failure to disclose completely and timely may subject the expert or the expert's opinions to limitation or being stricken under Tex. R. Civ. P. 193.6. Still, circumstances may develop that require that the expert's report or opinions be supplemented. The question then arises whether the expert is supplementing to add

new opinions or is merely refining the opinions that previously have been disclosed, particularly to conform the opinion to facts that have been exposed since the expert's designation.

4) Supplementation to add new opinions is generally disfavored, both in federal court and in Texas, absent a showing of good cause or absence of unfair prejudicial surprise. However, supplementation to refine previously revealed opinions or to rebut new opinions offered by opposing parties' experts, has a much lower threshold for acceptance.

B. REFINEMENTS

As a general proposition, experts can refine or perfect their opinions for trial without the necessity of supplementing so long as the expert does not make a material alteration that constitutes a surprise at trial. *See* ***Exxon Corp. v. W. Texas Gathering Co.,*** 868 S.W.2d 299 (Tex. 1993) and ***Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.,*** 883 S.W.2d 687 (Tex. App. – Texarkana 1994, writ denied). In ***Pilgrim's Pride Corp. v. Smoak,*** 134 S.W.3d 880 (Tex. App.–Texarkana 2004) this concept is applied to an economist's revisions to his report. The Court found that the expert's methodologies were unchanged and that he merely substituted different variables that became available to him. Accordingly, the Court held that the expert did not need to supplement his report. The complaining party also claimed surprise. It was aware of the economist's revisions but claimed it was surprised because it did not receive a supplemental report. The Court was unimpressed with this argument and rejected it.

C. MATERIAL CHANGES IN OPINIONS

There is a difference between refining or enlarging upon an expressed opinion and materially altering or adding a new opinion. As discussed above, altering a conclusion because variables have changed likely will be considered a "refinement" if the expert's model is unaltered. However, when an expert materially changes her opinion from "no" to "yes," such a change likely is not going to be considered a refinement, but a material change. Failure to timely supplement an expert report or designation likely will result in the supplementation being stricken. This is demonstrated in ***Beinar v. Deegan***, 432 S.W. 3d 398 (Dallas 2014).

Beinar arose out of a property dispute. Ms. Beinar argued that Deegan and the homeowner's association had caused her potential injury to the foundation of her home by diverting drainage onto her property. The procedural dispute important for our consideration involved an affidavit that Ms. Beinar's expert submitted in support of a response to Deegan's motion for summary judgment. The affidavit testimony asserted opinions that were materially different from the opinions that previously had been disclosed for this expert. Deegan moved to strike the affidavit. The Trial Court agreed, and the Appellate Court found no abuse of discretion.

> A party must not be allowed to present a material alteration of an expert's opinion that would constitute a surprise attack. The purpose of requiring timely disclosure of a material change in an expert's opinion is to give the other party an opportunity to prepare a rebuttal. ***Norfolk Southern Railway Co. v. Bailey***, 92 S.W.3d 577, 581 (Tex. App. – Austin 2002, no pet.). The Deegans were not given this opportunity. As such, the Trial Court did not abuse its discretion by sustaining the Deegans' objections and excluding Tolson's affidavit attached to Beinar's summary judgment response. Accordingly, we overrule Beinar's second issue.

D. SUPPLEMENTATION OF DEPOSITION TESTIMONY

1) A party must supplement incomplete or incorrect deposition testimony by a retained expert, but only with regard to the expert's mental impressions or opinions and the basis for them. *Id*..6. When an expert changes his opinion about a material issue after being deposed, the party must supplement discovery. ***Red Sea Gaming, Inc. v. Block Invs. (Nev.) Co.,*** 338 S.W.3d 562, 572 (Tex. App. – El Paso 2010, pet. denied)..

2) A failure to timely supplement testimony of an expert retained or specially employed by a party could result in automatic sanctions under Tex. Rule 193.6, including striking the expert or the supplemental testimony. However, it has been found that a Court's refusal to impose sanctions for late supplementation is not an abuse of discretion if the Court acted reasonably to afford the other side an additional time to prepare for cross examination of the expert. ***Bituminous Cas. Corp. v. Cleveland***, 223 S.W.3d 485, 490 (Tex. App.- Amarillo 2006) (Court allowed the production of supplemental information reviewed by the expert during a recess prior to the opposing

party's cross examination of the expert). ***See also, Koko Motel,f Inc. v. Mayo,*** 91 S.W.3d 41, 49-51 (Tex. App. – Amarillo 2002, pet. denied),

9. SANCTIONS- UNTIMELY, INADEQUATE DESIGNATION

A. OVERVIEW

Tex. R. Civ. P. 193.6, allowing for automatic sanctions, may be activated and employed if a party fails to timely and completely comply with its expert designation requirement under Tex. R. Civ. P. 194; however, there is a tension between this rule and the policy of the Texas Supreme Court that trial courts should not impose death penalty sanctions without first considering less punitive sanctions. Since experts play such a crucial role in medical malpractice cases, it will be an unusual circumstance when a court considers striking an expert witness and it is not considered a death penalty sanction. Not that severe sanctions cannot be imposed for failing to make complete and timely expert discovery, but striking an expert requires extreme discipline for a trial court to demonstrate that a lesser sanction was not warranted and could not have been imposed.

B. In ***Lee v. Wal-Mart,*** Not Reported in S.W.3d, 2016 WL 1072644 (Tex. App. - Eastland- 2016) the appellant argued that the Court had abused its discretion in denying its late filed expert affidavit in response to a motion for summary judgment and that such a denial was in effect a death penalty sanction. The Eastland Court of Appeals, applying the law of the Austin Court of Appeals, from which the case had been transferred, found that 1) the sanctions under Rule 193.6 are not death penalty sanctions; 2) that the appellant did not at the trial level ever attempt to demonstrate good cause for the untimely designation or that it would not unfairly prejudice the opposing party. Since there was no explanation for the untimely designation, the Appellate Court found that the Court was in its discretion in denying the affidavit under Rule 193.6 and that regardless of the effect, such an action did not constitute a death penalty sanction.

C. In ***PopCap Games, Inc. v. MumboJumbo, LLC,*** 350 S.W.3d 699 (Tex. App.-Dallas 2011, pet. denied), Plaintiff argued that good cause existed for the Court to allow late designation of experts on damages because Plaintiff's first expert had been stricken as unreliable. The Court held that having an expert stricken under ***Daubert*** is not good cause sufficient to allow late designation of a replacement expert.

D. A Trial Court was found to have been within its discretion to disallow specific expert testimony. The expert had testified in deposition that he did not review various city ordinances. Later, without supplementation, the expert at trial attempted to offer opinion testimony based upon his review of the ordinances. While the appellate court intimates that it considered the testimony a refinement on disclosed opinions, it could not say that the trial court abused its discretion in disallowing the testimony, based upon a failure to fully provide the basis for the expert's opinions. Tex. R. Civ. P. 195.6. Also, the appellate court noted that the offering party did not help its cause by failing to show good cause or absence of prejudicial surprise. ***Kingsley Properties, LP v. San Antonio Title Services of Corpus Christi LLC,*** 501 S.W.3d 344, 352 (Tex. App- Corpus Christi-Edinburg 2016).

E. DEATH PENALTY SANCTIONS

Exclusion of expert testimony can be a devastating and possibly fatal sanction. ***In re First Transit, Inc.,*** 499 S.W.3d 584 (Tex. App. – Houston [14th Dist.] 2016). Any sanction that is case determinative is considered a "death penalty sanction." In a medical malpractice case, which is dependent on expert testimony, striking of an important witness on liability or causation could be case determinative and hence would likely be a death penalty sanction. In ***First Transit***, the appellate court considered striking Defendant's only causation expert a death penalty sanction. Accordingly, the court found that the trial court had abused its discretion in striking Defendant's expert, without first considering lessor sanctions. *See also* ***In re Alere Women's & Children's Health, LLC***., 357 S.W.3d 809, 814-815 (Tex. App. – Houston [14th Dist.] 2011).

10. SCOPE OF DISCOVERY

A. OVERVIEW

As already discussed earlier in this paper, the scope of discovery from testifying experts is quite broad, while the discovery from consulting experts is virtually non-existent. Rule 192 defines the general scope of

discovery from testifying experts and experts whose opinions and mental impressions have been reviewed by testifying experts in the case. Discovery solely for the purpose of impeachment is disfavored and usually restricted, particularly when it focuses on the expert's personal finances.

B. TEX. R. CIV. P. 192.3:

Rule 192.3 defines the scope of discovery obtainable from a testifying expert:

> **(e)** ***Testifying and consulting experts.*** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:
>
> (1) the expert's name, address, and telephone number;
> (2) the subject matter on which a testifying expert will testify;
> (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
> (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
> (5) any bias of the witness;
> (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;
> (7) the expert's current resume and bibliography.

While the rule defines the scope of discovery, it is fair to say that the interpretation of the rule is quite expansive. Other than the expert's personal finances, which will be discussed below, virtually everything else that might inform or influence the expert's opinions, experience and credibility in offering the opinions is fair game. For instance, much discovery will often be devoted to challenging the expert's credentials to pass the gatekeeping threshold of Daubert/Robinson. The expert's qualifications, education, experience, methodology and the reliability of the data used and discarded in formulating the expert's opinions will all be the subject of scrutiny. And then there is the issue of bias, which is probably the most controversial aspect of the scope of testifying expert discovery. What is bias and what data is relevant to exposing it?

C. ATTORNEY FEES:

In re National Lloyds Insurance Company, 532 S.W.3d 794, 814 (Tex. 2017). This recent Texas Supreme Court case is noteworthy on multiple levels. However, in this paper I am focusing on the aspect of the opinion that deals with permissible forms of discovery regarding testifying experts. The opinion focuses on the discoverability of attorneys' fees from a Defendant insurance company involved in windstorm litigation. The central holding of the case is that if the party is not seeking attorney fees, then discovery of its attorneys' fees generally is going be found to be irrelevant and an invasion of the core attorney work product exemption. It also is noteworthy what the opinion says it does not restrict:

> Our holding does not prevent a more narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes. Nor does our holding preclude a party from seeking noncore work product "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means." [footnotes omitted]

In re National Lloyds Insurance Company, supra at *7

D. PRODUCTION OF THINGS CREATED AND REVIEWED

1) In ***Collins v. Western Digital Technologies, Inc.***, Slip Copy, 2012 WL 7189181 (E.D. Tex. 2012) Defendant argued that it was entitled to all the products that Plaintiff's expert had tested, not just the model and serial numbers, which is what had been disclosed. The federal judge held that the "Federal Rules of Civil Procedure further require the production of all data considered by testifying experts and the opportunity to inspect and test all designated tangible things. FED R. CIV. P. 26 and 34. Providing model and serial numbers rather than the actual drives that were tested does not comply with either the Discovery Order or the Federal Rules of Civil Procedure.

2) What happens when the expert witness produces a complete report and is offered for deposition, but unintentionally loses his complete file and cannot recreate it? This problem was confronted in ***Harris County Appraisal Dist. v. Houston 8th Wonder Property, L.P.***, 395 S.W.3d 245 (Tex. App.-Houston. [1 Dist.] 2012). The Appraisal District argued that under TEX. R. CIV. P. 192 and 194, it was entitled to everything that the expert had created or reviewed in anticipation of litigation. Interestingly, the Appraisal District did not seek exclusion of the expert's testimony under TEX. R. CIV. P. 193.6 or as a sanction under TEX. R. CIV. P. 215. Rather, it saw exclusion of the expert under ***Daubert*** because the expert could not provide the data that he had relied upon in formulating his opinions. The Court held that the exception to TEX. R. CIV. P. 193.6 exclusion applied because 1) the expert testified that the loss of the file was inadvertent; 2) the expert had provided a comprehensive report; and 3) the Appraisal District was able to take a complete deposition of the expert. *See* TEX. R. CIV. P. 193.6(a). *Supra* at p. 12.

E. INVESTIGATIONS AND CONSULTING EXPERT DATA

1) In ***In re Energy Transfer Partners, L.P.***, Not Reported in S.W.3d, 2009 WL 1028056 (Tex. App.-Tyler 2009) Energy built a compressor station and some neighbors complained about the noise. Transfer responded that it would investigate the complaint. Upon receiving a promise from Energy that the "results" of the testing would be shared with them, the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbor's property. The testing was conducted but the results were never shared. A group of neighbors filed suit against Energy and send a request for production that sought "reports relating to sound at or around the subject pump station." Defendant agreed to produce non-privileged documents responding to the request. This production did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant's conclusions were protected. The Trial Court found that the "raw data" was discoverable, but not the consultant's opinions that were formulated in anticipation of litigation.

The Appellate decision centers first on whether the consultant was a consulting expert. The Court does a ***National Tank Co. v. Brotherton,*** 851 S.W.2d 193 (Tex. 1993) analysis and finds that in examining the "totality of the circumstances" Energy proved that it anticipated litigation when it hired the consultant and that the consultant's work was done in anticipation of litigation (even if there were other ostensible purposes for the report). Energy conceded that the consultant was a "dual capacity witness," one who possessed both expert opinions and knowledge of relevant facts. ***Axelson, Inc. v. McIlhaney***, 798 S.W.2d 550, 555 (Tex. 1990). Interestingly, the Appellate Court uses this to overrule Plaintiffs' argument that Energy had waived the consulting expert exemption by identifying the consulting expert.

The opinion next focuses on the implied finding that Energy had waived the consulting expert privilege by "agreement/consent" in that Energy had agreed to share the "results" of the testing. The Appellate Court concludes that there was no agreement to share the specific sound test or the consultant's conclusions drawn from the test.

> Moreover, Energy Transfer's promises to provide "what we find" and that "the results" of the sound tests are not sufficiently definite to encompass the privileged report and information.

This finding is less than compelling. However, there is one argument that does not appear to be raised or considered by the Appellate Court. In ***Axelson, Inc. v. McIlhaney***, 798 S.W.2d supra at 555 (which is cited by the Appellate Court as authority for the "dual capacity" rule, see above), the Texas Supreme Court upheld a Trial Court finding that individuals designated as consultants could not be deposed about their conclusions; but they could be deposed as fact witnesses about the facts they possessed.

> Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition to the condition of Axelson's relief valve. The trial judge limited the scope of

discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. Id at 555.

Similarly, in this instance, one could ask why the Trial Court was found to have abused his discretion in allowing discovery of the "raw data" which arguably would be considered the core "factual" data compiled by the consultant.

2) ***In re Fast-Trak Const., Inc.***, 307 S.W.3d 526 (Tex. App.-Dallas, 2010). ***Fast Trak*** reaches a result similar to that reached in ***In re Energy Transfer Partners, L.P.*** The case involved an alleged construction defect and whether the soil was properly prepared prior to construction. The parties entered into a Rule 11 agreement allowing the Defendant's consulting expert to conduct destructive soil testing. The parties agreed that the Defendants would "produce photographs or electronic images taken during the investigation as may be required under Rule 192.5." A dispute arose about the discoverability of "underlying data." The Trial Court issued an order that Defendant produce "the underlying facts and data from the laboratory testing of the soil samples." The Appellate Court found that underlying data equated with mental impressions which are protected from discovery and, therefore, the Trial Court abused its discretion in ordering the discovery of "underlying data." See comments above regarding how this type finding reconciles with the holding in ***Axelson, Inc. v. McIlhaney***, 798 S.W.2d 550, 555 (Tex. 1990).

3) ***In re Jourdanton Hospital Corporation***, Not Reported in S.W.3d, 2014 WL 3745447 (Tex. App. – San Antonio 2014). What happens when an employee of a party who is subsequently designated as a testifying expert, reviews investigative materials in anticipation of litigation, prior to the employee being designated as a testifying expert? ***Jourdanton*** helps dissect and inform this difficult issue.

The issue arose in the context of a medical malpractice case against Jourdanton Hospital. The hospital received notice of a claim and its risk manager (who also is an attorney) commissioned an adjusting company to investigate and provide a report. Subsequently, suit was filed, and Plaintiff requested the hospital's investigation. The risk manager filed an affidavit in support of protecting the investigation as core work product created in anticipated of litigation. Later, the risk manager was designated as a testifying expert. Plaintiff sought the production of the investigation report because it had been "provided" to the risk manager.

The hospital de-designated the risk manager (which will be discussed below in a different section of the paper) and argued that the privilege had not been waived because the investigation report had not been reviewed or relied upon by the risk manager in the formulation of expert opinions and testimony. The Appellate Court points out that there is a distinction between a report reviewed in anticipation of litigation and one reviewed for the formulation of expert opinions.

> There is a distinction between a report prepared in anticipation of litigation and one provided to or prepared by or for an expert in anticipation of trial or deposition testimony. [citations omitted] A report provided to an expert for the purpose of preparing the witness to provide expert opinion testimony is discoverable, while one provided solely for the purpose of evaluating potential claims in anticipation of possible future litigation is not.

F. BIAS

1) OVERVIEW:

While Tex. R. Civ. P. 192 allows discovery of bias, the rule has been interpreted restrictively. Discovery is not generally allowed to find out if an expert is biased. Rather discovery of bias is allowed, once there is a demonstration of bias. Courts have observed that the amendment to the rules was not intended to overrule the holding in ***Russell v. Young,*** 452 S.W.2d 434 (Tex. 1970) 437 (Tex. 1970) (orig. proceeding) (denying discovery of financial records from a potential medical expert witness because "[t]here is ... a limit beyond which pre-trial discovery should not be allowed"). The Texas Supreme Court explained in ***Walker v. Packer***, 827 S.W.2d 833 (Tex. 1992) that bias has to be established before a party may essentially fish for evidence of bias**.** ***Walker*** involved a claim of obstetrical malpractice. One of the experts was a professor at the University Health Science Center in Dallas. The plaintiff learned, despite this witness' testimony to the contrary, that the medical school required that a doctor first obtain permission from the faculty before that doctor could testify on behalf of a plaintiff. The plaintiffs' attorney sought to depose the medical

school's representative about this policy. The trial court, however, sustained an objection to the deposition for the reasons stated above. The Texas Supreme Court observing that "[o]ur rules of civil procedure. . .mandate a flexible approach to discovery," found that the trial court had misapplied the holding in ***Russell v. Young***, , and that the instant case was factually distinguishable from ***Russell*** because in ***Walker*** (unlike the situation in ***Russell)*** the requesting party had demonstrated a specific circumstance that might possibility have imputed the credibility of the expert (the medical school's policy of restricting the faculty's freedom to testify for plaintiffs). ***Walker***, 827 S.W.2d at 837. The court disapproved the trial judge's "mechanical approach to discovery rulings;" however, it did not decide the case on this basis, but instead held that it was a matter that could be addressed on appeal. *Id.* at 838.

2) In re Ford, 427 S.W. 3d 396 (Tex. 2014) involved a claim of product defect, the Plaintiff sought to depose the corporate representative of each of the Defendant's two testifying expert's employers. One expert worked for Exponent and the other for Carr Engineering. Both of these companies regularly appear in automotive product liability cases for the Defendant automotive company, particularly Ford Motor Co. Plaintiff wanted to depose the corporate representatives on "detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011." The Texas Supreme Court rejected this type of discovery as an improper fishing expedition. The Court points out in the decision that both experts gave testimony relevant to the issue of bias. Both testified that they had never testified against Ford and one testified that she had never testified that a vehicle had any type of design defect. It is clear that the Texas Supreme Court is not holding that discovery of bias is impermissible; rather it is reiterating that when a party seeks to delve into the financial records of the expert (or the expert's employer) the Court has drawn a very red line.

3) In re Siroosian, S.W.3d , 2014 WL 6911024 (Ft. Worth 2014). Many smaller motor vehicle collision cases come down to establishing the true amount of medical bills, particularly those incurred in the past. Plaintiffs may employ a procedural device to have a treating physician provide an affidavit that the care provider's bills are reasonable and necessary. If not timely controverted, the testimony of the affiant is dispositive on the issue. ***Siroosian*** involved such a situation. The Plaintiff originally had designated Siroosian as a testifying expert, but after successfully having Siroosian file a reasonable and necessary affidavit that was not timely controverted, Plaintiff de-designated Siroosian as a testifying expert. Defendant then sought through deposition on written questions to attempt to demonstrate that Siroosian had biases that should be considered regarding his testimony. The questions centered on the Siroosian's practice of taking letters of protection.

a. Whether there is an accounts receivable report or some sort of report in June of 2012 that would have shown how much was owed by each patient?

i. This question is not seeking patient names.

b. Is there a report or a document that shows letters of protection accounts that went into collection in 2012 for Chiropractic Doctors Clinic?

i. This question is not seeking patient names.

c. Can you think of a patient who went into collection under a letter of protection for whatever reason that didn't get a recovery?

i. This question is not seeking patient names.

d. Have you ever contributed to any campaign to Domingo Garcia the Plaintiff's lawyer?

e. Did Chiropractic Doctors Clinic have the ability in 2012 to generate, and does it possess a revenue report for each patient?

f. What is the identity of the software used to create the revenue reports for Chiropractic Doctors Clinic?

g. What is the dollar amount of collections efforts in 2012 by Chiropractic Doctors Clinic for patient bills after a letter of protection was provided to Dr. Siroosian and/or Chiropractic Doctors Clinic?

> h. What is the impact of the letter of protection provided to Dr. Siroosian and/or Chiropractic Doctors Clinic by Plaintiff's counsel for this matter?
>
> i. What is the identity of any individuals who worked for Chiropractic Doctors Clinic that would be better suited than Dr. Siroosian to answer questions about the collection efforts of Chiropractic Doctors Clinic for patient bills after a letter of protection was provided?

The Appellate Court, in deciding whether the trial judge had abused her discretion in ordering Siroosian to answer the above questions, relied heavily on ***In re Ford***, discussed above. The Appellate Court not only was concerned with the relevancy of the requests but with the breadth of the requests, pointing out importantly that overbroad requests for irrelevant discovery are improper whether there is an undue burden or not. ***In re Nat'l Lloyds Ins. Co.***, No. 13-0761, 2014 WL 5785871, AT *1-2 (Tex. Oc. 31, 2014) (orig. proceeding). The Court found that all the above requests, except (d) and (i) (which were rejected for other reasons) were not relevant to the claims and defenses pled in the lawsuit and therefore it was an abuse of discretion for the Trial Court to order that the questions be answered:

> We fail to see how accounts receivable reports showing amounts owed by each patient, collection efforts by Relators from patients on letters of protection, collection efforts by Relators from patients on letters of protection when the patient did not obtain a recovery, revenue reports concerning each patient, the total dollar amount of collections under letters of protection, the software utilized by CDC, or Siroosian's thoughts on the impact of a letter of protection are probative of the Plaintiff's injuries or the treatment of those injuries by Siroosian, CDC, or other chiropractic doctors at CDC.

The Court further found that the questions were not designed to reveal any "bias" toward one side or the other. The majority opinion hinges in large part on its definition of bias**. "Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other."** *See* ***Compton v. Henrie***, 364 S.W.2d 179, 182 (Tex. 1963). This may or may not prove to be too restrictive a definition. However, using this definition, the Appellate Court found that the subject requests were both overbroad and irrelevant.

The Court then turned to questions about campaign contributions and found that the question was improper for its infringement on free speech and also with regard to its relevancy. Lastly, the majority addresses the dissent's view that the requested discovery could be relevant on "billing bias." The majority's response is informative not only on the issue of scope generally, but also regarding the interplay between the rules of discovery and TEX. CIV. PRAC. & REM. CODE § 18.00(e).

> Siroosian's bill is reasonable, or it is not; it is for medical treatment that was necessary or that was not necessary. Procedures exist for Mazurek to challenge the reasonableness of the amount Siroosian billed the Plaintiff and to challenge whether the treatments that Siroosian provided to the Plaintiff were necessary. *See* Tex. Civ. Prac. & Rem. Code § 18.00 (e). (Setting forth procedure for filing counter-affidavit concerning cost and necessity of services); *see also* ***Horton v. Denny's Inc***., 128 S.w.3d 256, 258 (Tex. App. – Tyler 2003, pet. denied) (involving cross-examination of treating doctor at trial concerning reasonableness and necessity of medical expenses).

4) PERSONAL MEDICAL HISTORY

One federal court has held that a testifying expert was required to disclose in discovery whether he himself had a hip implant to expose the witness' potential bias in litigation involving whether the defendant's hip implant was an unreasonably dangerous defective product. ***In re Depuy Orthopedics Inc. Pinnacle Hip Implant Products Liability Litigation***, 2016 WL 6271479 (N. D. Tex. Dallas Div. 2016).

5) EXPERT REPORTS FROM OTHER CASES

An expert's reports from other cases in which the expert has participated as a testifying expert (consulting expert reports will likely continue to be exempt absent extenuating circumstances) generally are not going to be relevant unless the party requesting the reports tailors the request to reports to the opinions, claims and defenses in the instant case. ***In re Plains Marketing, L. P.,*** 195 S.W.3d 780 (Tex. App. – Beaumont 2006) and ***In re Makris***, 217 S.W.3d 521, 526 (Tex. App. – San Antonio 2006).

We conclude that the trial court abused its discretion in ordering discovery of a nonparty expert witness's personal financial documents, and expert reports and correspondence from other unrelated cases, without first requiring some evidence of the witness's bias.

6) PRIOR REPRESENTATION IN A MEDICAL MALPRACTICE CASE

A trial court has been found to be within its discretion in disallowing admissibility of testimony that an expert previously has been represented in a prior medical malpractice claim by an attorney involved in the instant litigation. ***Stam v. Mack, M.D.,*** 984 S.W.3d 747 (Tex. App. – Texarkana 1999).

7) DRAFT REPORTS

A) The Federal Rules have been amended to protect communications between attorneys and experts regarding the drafting of expert reports unless the communications can be shown to provide factual data. Fed. R. Civ. P. 26.b(4):

Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

B) *Cf.* ***U.S. v. Vista Hospice Care***, 319 F.R.D. 498 (N.D. Tex. 2016) (relator was entitled to disclosure of portions of draft expert rebuttal report that, inter alia, identified facts or data that provider's attorney provided to experts and that experts considered in forming the opinions to be expressed).

C) Texas has not adopted a similar rule.

11. MOTIONS FOR PROTECTION:

A. An expert as a non-party is permitted to file a motion for protection if information or materials outside the scope of permissible discovery or information that is privileged is sought. Tex.R. Civ. P. 192.6(a) ("A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. . ."). A question that sometimes arises is what court has jurisdiction to grant a motion for protection or a motion to quash regarding a non-party. That question is answered in Tex. R. Civ. P. 176.6(e):

A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b), before the time specified for compliance***, either in the court in which the action is pending or in a district court in the county where the subpoena was served.***

B. MOTIONS TO QUASH:

The Texas Supreme Court recently has held that it is proper for a physician whose file is subpoenaed to seek protective relief in the county in which the physician resides and was served with a subpoena and that the party retaining or relying on the expert's records cannot be sanctioned for the expert seeking protection absent a showing of collusion. ***In re Garza,*** 544 S.W.3d 836, 841 (Tex. 2018).

> Garza asserts that McClain and Palacio were lawfully permitted to seek the protection they desired in Bexar County pursuant to rules 176.6(e) and 192.6 of the Texas Rules of Civil Procedure and that the Jim Wells County court abused its discretion by sanctioning her for their lawful actions. We agree.

C. PRIVILEGES: DOCUMENTS REVIEWED BY A COMPANY REPRESENTATIVE DESIGNATED AS TESTIFYING EXPERT:

1) It is axiomatic, in Texas, that if something is reviewed or relied upon by a testifying expert in formulating the expert's opinions to be expressed in the case, those data are subject to discovery. ***In re Christus Spohn Hosp. Kleberg***, 222 S.W.3d 434, 445 (Tex. 2007) orig. proceeding) (holding that work product was not protected if provided to or reviewed by a testifying expert. Apparently, while communications between the expert and counsel were involved, no claim of attorney-client privilege was before the Court). But what is the rule when the testifying expert is a "specially employed" expert, such as a company employee or representative? I have written in the past that the discovery of and from the specially employed expert is the same as for any testifying expert. The case I cited for this proposition was ***Aetna Casualty & Sur. Co. v. Blackmon***, 810 S.W.2d 438 (Tex. App.--Corpus Christi 1991, orig. proceeding), which involved an in-house employee who was designated as a testifying expert. The Court held that it was undeniable that the designation of the employee as a testifying expert waived any privilege that attached to any documents ***relied*** (this was before the rule was amended to include "reviewed.") upon in forming his opinions. However, implicit in the holding was that documents and data not relied upon continued to be protected by any privilege that otherwise applied. So, what is the result if the specially employed representative testifying expert is provided or reviews data protected by the attorney/client privilege? Recent opinions suggest that if the specially employed expert qualifies as a company representative, any attorney/ client data reviewed by the expert continues to retain its privileged status, which is not waived by designating the representative as a testifying expert.

2) ***In re Segner,*** 441 S.W.3d 409 (Tex. App. – Dallas 2013) ***involved*** claims in bankruptcy by a limited liability partnership against a bank. The trustee designated an individual as a testifying expert and the bank sought the expert's deposition. At issue were communications between the expert and attorneys for the trust, which claimed the communications were protected because the expert also was a "representative" of the estate. The Court found that the expert was a representative of the trust and accordingly communications between the representative and the trust attorneys were protected by the attorney-client privilege, notwithstanding the individual also was designated as a testifying expert. Finding that the holding in ***Christus*** was not applicable because the Court in that instance was dealing with work product and not matters protected by the attorney-client privilege, the Appellate Court found simply that communications protected by the attorney/client privilege are not waived by designating the individual as a testifying expert. Further, and even more curiously, the Court found that Tex. R. Civ. P. 195.1 does not expressly allow for discovery of matters protected by the attorney-client privilege. The Court's analysis here is somewhat confusing. It seems to intimate that had the notice of deposition been issued under Rule 199.1, discovery of attorney-client communications might be discoverable, but since the notice was issued under Rule 195.1 (and 195.4), no such exception is allowed. *Supra* at 412-413. Why this is curious is because there is no unique deposition rule under Rule 195.1 and 195.4. Arguably, a deposition of a testifying expert is taken under Rule 195.1 through either Rule 199.1 which allows for the oral depositions of parties, or under Rule 205, which allows for the depositions of non-parties. In either event, attorney-client communications are presumably protected subject to claim of waiver. The issue that is not clearly raised and discussed in ***Segner*** is whether designation of an individual as a testifying expert waives the attorney/client privilege in any respect. The inference of the Court's holding appears to be no.

3) ***In re Texas Windstorm Insurance Association***, Not Reported in S.W.3d, 2016 WL 7234466 (Tex. App. – Houston [14th Dist.] 2016] arose out of a first party insurance dispute. The insurance company, in response to a motion for summary judgment, tendered the affidavit of a company representative who also was designated as a non-retained expert. The City of Dickinson somehow learned that the affidavit had been modified after communications between the attorney for the insurance company and the affiant, and the City requested the communications between the attorneys and the affiant. The Trial Court ordered the production of these communications. The Appellate Court, citing the holding in Segner, held that the communications were protected by the attorney-client privilege and were not waived by designating the representative as a testifying expert.

> We agree with ***Segner,*** and conclude that the email exchanges and the accompanying drafts of Strickland's affidavit between Texas Windstorm's counsel and Strickland are protected by the attorney-client privilege and are not subject to discovery. Supra at *6.

4) The holdings in ***Segner*** and ***Texas Windstorm Insurance*** appear premised on the proposition that the attorney-client privilege is sacrosanct and that it cannot be invaded under any circumstances. This is contrary to the holding in the Texas Supreme Court case ***Republic Ins. Co. v. Davis***, 856 S.W.3d 158 (Tex. 1993).

> We conclude the better position applies the ***Ginsberg*** offensive use waiver to the attorney-client privilege. The common law and now our rules of evidence acknowledge the benefit provided by the attorney-client privilege. In an instance in which the privilege is being used as a sword rather than a shield, the privilege may be waived. [footnotes omitted] ***Id*** at 163.

Arguably, by designating an employee representative as a testifying expert, Pinnacle was using the attorney-client privilege offensively and an argument could be made that by doing so, it waived the privilege. The ***Segner*** opinion talks about balancing interests, but no real balancing analysis is provided in the opinion. While the result may have been the same, I believe the Court could and should have followed the balancing test set out in ***Davis.***

> Privileges, however, represent society's desire to protect certain relationships, and an offensive use waiver of a privilege should not lightly be found. For that reason, the following factors should guide the Trial Court in determining whether a waiver has occurred.
>
> First, before a waiver may be found, the party asserting the privilege must seek affirmative relief. Second, the privileged information sought must be such that if believed by the fact finder, in probability, it would be an outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. If any one of these requirements is lacking, the Trial Court must uphold the privilege. [footnote omitted*] **Id.*** at 163.

12. RESPONSIBLE THIRD-PARTY PRACTICE

A. The Texas Responsible Third-Party statute (Civ. Pract. & Rem. Code §33.033) causes great confusion and consternation among litigants regarding the need for expert testimony when a health care provider is designated as a responsible third party. There are two important aspects to this statute: 1) the opportunity to designate a responsible third party and 2) the motion to strike the designated third party.

B. The statute is very liberal about whom may be designated as a responsible third party. This of course includes designated a health care provider, for putatively causing the claimed injuries because of a failure to comply with the applicable standard of care. The question arises whether the party designating the health care provider must comply with the notice and expert report provisions of Chapter 74. Although there is not a case directly on point, it is arguable that the requirements of Chapter 74 apply only to a "claim" or "suit," against a healthcare provider and a designation as a responsible third party is neither.

C. There has been one case discussing the applicability the Ch. 33, designation of an emergency room physician as a responsible party. Although this case was later reversed on appeal on other grounds, the holding regarding Ch. 33 is at least informative. The Court held that the heightened "standard of proof" required in Ch. 74 for a healthcare provider providing emergency care did not apply to a Ch. 33 determination about whether the emergency room physician violated a standard of care that was a proximate cause of the injuries claimed by the Plaintiff. However, when it came to whether there was sufficient evidence to overcome a motion to strike the designation, the court noted that expert testimony would be necessary to meet the evidentiary requirement of showing a violation of a standard of care that was a proximate cause of the Plaintiff's alleged injuries. See, ***ExxonMobil Corporation v. Pagayon***, 467 S.W.3d 36, 51-53 (Tex. App. – Houston [14th Dist.] 2015) rev'd on other grounds, ***Pagayon v. ExxonMobil Corporation,*** 536 S.W.3d 499 (Tex. 2017). While the decision does not expressly note that the evidentiary requirement can only be met by qualified expert testimony, I believe this is tacit in the holding.

13. DE-DESIGNATION and CROSS DESIGNATION OF EXPERT WITNESS

A. OVERVIEW**:** The practice of de-designating and cross-designating experts involves a number of competing concepts, including ethics and tactics. A party is entitled to de-designate a testifying expert as a consulting only expert and thereby exempt the expert's opinions from discovery, provided that the party has not waived the exemption by having other testifying review the opinions of the de-designated expert and the purpose in de-designating the testifying expert is not against public policy. Further, if another party has cross-designated the testifying expert, the benefit of the de-designation maneuver could be thwarted. There is no prohibition against an opposing party designating an opponent's testifying expert as their own testifying expert and calling the testifying expert at trial, or otherwise utilizing the expert's opinions.

B PRE-1999 HOLDINGS: ***Jones & Laughlin Steel, Inc. v. Schattman***, 667 S.W.2d 352 (Tex. App.-- Fort Worth 1984, orig. proceeding), involved a scenario similar to that in ***Barker v. Dunham***, in that the deponent who was refusing to answer a question about his investigation or opinions was a regular employee and senior field engineer for the defendant. During the deposition, the defendant corporation stated that it had not decided whether the witness would be called as an expert witness at trial or used solely as a consultant. The plaintiff filed a motion to compel, and the defendant opposed it on the ground that it had insufficient time to make a determination regarding designation. A hearing was conducted, but before the judge made his ruling the defendant designated the witness as a consultant. The trial court ultimately ruled that the witness' factual observations and opinions could be discovered, but not his reports or communications to his employer. The appellate court observed that ***Werner v. Miller***, 579 S.W.2d 455 (Tex. 1979), did not dictate when a party must make its designation of experts, but found that the court did not abuse its discretion in this connection. *See also* ***Jones & Laughlin Steel, Inc. v. Schattman***, 667 S.W.2d 352, at 355 (Tex. App.--Fort Worth 1984, orig. proceeding). The court next analyzed the relator's argument under TEX. R. CIV. P. 186a that once it designated the witness as a consultant, *no matter when this occurred*, the witness' opinions and mental impressions were placed beyond the scope of discovery. *Id.* at 355-60. ***Barker v. Dunham***, was distinguished because the defendant in that case never positively stated what designation it was going to make, while the defendant did in ***Schattman***, albeit after a hearing on plaintiff's motion to compel.

C. AGAINST PUBLIC POLICY: In ***Tom L. Scott, Inc. v. McIlhany***, 798 S.W.2d 556 (Tex. 1990), the companion case to ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990), the Supreme Court adopted the policy that "the consulting expert privilege is intended to be only 'a shield preventing a litigant from taking undue advantage of his adversary's industry and effort, not a sword used to thwart justice or to defeat the salutary objects' of discovery." ***Tom L. Scott, Inc.***, 798 S.W.2d at 559. The court held that agreements assigning expert witnesses between parties for the purpose of re-designating them as consultants (thereby precluding discovery of their opinions) are against public policy, violate the rules of discovery and are ineffective. In the case, some of the defendants settled with some of the plaintiffs and through the agreement obtained "control" of the plaintiff's expert witnesses whose testimony was harmful to the defendants. The defendants promptly "de-designated" the experts as consulting only experts in an attempt to keep the other parties from obtaining ammunition against them. The court noted that ***Werner v. Miller***, 579 S.W.2d 455, 456 (Tex. 1979), and ***Jones & Laughlin Steel, Inc. v. Schattman***, 667 S.W.2d 352, 355-56 (Tex. App.--Fort Worth 1984, orig. proceeding), are distinguishable because they did not involve "bargains between adversaries to suppress evidence." ***Tom L. Scott, Inc.***, 798 S.W.2d at 560 n.8. Presumably, it is still permissible for a party to re-designate its own expert witnesses.

D. The Fourteenth Court of Appeals has held that once an expert witness is designated, the opposing party cannot be prevented from taking the expert's deposition by re-designating the expert. ***Harnischfeger Corp. v. Stone***, 814 S.W.2d 263 (Tex. App.--Houston [14th Dist.] 1991, orig. proceeding). In ***Harnischfeger***, the expert was designated in a companion case; however, the court found that the actions were sufficiently similar that access to the expert should not be barred. The reasoning in the opinion is somewhat confusing. The court speaks at length about allowing full discovery of the facts; however, no one had objected to the expert being deposed about his factual knowledge. What the respondents were trying to protect from discovery was the expert's opinions and the court failed to clearly articulate why the opposing party had a right to discover these. The court conceded that there was nothing in the record indicating any contingency or agreement between the real parties interest for any of the parties to obtain the use of the consultants.

E. ***Hooper v. Chittaluru,*** 222 S.W.3d 103, 108 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) holds that an opposing party may call in its case in chief the opposing party's testifying expert. This case will be discussed further under Experts at Trial, below.

F. What happens if a party de-designates its testifying expert, rendering the expert a consulting only

expert? We get an answer in ***Kevin D. Spruill and Darcy Spruill, Individually and as Next Friend of Camryn Spruill, a Minor v. USA Gardens at Vail Leasco, L.L.C.; USA Gardens at Vail, L.L.C.; and Internacional Realty, Inc.***, Not Reported in S.W.3d, 2013 WL 362740 (Tex. App.-Waco). The Spruill's had designated Michael Welton as one of their testifying experts and presented him for deposition. After the deposition, the Spruill's "de-designated" Welton as one their testifying experts, reclassifying him as a consulting only expert. However, Defendants filed a motion asking the Court to allow them to designate the expert as their testifying expert, as they had relied upon the expert's testimony. The Court granted the motion and the Defendants used the expert's testimony in support of their motion for summary judgment. The Appellate Court held that the Trial Court had not abused its discretion.

What is unclear from the opinion is whether Defendants had designated the expert as their testifying expert before or after the Spruill's de-designated him as their testifying expert. However, it is arguable whether the timing would have made any difference. The question that is not clearly resolved from this opinion is whether it is material that the Spruill's de-designated Welton after he had given deposition testimony. As a practical matter, while it may not make a difference legally whether the expert has testified before de-designation, it will be much harder for an opposing party to obtain the testimony it wants and needs if the de-designation occurs *before* the testifying expert is de-designated, as it is unlikely the testifying expert will cooperate willingly with the adverse party.

G. In ***In re Jourdanton Hospital Corporation,*** Not Reported in S.W.3d, 2014 WL 3745447 (Tex. App. – San Antonio 2014) the defendant hospital had obtained an affidavit from its risk manager to the effect that she had commissioned and obtained an investigative report in anticipation of litigation. The hospital later designated the risk manager as a testifying expert. When it did so, the Plaintiff demanded that the investigation be produced because it had been provided to a testifying expert. The hospital then de-designated the risk manager as a testifying expert to protect the investigation privilege. Plaintiff argued that the de-designation was improper, citing ***In re Christus Spohn Hosp. Kleberg***, 222 S.W.3d 434, 435 (Tex. 2007) (orig. proceeding). In ***In re Christus Spohn***, the hospital tried to snap back documents that had been reviewed by one of its testifying experts. The Supreme Court ruled that the hospital could snap back the documents if it de-designed the expert but that if it did not de-designate the expert, it would waive the privilege. In ***Jourdanton***, the Appellate Court found that ***In re Christus Spohn*** was not controlling.

> We do not agree that ***Christus Spohn*** compels the conclusion that the Hospital's privilege was irrevocably destroyed by Castillo's designation. This Court has held, "Texas law permits a testifying expert to be 'de-designated' so long as it is not part of 'a bargain between adversaries to suppress testimony' or for some other improper purpose." [citations omitted]

No bargain or improper purpose was demonstrated. Therefore, Jourdanton's de-designation of its risk manager as a testifying expert was held proper and its investigation report retained its privileged status.

H. ***In re Robins & Morton Group,*** Not Reported in S.W.3d, 2016 WL 2584526 (Tex. App. – San Antonio, 2016). This is a noteworthy case regarding de-designation. What is significant is that each of the Defendants' experts noted in their respective designations that they had "reviewed" the Plaintiff's original petition which incorporated a certificate of merit, which later was disclosed as Plaintiff's expert's report. The Plaintiff later de-designated her expert as a consulting expert and attempted to preclude the Defendants from taking the expert's deposition. The Appellate Court held that since the other experts had "reviewed" the expert's report, even though the experts offered affidavits that they had not "relied" upon the report, the expert could be deposed.

> Because the mandamus record reflects that Nardella's report and opinions were *reviewed* by other testifying experts in this suit, we conclude relators are entitled to further discovery regarding Nardella under rule 192.3(e), and the Trial Court's order thus constitutes an abuse of discretion. *See* ***Martin v. Boles****, 843 S.W.2d 90, 92* (Tex. App. – Texarkana 1992, orig. proceeding) (granting mandamus to allow deposition of defense consulting expert where expert's opinions about the case were reviewed by Plaintiffs testifying expert). [emphasis added]

In re Robins & Morton Group*, supra at *4.*

14. *DAUBERT/ROBINSON*[14]

A. OVERVIEW:

A trial court functions as a gatekeeper in deciding whether to admit or exclude expert opinion. *See* ***In re Commitment of Gollihar***, 224 S.W. 3d 843, 853 *(*Tex. App. – Beaumont 2007, no pet.) (citing Harvey Brown, *Procedural Issue Under Daubert*, 36 Hou. L. Rev. 1133, 1158-59 (1999). The qualification of a witness as an expert is within the trial court's discretion. *See* ***Broders v. Heise***, 924 S.W.2d 148, 151 (Tex. 1996). Expert testimony is admissible when (1) the expert is qualified, and (2) the testimony is relevant and based on a reliable foundation. *See* ***Cooper Tire & Rubber Co. v. Mendez,*** 204 S.W.3d 797, 800 (Tex. 2006).

B. NO CONCLUSORY OPINIONS:

An expert no longer may take an oath and offer a simple opinion that the expert believes there was or was not negligence. Conclusory, "it is because I say so," ("ipsi dixit") opinions constitute no evidence in Texas. ***Burrow v. Arce***, 997 S.W.3d 229, 235 (Tex. 1999). ***IHS Cedars Treatment Center of De Sota, Inc. v. Mason***, 143 S.W.3d 794, 803 (Tex. 2004)

> This Court has held that "[a] conclusory statement [in an affidavit] of an expert witness is insufficient to create a question of fact to defeat summary judgment." ***McIntyre v. Ramirez***, 109 S.W.3d 741, 749-50 (Tex. 2003); *see also* ***Coastal Transp. Co. v. Crown Cent. Petroleum Corp.***, 136 S.W.3d 227, 231 (Tex. 2004); ***Mercer v. Daoran Corp***., 676 S.W.2d 580, 583 (Tex. 1984).

There must be more than conclusory statements. A lot more.

C. TESTIMONY MUST BE RELEVANT AND RELIABLE

Since 1995, the law in Texas has been that expert testimony must be both relevant and based on a reliable foundation. ***Helena Chem. Co. v. Wilkins***, 47 S.W. 3d 486, 499 (Tex. 2001). ***Gharda USA, Inc. v. Control Solutions, Inc.,*** 464 S.W.3d 338, (Tex. 2015). The testimony may be based on experience or it can be based upon studies and literature. ***Windrum v. Kareh, M.D.*** 2019 WL 321925 at *4 (Tex. 2019).

> **[14] [15]**Experience alone may provide a sufficient basis for an expert opinion. *See* ***Gammill v. Jack Williams Chevrolet, Inc***. 972 S.W.2d 713, 726 (Tex. 1998). But experience may not be sufficient in every case. *See id.* (explaining that "[a] more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing"). Further, medical literature is not necessary to support an expert's opinion, although it tends to strengthen the bases for the opinion and therefore is preferred. *See id*

D. NO ANALYTICAL GAP

If there is too large of "an analytical gap" the opinion will constitute no evidence. ***Volkswagen of America, Inc. v. Ramirez***, 159 S.W.3d 897, 904-905 (Tex. 2004).

> Expert testimony is also unreliable if there is too great an analytical gap between the data on which the expert relies and the opinion offered. ***Gamill v. Jack Williams Cheverolet, Inc***., 972 S.W.2d 713, 727 (Tex. 1988); *see also* ***Havner,*** 853 S.W.2d at 714 (reasoning that an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology).

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[14] *See* ***Daubert v. Merrill Dow Pharmaceuticals, Inc.,*** 113 S.Ct. 2768 (1993);); ***Kumho Tire Co. Ltd. v. Carmic*****hael**, 526 U.S. 137 (1999); ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, (Tex. 1995*); **Merrel Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706 (Tex. 1996); ***Gammil v. Jack Williams Chevrolet, Inc.***, 972 S.W.2d 713,724 (Tex. 1998) ***Ford v. Ledesma***, 242 S.W.3d 32 (Tex. 2007); ***Whirlpool Corp. v. Camacho***, 298 S.W.3d 631 (Tex. 2009).

E. METHODOLOGY

The expert's testimony must be based on a scientifically reliable methodology and more than the expert's naked testimony that the methodology is valid is needed. ***Moore v. Ashland Chemical, Inc***., 151 F.3d 269, 296 (5th Cir. 1998)

> This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. *See* ***Daubert v. Merrell-Dow Pharmaceuticals, Inc.,*** *43 F.3d 1311, 1316 (9th Cir. 1995)* (on remand).

F. BASES OF OPINION MUST BE RELIABLE

The expert's opinions are supposed to comport with "the applicable professional standards." ***Helena Chem. Co. v. Wilkins***, 47 S.W.3d 486, 499 (Tex. 2001) (quoting ***Gammill v. Jack Williams Chevrolet, Inc.***, 972 S.W.2d 713, 725-26 (Tex. 1998). Above all, the opinions must be scientifically reliable. In order for an expert's opinions to be scientifically reliable, the data upon which the expert relies must itself be reliable.

> "If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable."

Gross v. Burt, 149 S.W.2d 213, 237 (Tex. App. – Fort Worth 2004, pet. denied) citing ***Merrell Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706, 714 (Tex. 1997).

G. NON-EXCLUSIVE FACTORS

Daubert and ***Robinson*** each set out a number of factors for consideration to aid the trial court in its gate-keeping duty of determining whether the expert's opinions are reliable. ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, 557 (Tex. 1995). [15] Many of the early opinions under Daubert applied these factors rigidly. If there was not peer reviewed literature in support of the expert's methodology or conclusions, the opinion might be stricken. Similarly, if there was not testing or the conclusions could not be replicated the opinion might be stricken. The Texas Supreme Court has emphasized however that these factors are not exclusive or mandatory and that an expert's opinions might qualify even if all or most of these factors are not met. ***TXI Transp. Co. v. Hughes***, 306 S.W.3d 230, 235 (Tex. 2010):

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[15] There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

(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 WEINSTEIN & BERGER, *supra*, ¶ 702[03];

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.[2]

We emphasize that the factors mentioned above are non-exclusive. Trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence. The factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case.

> We have emphasized, however, that these factors are non-exclusive, and that they do not fit every scenario. ***Gammill***, 972 S.W.2d at 726. They are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony. ***Ford Motor Co. v. Ledesma,*** 242 S.W.3d 32, 39 (Tex. 2007) (citing ***Cooper Tire & Rubber Co. v. Mendez***, 204 S.W.3d 97, 802 (Tex. 2006); *see also* ***Gammill***, 972 S.W.3d at 727.

H. TESTIMONY MUST BE BASED ON REASONABLE PROBABILITY

It is not enough for the testimony to be based upon a accepted methodology and to be relevant. The testimony must be based on more than possibility or surmise. The opinion must be based upon reasonable probability. *See* ***Gen. Motors Corp. v. Iracheta***, 1611 S.W.3d 462, 471, 72 (Tex. 2005) and ***Burroughs Wellcome Co***. 907 S.W.2d 497, 500 (Tex. 1995). An additional factor is whether the expert has ruled out other likely (not speculative) causes within a reasonable degree of medical probability. ***Transcom Ins. Co. v. Crump,*** 330 S.W.3d 211, 217-18 (Tex. 2010)

I. TREATING PHYSICIANS:

1) Daubert has been held to apply to clinicians. ***Merrell Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706, 719 (Tex. 1997).

> A physician, even a treating physician, is not in a position to infer causation. The scientific community would not accept as methodologically sound a study by such an expert reporting that the ingestion of a particular drug by the mother caused the birth defect Similarly, an expert's assertion that a physical examination confirmed causation should not be accepted at face value. [P]hysicians following a scientific method would not examine a patient or several patients in uncontrolled settings to determine whether a particular drug has favorable effect, nor would they rely on case reports to determine whether a substance is harmful. [A]necdotal or particularized evidence accomplishes no more than a false appearance of direct and actual knowledge of a causal relationship.

Cited in ***Baker v. Smith and Nephew Richards, Inc***., Not Reported in W.W.2d, 1999 WL 811334 at *30-31 (Harris County Texas 152d Jud. Dist. Ct. 1999) A treating physician merely cannot infer causation and must demonstrate that he or she meets the elements necessary to qualify as an expert for the opinions the treating physician expresses and the scientific reliability of the opinions. Further the opinions cannot simply be conclusory.

2) However, also *see* ***Ahmed Ishmail v. Volvo Trucks North America,*** 2018 WL 3751277 at *1 (S.D. Tex. Corpus Christi Div. 2018):

> Nothing suggests that the subjective nature of the diagnosis is not a medically sound methodology for diagnosing the types of complaints Ismail makes. The lack of objection confirmation of Ismail's complaints goes to the weigh, not the admissibility of the evidence proposed from Ismail's medical experts.

3) Differential diagnosis has been accepted as a scientifically reliable clinical methodology, but it still must be found to have been reliably employed. Just saying a differential diagnosis was used is not enough; there must still be a demonstration of proper application. ***BNSF Railway Co. v. Nichols,*** 379 S.W.3d 378, 388 (Tex. App. – Fort Worth 2012)

> The question of whether it is reliable under ***Daubert*** is made on a case-by-case basis, focused on which potential causes should be "ruled in" and which should be "ruled out." ***Meyers v. Ill Cent. R.R.***, 629 F.3d 639, 644 (7th Cir. 2010) Calling something a "differential diagnosis" or "differential etiology" does not by itself answer the reliability question but prompts three more: (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? and (3) Did the expert reliably rule out the rejected causes? If the court answers "no" to any of these questions, the court must exclude the ultimate conclusion reached. ***Tamarez v. Lincoln Elec. Co.***, 620 F.3d 655, 674 (6th Cir. 2010), cert. denied, -- U.S. --, 131 S.Ct. 2434, 179 L.Ed. 2d 1210 (2011).

J. OPINIONS IN MEDICAL RECORDS AND MEDICAL ARTICLES:

Often in medical malpractice litigation, parties will offer medical records into evidence. The offering can be to establish that the injury the Plaintiff complains of occurred or that the defendant's negligence was a cause of the injuries. While the records may be admissible as business records, the opinions contained within the records arguably are also subject to a Daubert/Robinson analysis. It is reasonable that just because a record contains a medical opinion does not make the opinion reliable. The author of the opinion might not be qualified to render the opinion, the opinion might not be scientifically reliable, it might not be based upon reliable data and it might simply be conclusory. The same rationale applies to opinions expressed in medical journal articles. Simply because an opinion appears in an article does not make it scientifically reliable, unless the article itself was peer reviewed and found to be scientifically reliable.

K. PARTY PHYSICIANS:

Question whether ***Daubert***/***Robinson*** could also apply to a defendant care provider, if the care provider defendant is named as a testifying expert. I am not aware of an appellate decision holding that a party defendant, when designated as an expert is exempt from the ***Daubert/ Robinson*** criteria. Indeed, there is authority for the proposition that a party defendant, when designated as a testifying expert is treated the same as a retained expert except perhaps with regard to the report requirement. ***Tinkle v. Henderson***, ***Tinkle v. Henderson,*** 777 S.W.2d 537, 539 (Tex. App.– Tyler 1989, writ denied).) If Daubert applies to a treating physician, then arguably a defendant care provider expert and that care provider's expert opinions also could be challenged under ***Daubert.***

15. TRIAL:

A. One party is free to cross-designate and call an opposing party's testifying expert at trial. ***In Hooper v. Chittaluru, M.D. et al***, 222 S.W.3d 103, (Tex. App. Houston. [14th Dist.] 2006, pet. denied).

B. An expert may rely on inadmissible evidence; however, a party may not use a testifying expert to place before the jury inadmissible evidence. In other words, a testifying expert may state that the expert relied on some particular data, however, the expert is not allowed to offer the substance of such data into evidence, particularly if the data is not otherwise admissible or admitted into evidence. **TEX. R. EVID 703** and ***In re Commitment of Salazar***, 2008 WL 4998273 at *4 (Tex. App. – Beaumont 2008)

C. An expert may review a Ch. 74 report; however, the expert is not permitted to discuss the contents of the Ch. 74 report at trial. ***In re Alere Women's & Children's Health, LLC***., 357 S.W.3d 809 (Tex. App. – Houston [14th Dist.] 2011).

D. An expert's report is not a business record. It is a report create for litigation and therefor is inadmissible hearsay. That said, a table contained in a report may conceivably be offered and admitted into evidence if it meets the summary of evidence rule. *See generally*, ***Texas Employer's Insurance Association v. Sauceda,*** 636 S.W.2d 494 (Tex. App. – San Antonio 1982, no writ).

E. An expert is not permitted to testify about the credibility of witnesses. The credibility of witnesses is solely the province of the jury. ***Ochs v. Martinez,*** 789 S.W.2d 949,957 (Tex. App. – San Antonio 1990, writ denied).

F. A trial judge has discretion to limit the number of expert witnesses called by the parties at trial; however, this discretion is not unlimited. There must be a finding that the stricken expert's testimony not only would be cumulative, but also that it would not add substantial weight to the party's case. ***Rains v. Sepulveda, M.D.***, 2002 WL 243202 at *3 (Tex. App. – Houston [1st Dist.] 2002)

> Under rule 403, the test "is not merely whether the evidence to be adduced from the two witnesses is similar, but also whether the excluded testimony would have added substantial weight to the offering parties' case." ***Sims v. Brackett***, 855 S.W.2d 450, 454 (Tex. App. – Corpus Christi 1994, writ denied) (exclusion of expert in medical malpractice case).

See also, ***State of Texas v. Gaylor Investment Trust***, 322 S.W.3d 814 (Tex.App. – Houston [14th Dist.] 2010) (Trial court did not abuse its discretion in limiting each side to one expert witness).

G. IMPEACHMENT:

The Fifth Circuit, citing Texas Supreme Court precedent, has held that an expert may be cross examined and impeached by prior testimony in another case and about fees and earnings from litigation. *See* ***Collins v. Wayne Corp.***, 621 F.2d 777, 784 (5th Cir. 1980).

> We hold that cross-examination of an expert about fees earned in prior cases is not improper. The parties have not cited and our research has not uncovered any federal cases on this point. Cases from the state courts are split. Texas allows cross-examination of an expert witness about payments that expert has received for testifying in prior lawsuits. ***Russell v. Young,*** 452 S.W.2d 434 (Tex. 1970).

H. LEARNED TREATISES

1) Learned treatises are an exception to the hearsay rule. I question whether the rule has kept up with the changes in the law pertaining to admission of expert testimony. All that is required is a conclusory statement of an expert recognizing a text or an article as a learned treatise and it may be used as impeachment. Tex. R. Evid. 803(18).

> [t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

While impeachment evidence is not necessarily admissible evidence to support a judgment, it still can have a very powerful influence on the jury. Question whether more should be required to establish that an article or publication is scientifically reliable.

2) In a medical malpractice case, it has been held not to be harmful error for a judge to deny the use of a learned treatise for impeachment, when Plaintiff's expert was unable to establish that he recognized the article as a learned treatise. ***Durst v. Hill Country Memorial Hospital,*** 70 S.W.3d 233, 239-240 (Tex. App. – San Antonio 2001):

> An expert witness may properly be impeached by asking whether he or she agrees or disagrees with the statements contained in treatises and scientific materials; however, such cross-examination is limited to publications which the witness recognizes as authoritative or publications upon which the expert has relied. ***Carter v. Steere Tank Lines, Inc.***, 835 S.W.2d 176, 182 (Tex. App. – Amarillo 1992, writ denied).

3) An unresolved issue is whether a learned treatise relied upon by a testifying expert is something that must be voluntarily revealed, even if it is not specifically requested. Oftentimes a testifying expert will base or support his opinions upon studies, reports or journals in a particular field. The interesting-- and as yet unanswered--question is whether the author of the treatise is in the nature of a consulting expert whose opinions have been reviewed or relied upon. If so, does the party whose expert reviewed or relied upon the learned treatise have a duty to produce the author's work product? If so, would this duty include having to produce the author for deposition? If not, would there at least be a duty to have to pay the author's fee for testifying if the opposing attorney sought his deposition for purposes of cross-examining him about his work product?

I. CONCLUSORY TESTIMONY

> An "expert must explain the basis of his statements to link his conclusions to the facts." ***Earle v. Ratliff***, 998 S.W.3d 882, 890 (Tex. 1999); see also ***Jelinek v. Casas***, 328 S.W.3d 526, 536 (Tex.

> 2010) ("It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury.").

In one of the most significant medical malpractice opinions out of the Texas Supreme Court, the Court has recently clarified what constitutes conclusory expert opinion and what does not. ***Windrum v. Kareh, M.D.*** 2019 WL 321925 (Tex. 2019). This is extremely important for the reason the Court observes at the beginning of its analysis:

> If Dr. Parrish's expert opinion as to breach of the standard of care was not conclusory, then it was the sole obligation of the jury to determine Dr. Parrish's credibility over other experts, and this Court will not disturb the jury's findings. *See, e.g.*, ***Golden Eagle Archery, Inc. v. Jackson,*** 116 S.W.3d 757, 761 (Tex. 2003) (recognizing the principle that the jury is the sole judge of witness credibility).

One of the major differences between ***Daubert*** rulings in federal court and Texas State court historically has been that in federal court improper admission of expert testimony is treated as harmful error potentially resulting in a remand. In Texas, however, the effect of an expert testimony found on appeal to be conclusory has been fatal. ***City of San Antonio v. Pollock***, 284 S.W.3d 809, 818 (Tex. 2009) (quoting ***Burrow v. Arc***, 997 S.W.2d 229, 235 (Tex. 1999). A challenge to expert testimony as being conclusory may be made for the first time on appeal. ***Arkoma Basin Exploration Co., Inc. v. FMF Assocs. 1990-A. Ltd,*** 249 S.W.3d 380, 388 (Tex. 2008)(No objection to the admissibility of conclusory testimony is necessary "if the complaint 'is restricted to the face of the record' " and asserts that an expert opinion "was speculative or conclusory on its face[ ] or assume[s] facts contrary to those on the face of the record.") Conclusory testimony constitutes no evidence. ***City of San Antonio v. Pollock***, 284 S.W. 3d 809, 816 (Tex. 2009) (Conclusory testimony cannot support a judgment in a medical malpractice case). If there is no expert evidence in support of Plaintiff's medical malpractice claim, the judgment may be reversed and rendered by the Texas Supreme Court on a no evidence basis. ***City of Keller v. Wilson***, 168 S.W.3d 802 (Tex. 2005).

The Texas Supreme Court in ***Windum*** found that the testifying neurosurgeon was not conclusory, it was not *ipse dixit.* ***Windum***, *supra* at 5, 9.

> He based this conclusion on his own experience treating patients with hydrocephalus and intracranial pressure, the experience of other doctors in the field, Lance's own medical records and test results, Lance's autopsy report, and the testimony of Dr. Dragovic, the forensic pathologist. Dr. Parrish explained how and why all of these bases led him to conclude that Lance required a shunt. However, Dr. Parrish cited medical literature in support of only some of his opinions.[4] He failed to cite any literature in support of his ultimate conclusion that the standard of care for Lance's condition required insertion of a shunt. However, in addition to providing his resume and describing his experience, Dr. Parrish provided enough reasons for his opinion. While Dr. Parrish undoubtedly could have provided more solid support for his conclusion, he provided a basis for his opinion which was more than mere *ipse dixit*.
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> Although the bases for Dr. Parrish's testimony could have been better, we hold that Dr. Parrish's testimony as to the standard of care and Dr. Kareh's breach of that standard of care "did not simply state a conclusion without any explanation or ask the jurors to take [his] word for it" and therefore was not conclusory.