EXPERTS & FIDUCIARY LITIGATION

SCOTT D. WEBER, *Dallas*
Calloway, Norris, Burdette, Weber

State Bar of Texas
13th ANNUAL
FIDUCIARY LITIGATION
December 6-7, 2018
San Antonio

CHAPTER 11

With much thanks to Colin R. Byrne, J.D., who wrote the bulk of the paper and will, hopefully, be a licensed attorney as of the date of this seminar.

SCOTT D. WEBER
Calloway, Norris, Burdette, Weber
& Baxter-Thompson, PLLC
3811 Turtle Creek Blvd., Suite 400
Dallas, Texas 75219-4531
sdweber@cnbwlaw.com

SCOTT D. WEBER is a trial lawyer and a member of Calloway, Norris, Burdette, Weber & Baxter-Thompson, PLLC, in Dallas, Texas. Scott's practice involves contested probate and fiduciary litigation. Scott grew up in Dallas, Texas, attended Woodrow Wilson High School, received a B.A. in history from Columbia University in 1986, and a J.D. from Southern Methodist University in 1989. He was admitted to the Texas Bar in 1989. Scott is also admitted to practice before all of the Federal Courts in Texas, the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court, and the United States Tax Court. In 2006 he became Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. Scott has been named a "Texas Super Lawyer" by Texas Monthly Magazine since 2006, and has been listed in Best Lawyers in America since 2008. He has been an adjunct professor of Trial Advocacy at Southern Methodist University's Dedman School of Law. Scott is active in the Dallas Bar Association and served as the Chair of the Probate Trust and Estate Section.

TABLE OF CONTENTS

EXPERTS & FIDUCIARY LITIGATION

I. INTRODUCTION.

The outcome of a case often rests on the selection and presentation of an expert. Choosing and effectively using an expert witness can be difficult. In fiduciary litigation there are additional obstacles that make the effective use of experts even more challenging. We hope that this article will be a helpful guide and give you a better understanding of how to use and succeed with an expert, while, at the same time, trying to minimize the cost attendant in the use of expert witnesses. We will focus on how to deal with the expert; when and how to disclose the opinions of your expert; what the expert can and cannot do; challenging experts; and bolstering your own expert. So, you need to find an expert. Where do you start?

II. PRACTICAL ADVICE ON HOW TO DEAL WITH EXPERTS.

A. So, you need to find an expert. Where do you start?

Most lawyers delay hiring an expert because of the cost and don't engage one until it is apparent that the case is not going to settle. Other lawyers engage experts early on in the process so that they can take advantage of their expertise to formulate discovery, prepare for trial and craft the jury charge. Regardless of when you decide to hire an expert, the difficult part is where to begin your search. The first location you may go to (and where we went for this article) is Google. Here is a short list of websites that may help you find the expert you need and a short description of each website:

- Seak Expert Witness Directory - Seak, Inc., holds themselves out to be "the expert witness training company" and offers a directory search for the speciality area and state. Seak also offers free access to a directory of experts. SEAK EXPERT WITNESS DIRECTORY, www.seakexperts.com (last visited Sep. 7, 2018).
- ALM Experts - ALM Experts offers an easy to use search platform that allows you to narrow down your search to particular categories. ALM EXPERTS, www.almexperts.com (last visited Sep. 7, 2018).
- JurisPro Expert Witness Directory - Similar to the above listed websites, JurisPro also offers a category search by field and state. Once you select a field and state, JurisPro will list featured experts with a brief description of their background. JURISPRO EXPERT WITNESS DIRECTORY, www.jurispro.com (last visited Sep. 7, 2018).
- ExpertPages - Another good website to start your search, ExpertPages even offers an article library that can be helpful. EXPERTPAGES, www.expertpages.com (last visited Sep. 7, 2018).
- The TASA Group – Also a good source for finding experts. The TASA Group offers a search by expert category and search by specific state. Additionally, the website is user friendly and easy to navigate. THE TASA GROUP, www.tasanet.com (last visited Sep. 24, 2018).
- IMS Expert Services – IMS Expert Services has a well-designed layout on their website and offers a free search for their listed experts. Additionally, IMS lists client testimonials on the success they had with IMS experts. IMS EXPERT SERVICES, www.ims-expertservices.com (last visited Sep. 25, 2018).

If you do not want to start your search online, another great place to start is by simply asking your client. If your client is a corporate trustee, they are likely to have a few names of potential experts. As one author stated, your client may know the respected experts in the field, and may also know who are the quacks. Kate Mahan & Heather Menezes, *Tips for Finding and Vetting Expert Witnesses*, AM. BAR ASS'N. (Aug 17, 2017), https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2017/tips-for-finding-vetting-expert-witnesses.html).

Another option to help you find an expert is simply to ask attorneys who practice in your field. If you work in an office that focuses on litigation, chances are that someone has a list of vetted experts who can help your case. Should your firm not have an expert that is the right fit, you should reach out to others attorneys in your practice area and see who they recommend. *See* Mahan. Fellow attorneys you meet through networking events can also be good sources.

By far the most important thing in seeking an expert is to give yourself *plenty* of time. Sifting through the numerous listings and peer recommendations can be a time-consuming task. Good experts are usually in high demand and are usually booked-up months in advance. Getting in contact early can allow you to be flexible. More importantly, you want to be sure that your expert fits into your case and your argument. Just because a person is an expert in forming limited partnerships does not mean that they can properly explain why the amendment to that limited partnership agreement was fair. *See generally* Mahan. Finally, you don't want to be scrambling to get documents to your expert and disclosing their opinions at the last minute.

B. Vetting the Expert.

You must properly vet the potential expert. At a minimum, you need to review the types of cases where the expert has previously testified. You need to find

out if your potential expert has taken a different position in a similar case or ever testified to something that can come back to haunt you. Depending on the size of the case and budget, you may even need to review prior deposition and trial testimony. Under Federal Rule of Civil Procedure 26, the expert must provide a written report of "(iv) the witness's qualification, including a list of all publications authored in the previous ten years; (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case." FED. R. CIV. P. 26(a)(2)(B)(iv)-(vi). Ask your expert if they have ever testified in federal court and, if so, review that information. They should have no problem turning over the above-mentioned list, and they are likely to have a list that goes back even further than the required four to ten years. Even if the potential expert does not have such a list, you should ask the expert for transcripts of any previous depositions or trial testimony. Fellow attorneys who used, or fought against, the expert should also have copies of the transcripts. An organized expert should have no problem in providing you transcripts. Additionally, the expert should have compiled information on the previous cases they worked on, what argument they made for each case, when they worked on a case, how much they were compensated, etc. It should come across as a red flag if a potential expert is unwilling or unable to provide this information.

Your job as the attorney is to vet the expert, so use this article as a starting point for your questions. The last thing you want, especially during trial, is to find out that you overlooked a critical flaw in your expert's personal history and either have their testimony excluded or make you look ill prepared in front of a jury. Surprises are only good when you create them, not when opposing counsel does it.

C. Who pays for the expert?

Once you find a potential expert, you need to discuss with your client the costs. There are two possibilities that should be discussed at this point: (1) will your firm pay for the expert upfront; or (2) will the client pay for the expert as the case moves along? Asking your client how much they are willing to spend on the expert witness (especially if the outcome of the case is not favourable) can be a major area of dispute. Balancing the value of the expert and controlling the costs are important factors in evaluating the case.

Expert witness fees are second only to attorney fees in the cost of litigation. Because expert fees can hike up the bill, determining how and when the expert gets paid is an important question to answer before moving forward. Clients need to know just how expensive expert fees can be. Hopefully, once a case gets to the point that an expert is required, you are likely to have discussed what the expert can cost. From flying, housing, meals, material review, trial prep, and trial time, the total cost of an expert can range wildly. The expert's hourly fee alone can range from a few hundred dollars per hour to a few thousand per hour. John D. Sear & Michael Pangburn, *Anticipating and Avoiding Expert Deposition Fee Disputes*, AM. BAR ASS'N. (July 26, 2016), http://apps.americanbar.org/litigation/committees/expertwitnesses/articles/ summer2016-0716-anticipating-avoiding-expert-deposition-fee-disputes.html. As the total amount of the expert fee increases, so does the probability of a dispute over those fees. *Id*.

Typically, "the fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable." *In re Slanker*, 365 S.W.3d 718, 719-20 (Tex.App.—Texarkana 2012, pet. dism'd by agr.). Under Tex. R. Civ. P. 131, a successful party "shall recover [from] his adversary all costs included . . . except where otherwise provided." TEX. R. CIV. P. 131; *see also Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003). But, there are ways that will allow you to recover the costs for reasonable and necessary expert witness fees. *See* TEX. BUS. & COMM. CODE ANN. § 27.01(e) (2009) (a person who commits fraud in a real estate or stock transaction "shall be liable to the person defrauded for reasonable and necessary . . . expert witness fees . . . .) *and Farley v. Farley*, 930 S.W.2d 208, 213-14 (Tex.App.—Eastland 1996, no writ) (trial court has discretion to award expert witness fees in certain family law cases). Additionally, expert witness fees can be awarded if the court determines there is "good-cause," which is determined on a case-by-case basis. *Headington Oil Co., L.P. v. White*, 287 S.W.3d 204, 212 (Tex.App.—Houston [14th Dist.] 2009, no pet.) *citing Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376-77 (Tex. 2001); *see also* TEX. R. CIV. P. 141. "Good-cause" means the party "unnecessarily prolonged the proceedings, unreasonably increased costs, or committed some other offense." *Id.* at 212 *citing Bethune*, 53 S.W.3d at 377. In *Headington*, the Court of Appeals reversed the award of expert witness fees and determined there was not "good-cause" because no evidence established a failure to cooperate with opposing counsel or any unnecessary prolonging of the proceedings. *Id*. at 213; *but see also Richards v. Mena*, 907 S.W.2d 566, 571 (Tex.App—Corpus Christi 1995, writ dism'd by agr.) (regardless of ***any*** good-cause shown, expert costs are incidental and not taxable court costs) (emphasis added); *and Power Reps, Inc. v Cates*, No. 01-13-00856-CV, 2015 Tex.App. LEXIS 8384, at *55 (Tex.App.—Houston [1st Dist.] Aug. 11, 2015, pet. denied) (mem. op.) *citing Griffin v. Carson*, No. 01-08-

00340-CV, 2009 LEXIS 3842, at *19-20 (Tex.App.—Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.) ("A prevailing party may not recover the costs of accountants and other expert witnesses under Rule 141, regardless of whether good cause is shown"). Unfortunately, little authority exists for when a court has found "good-cause" to award recovery of the expert witness fee. Therefore, it is critically important to determine who will pay for the expert and the associated costs before the expert comes into the case.

1. When does the expert get paid?

Another important consideration is to figure out how and when the expert gets paid. Depending on the experience and reputation of the expert, he or she may charge an upfront retainer before they even begin to look at your case. For lawyers who work on a contingency basis, paying a retainer for an expert can be difficult. Experienced experts frequently want payment upfront because they have been burned in the past by lawyers who did not pay after they lost their case. Steven Babitsky, *The 5 Biggest Reasons Expert Witnesses Don't Get Paid*, SEAK (Jan. 22, 2014), https://www.testifyingtraining.com/the-5-biggest-reasons-expert-witnesses-dont-get-paid/. Conversely, some experts will send a bill for their hours on a monthly basis, rather than a complete bill at the end of the case. It is important to discuss these options with your expert witness before they begin working to your case.

2. Do you need to set a budget for the expert?

Depending on your experience, it can be challenging to know exactly how much an expert will cost. The complexity of the case and the expert's reputation and experience can vary the overall costs. If you have a limited expert budget, be sure to let the expert know upfront. Knowing exactly how much the expert is allowed to bill will reduce administrative stress for both parties. Just remember that if you set too low a budget for the expert, or limit the materials that the expert reviews (in an effort to keep down costs) you could be setting yourself up for disaster and giving the other side ample fodder for cross-examination. *See* Babitsky. To properly do the job, the expert will need to see all of the necessary materials. Be sure you keep this in mind when you and the client make the ultimate decision on the expert's budget.

3. What about the appearance of "Hired Gun" testimony?

Another interesting situation can arise regardless of who pays for the expert witness. Even though either the firm or the client can pay for the expert, usually the retaining attorney is the only person who can influence the expert's testimony. As one legal scholar wrote, "the extent to which attorneys . . . influence the opinions of experts varies" and "the relationship between an attorney who chooses, hires . . . [and] pays . . . an expert is inherently [coercive]." Stephen D. Easton, *"Red Rover, Red Rover, Send That Expert Right Over": Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses*, 55 SMU L. REV. 1427, 1500 (2002). The scholar went further into the debate on who pays for the expert, stating that "[e]ven if the client technically retains and directly pays the expert, the attorney is usually the person who searches for, chooses, informs, directs, and otherwise influences the expert." Easton, 55 SMU L. REV. at 1431-32 n.21 *citing* Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 492-99 (2000). Although opposing counsel can argue to the jury that by hiring an expert witness you, the client, or both have simply paid the expert to craft a self-serving opinion, that argument is naïve at best, and mud-slinging at worst. Unfortunately, this argument is frequently seen at trial and is comparable to political advertisements in the weeks before an election. If a case goes to trail, both sides are oftentimes required to hire competing experts. Even though some jurors are shocked to hear how much some experts are paid to give testimony, everyone knows that experts do not work for free. Consider asking your expert witness during direct how much their time is worth to get it out in the open and you can then put your own spin on it.

D. How do you prepare your expert?

As with any witness who will take the stand, the most important job of a lawyer is to prepare the witness for both direct and cross examination. As one author wrote: "[e]ven though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. [Therefore] witness preparation is treated as one of the dark secrets of the legal profession." John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989).

In an effort to avoid the misconception that expert witness preparation is a "dark secret" here are some general methods for prepping your expert witness:

- Creation of questions you will ask during direct and cross-examination. Although I recommend avoiding scripted questions at all costs, it is important to know what you will ask your own expert during direct and what opposing counsel will ask your expert on cross. Rehearsing the answer to a difficult question will help the expert on direct and cross. Drafting good direct and cross

questions comes with practice. Just because a question sounds good on paper does not mean that it will come across easily to the jury. Think of the questions you would like to ask, what responses they will elicit, and whether the possible responses further your argument.

- Think of a theme for your case, and work that theme into the expert's examination. Any good trial attorney, or orator in general, knows that telling your argument through the structure of a themed story is key to keeping the attention of your audience. Use your expert witness to reinforce the foundations of your theme. To create a theme, look at your case as a whole and see if there is some sort of repetitive action or overall motive that can be put into a simple phrase. Use this phrase to think of themes that would match well with the jury.
- Schedule more than one practice examination with your expert. Once your expert witness has reviewed the material and is comfortable making their opinion you should have the expert come to your office to practice questioning. Saying the questions out loud can allow both you and the expert to tweak the points that may come across as weak. The more practice you get, the more comfortable you will feel once deposition and trial day arrives.
- Write down the specific points you would like your expert to talk about during questioning. While you are practicing with your expert, be sure to have a few major points that the expert needs to get across during the deposition and trial. Did the trustee make bad investments? Was the failure to make distributions a breach of their fiduciary duty?
- Ask your expert if there are any areas that he/she would like you to ask them about during questioning. Because there are issues that only your expert will know about, be sure to ask them whether a particular topic needs to be discussed. Remember, you pay the expert witness to strengthen your argument, let them help you build it.
- Be a stubborn opposing counsel. Finally, while you are practicing with the expert, think of a cross-examination that you would craft if you were in the shoes of opposing counsel. Next, put your expert through that cross-examination. Better yet, get one of your partners to cross-examine your expert. Challenge the expert and see how they will react to pressure. Even if the real deposition or cross-examination is lacking in substance, it is critical to train your expert to contain their emotions and not get flustered if they are cross-examined by aggressive counsel.

The importance of good preparation *cannot* be emphasised enough. Remember, "expert witnesses require considerable preparation." John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 295 (1989). Experts are the make or break testimony of your case, so going through the motions is the only way to make sure your expert is prepared. If you are unsure if your preparation has worked, practice with a someone in your firm and see if they would change anything. You need to have an expert that can remain calm under pressure and will not buckle to opposing counsel. You want the expert to be as prepared as possible before placing them in front of the jury.

E. What to look for when selecting an expert?

What I have found helpful in getting my point get across to the jury is to use a personable expert who connects with the jury. People will naturally listen to someone they can relate with. Nobody enjoys being lectured on a subject they know little, if nothing, about by a person they could not care less about (except for lawyers and discussions of fiduciary duties). When you meet your potential expert, measure them to see how they could come across to the jury. Can they convey their point in a way the jury will understand?

A good expert will shape their personality to the story they tell the jury. John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 298 (1989). You also want to find an expert that will give you an honest opinion. Although there are plenty of experts that will say whatever you pay them to say, it is important to have experts who are truthful in their opinions. Whether your expert or their opponent had the better explanation will be decided by the jury. The expert should not compromise their integrity to reach a desired result.

You should also check out the demeanour of the expert. *See* Applegate at 298. What does the expert do when they are being asked questions? Do they have a good posture? Do they keep eye contact with you when you speak? How does their face react to difficult questions? Experts are humans, so no matter how perfect you think they are, there will be flaws. Look to the positive personality traits of the expert and emphasize those to the jury, and negate any unfavourable traits. *Id*. at 299.

F. What does your expert need to say?

What do you need your expert to say? The correct answer would be the truth in a method that guarantees a favourable outcome for your clients. One author went as far as stating "[a]ttorneys prize those experts who have the best testimonial manner . . . but avoid those who look bad [or] speak poorly." David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent*

Evidence, 32 REV. LITIG. 1, 8 (2013). Unfortunately, in the never-ending search for the expert that can present themselves to the jury, attorneys seem to avoid "[e]xperts who come across measured and impartial" and that "a fool with a small flair for acting and mathematics might be a more successful witness than say, Einstein." Sonenshein, 32 REV. LITIG. at *8 n.34. The author goes on to conclude an "individual's success in being chosen as an expert is not dependent on her knowledge of this issue, but rather on her ability to testify persuasively to the viewpoint that the paying party wants to hear . . . ." Sonenshein, 32 REV. LITIG. at *8. Although this may be disappointing to read, the practical side of litigation is that you need more than just expertise to be able to present your argument to the jury. During your search for the expert, find a balance between an expert who can present well to the jury and an expert who can say what needs to be said.

III. DISCLOSING EXPERT OPINIONS.

A. When do you disclose the expert's opinion?

Another critical part of using an expert is determining when you should disclose their opinion. Listed below are the primary rules and relevant cases on when you should disclose your expert's opinion.

1. Texas Rule of Civil Procedure 194.

Texas Rule of Civil Procedure 194 governs preliminary discovery of expert opinions and supporting documents. Under Rule 194, "[a] party may obtain disclosure from another party of the material listed in Rule 194.2 by serving the other party a request no later than thirty days before the end of the applicable discovery period . . . ." TEX. R. CIV. P. 194.1. One of the required disclosures is information on any testifying expert. TEX. R. CIV. P. 194.2(f). The rule, in part, states: "[a] party may request disclosure . . . for any testifying expert: (1) the expert's name, address, and telephone number; (2) subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions, opinions, and a brief summary of the basis for them . . . ." TEX. R. CIV. P. 194.2. Once the requesting party serves the disclosures, the "responding party must serve a written response on the requesting party within thirty days after service of the request." TEX. R. CIV. P. 194.3. There is an exception under Rule 194.3 for any testifying expert, stating that "a response to a request under Rule 194.2(f) is governed by Rule 195." TEX. R. CIV. P. 194.3(b). This exception exists because a party may, if necessary, supplement the required response after the responding party determines or changes who will be their testifying expert. Under Rule 195, "a party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5." TEX. R. CIV. P. 195.6. Therefore, should a party need to supplement their response, Rule 193.5 states, in part. That "if a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although correct when made, is no longer complete and correct, the party must amend or supplement the response," and the "amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response," "[and] [e]xcept as otherwise provided . . . it is presumed that an amended or supplemental response made less than thirty days before trial was not made reasonably promptly." TEX. R. CIV. P. 193.5.

a. What happens when you fail to properly disclose the expert's opinions and the basis for them?

These mandatory rules can cause issues if you do not follow them. *See Roman v. Cuprum S.A. de C.V.*, No. 13-10-00165-CV, 2012 Tex.App. LEXIS 2553, at *11-12 (Tex.App.—Corpus Christi Mar. 29, 2012, no pet.) (party did not disclose the resume of an expert until one day before trial and eight days before the expert's testimony; the court determined there was no reversible error in allowing that expert's testimony because the testimony was anticipated by an earlier disclosure and the party opposing the expert did not show that admitting the expert's testimony led to an improper judgment) *see also In the Interest of T.K.D.-H*, 439 S.W.3d 473, 479 (Tex.App.—San Antonio 2014, no pet.) (upholding the exclusion of the expert's testimony at trial when the party only disclosed the expert's name and contact information, but not the other information required by Rule 194) *and $27,877.00 Current Money of the United State v. State*, 331 S.W.3d 110, 119-20 (Tex.App.—Fort Worth 2010, pet. denied) (required disclosures on the expert are intended to provide the opponent with information on the expert's opinion so that the opposing party can craft a cross-examination and rebut the expert's testimony with its own expert) *and Moore v. Mem'l Hermann Hosp. Sys.*, 140 S.W.3d 870, 875 (Tex.App.—Houston [14th Dist.] 2004, no pet.) (rebuttal expert excluded by trial court when party failed to disclose the expert's identity under Rule 194). Failure to properly designate an expert witness results in the automatic exclusion of the expert testimony unless the offering party demonstrates good cause for the failure or a lack of unfair surprise or unfair prejudice. *Perez. v. Embree Constr. Group, Inc.*, 228 S.W.3d 875, 844 (Tex. App.—Austin 2007, pet. denied); TEX. R. CIV. P. 193.6(a). But, Rule 194.2(c) states that the "responding party need not [submit] all evidence that may be offered at trial." *Roman*, 2012 Tex.App. LEXIS 2553, at *5; *see also In re Staff Care*, 422 S.W.3d 876, 881 (Tex.App.—Dallas 2014, no pet.) (although there is a presumption that amended

disclosures made less than thirty days before trial are untimely, there is "no opposite presumption that an [amendment] made more than thirty days [before] trial is timely").

Overall, it is important to not overlook any of the mandatory disclosures under Rule 194. Ignoring or falling short of the required disclosures can lead to unnecessary trouble in getting your expert witness before the jury.

2. Texas Rule of Civil Procedure 195.

Texas Rule of Civil Procedure 195 lists the rules for discovery regarding testifying expert witnesses. TEX. R. CIV. P. 195. A common mistake lawyers make is to ask opposing counsel to designate and disclose information about testifying experts through this rule or some other method. Rule 195 is for additional information, not initial information. *Id*. A simple glance at Rule 195.1 reveals that expert designation and disclosure of information is initially through Rule 194, but that additional information through expert depositions and other reports are permitted by this rule. *Id*.; TEX. R. CIV. P. 194. Rule 195 lists the schedule for designating experts, scheduling their depositions, court ordered reports, and amendments to expert materials disclosed under Rule 195. *Id*.[1] Remember that under Rule 195.7: "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." TEX. R. CIV. P. 195.7. *See Bryson v. Reid*, No. 05-03-01152-CV, 2004 Tex.App. LEXIS 6139, at *2-3 (Tex.App.—Dallas July 12, 2004, no pet.) (mem. op.) (Court of Appeals upheld the denial of motion for continuance and motion to late file a designation of expert when even in the absence of a signed scheduling order, the party should have known the designation of experts was due no later than ninety days before the discovery period ended).

B. What do you disclose about the expert's opinion?

After a review of the rules you will have decided when you must disclose the expert's opinion. But, now the question becomes what is discoverable and how much do you need to tell the other side when you disclose the expert's opinion? The following rules and cases are broken down to better help you determine the answer:

1. Texas Rule of Civil Procedure 192.

Rule 192.3(e) lists the scope of discovery for testifying and consulting experts. TEX. R. CIV. P. 192.3(e). Under this rule, "[t]he 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." TEX. R. CIV. P. 192.3(e) (emphasis added). *See Rodriguez-Aguero v. Tex. Med. Bd.*, No. 03-09-00262-CV, 2010 Tex.App. LEXIS 3220, at *19-22 (Tex.App.—Austin Apr. 30, 2010, no pet.) (expert retained in an administrative proceeding became a consulting-only expert after de-designation as a testifying expert, therefore his testimony and report were properly excluded from discovery); *see also Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 471 (Tex. 1997) (the "consulting-expert privilege" allows parties and their attorneys protection and privacy to develop their case, similar to the work-product privilege). The expert's conclusions will be based on the material he or she has reviewed in the case. It is critical to have access to the "preparatory material" the opposing expert reviewed in reaching their opinion; without access to these materials, cross-examination would be difficult. John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 296 (1989).

For clarity sake, Rule 192.7(c)-(d) places experts into the following categories: "[a] *testifying expert* is an expert who may be called to testify as an expert witness at trial; and (d) 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." TEX. R. CIV. P. 192.7(c)-(d); *see also Nat'l Tank Co. v.*

[1] *See also Norman v. Grove Cranes*, No. 17-20632, at *2, 7 (5th Cir. Sept. 10, 2018, unpublished) (in a federal case out of the Southern District of Texas, the Fifth Circuit determined that the district court did not abuse its discretion in denying prima facie testimony by the plaintiff's expert of alternative crane designs when the plaintiff failed to file a motion to compel seeking the production of crane designs until one month after the close of discovery).

Brotherton, 851 S.W.2d 193, 204 (Tex. 1993) ("in anticipation of litigation" is found when (1) "the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation," and (2) "the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue."). Although it is both ironic and circular to define a testifying expert as one who testifies, and a consulting expert as one who is not a testifying expert, these are the definitions provided. *Id*. 192.7(c)-(d).

a. Documents provided to a Testifying Expert.

Let's put forth the following hypothetical: You are trying to determine what documents are important for your expert to use in giving their testimony at a deposition and trial. Unsure on how to proceed, you hand a document to your expert, who then looks at the document, but does not use or rely on the document for their testimony. Is that same, un-relied upon document now discoverable?

Remember that when dealing with an expert, "all documents and tangible things provided to a testifying expert under Rule 192.3 . . . is not work product protected from discovery." *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 439-40 (Tex. 2007) *citing* TEX. R. CIV. P. 192.3(e)(6). In *Christus*, the court determined that Rule 192.3(e) is broader than Fed. R. Civ. P. 26(a), so when the hospital accidentally provided privileged documents to its designated testifying expert witness, the hospital's claim that the expert did not sufficiently consider the documents was immaterial. *Id*; *citing* FED. R. CIV. P. 26(a). The golden rule is that you ***never*** should provide documents to your testifying expert if you do not want them to be disclosed to the opposing party.

Rule 192.3 is important to consider when you are interviewing your expert. If the expert takes notes, or passes you a note during a deposition or trial both are discoverable. TEX. R. CIV. P. 192.3(e)(6). Additionally, all the information discoverable under Rule 192.3 concerning experts is ***not work product***, even if made or prepared in anticipation of litigation or for trial. TEX. R. CIV. P. 192.5(c)(1); TEX. R. CIV. P. 192.3 (emphasis added). This is why it is critical to explain to your expert, before the process begins, the importance of not revealing anything damaging to your side in his/her written notes.

Some lawyers will go so far as to not have any written communication with an expert in order to avoid the possibility of something damaging coming out. However, the absence of written communication will also come to light and the other side can exploit that fact at trial. Find a happy medium and communicate with your expert in writing, but keep it limited to simple, non-controversial topics.

b. Documents provided to a Consulting Expert.

Although basically everything that a testifying expert touches is discoverable, the rules are completely different for consulting-only experts. *See Tom. L. Scott, Inc. v. McIlhaney*, 798 S.W.2d 556, 559 (Tex. 1990) (the "policy behind the consulting expert privilege is to encourage parties to seek expert advice in evaluating their case and to prevent a party from receiving undue benefit from an adversary's efforts and diligence.") *citing Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979) In *Beke*, the Court of Appeals upheld the trial court's denial of a motion to compel documents from a consulting-only expert, the consulting expert's work was not reviewed or relied upon by the testifying expert, and the consulting expert was never identified as a witness the party intended to call. *In re Beke*, No. 09-07-104 CV, 2007 Tex.App. LEXIS 2149, at *1-2 (Tex.App.—Beaumont Mar. 22,2007, no pet.) (mem. op.). Additionally, the "consulting-only expert's file, the party's correspondence to its consulting-only expert, the notes in the file concerning its consulting-only expert, and email to and from its consulting-only expert are [not] discoverable." *Id*. at *1. Although the rules afford protection to a consulting-only expert, their opinions and the documents they reviewed can lose their privilege. In *Vela*, the Court of Appeals first determined that "a party is entitled to discovery of all documents, physical models, reports, compilations of data, or other material provided to, reviewed by, or prepared by or for a retained testifying expert." *Vela v. Wagner & Brown*, Ltd., 203 S.W.3d 37, 58 (Tex.App.—San Antonio 2006, pet. denied); *citing* TEX. R. CIV. P. 192.3(e)(6). The Court then found that "a party is entitled to obtain the same information about a consulting expert whose work was reviewed by a testifying expert as it can obtain from the testifying expert." *Id*. This goes to show that if you retain a consulting expert, be sure that the testifying expert does not review the consulting expert's work or else all of the information shared between you and the consulting expert will be discoverable.

2. Waiver of the Consulting Expert Privilege.

Although the documents reviewed by the consulting-only expert can be disclosed if reviewed by the testifying expert, there is another way a party can lose the consulting-only expert privilege. The party that retains the consulting-only expert can waive the consulting expert privilege. *In re Energy Transfer Ptnrs., L.P.*, No. 12-08-00397-CV, 2007 Tex.App. LEXIS 3763, at *15 (Tex.App.—Tyler Apr. 15, 2009, pet. dism'd) (mem. op.). In *Energy Transfer*, the Court found that waiver requires intent, either "intentional relinquishment of a known right or intentional conduct inconsistent with that right," but that waiver is "seldom found." *Id*. at *15; *citing In re Gen. Elec. Capital*

Corp., 203 S.W.3d 314, 316 (Tex. 2006); *and Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990). The Court also cited to Rule 193.3(d), stating that "if a party produces privileged material without intending to waive the claim of privilege, no waiver occurs, if within ten days or shorter . . . the party amends the response, identifies the [privileged] material [erroneously] produced, and states the privilege asserted." *Id*. at *15-16; *citing* TEX. R. CIV. P. 193.3(d). Finally, the Court concluded the defendants did not waive the consulting expert privilege because they never made "an express promise to provide . . . the report, or to disclose [the consulting expert's] mental impressions and opinions to [the plaintiffs]." *Id.* at *17; *see also Hardesty v. Douglas*, 894 S.W.2d 548, 551 (Tex.App.—Waco 1995, writ denied) ("waiver by offensive use" found when testifying expert re-designated as consulting only expert for integral part of case). The *Energy Transfer* case is an important example that although a party can waive the consulting expert privilege, there must be intentional conduct by the waiving party, which courts are unlikely to find. To keep the consulting expert privilege, be sure you do not let your testifying expert review their documents or opinions. Do not waive the privilege by using the consulting expert in an offensive manner or making express promises to provide documents to the opposing party.

3. The standard of review on appeal for the admissibility of expert testimony.

The decision on whether to admit or deny evidence rests entirely with the discretion of the trial court, who is often referred to as the gatekeeper. *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). Abuse of discretion is found when the trial court "acted without reference to any guiding rules or principles." *Sierad v. Barnett*, 164 S.W.3d 471, 481 (Tex.App.—Dallas 2005, no pet.); *citing Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Although there was untimely disclosure and a referral to an unknown consulting expert, abuse of discretion not found when trial court allowed the expert to testify. *Birnbaum v. All. of Am. Insurers*, 994 S.W.2d 766 (Tex.App.—Austin 1999, pet. denied). The trial court's "determination of whether [the] expert's opinion is admissible under [Rule 702] is reviewed for an abuse of discretion." *McMahon v. Zimmerman*, 433 S.W.3d 680, 685 (Tex.App.—Houston [1st Dist.] 2014, no pet.); *citing* TEX. R. EVID. 702 *and Gammill*, 972 S.W.2d at 718-719. Therefore, on appeal in a case involving the admissibility of expert testimony, the standard is whether the trial court abused its discretion.

IV. WHAT EXPERTS CAN AND CANNOT DO.

A. What can Experts rely upon in making their conclusions?

The basis for an expert's conclusion can be based on many things. Listed below are major topics/areas that an expert can use to create their ultimate conclusion:

1. Reliance upon Hearsay?

A common area of confusion in fiduciary litigation is whether experts can rely on hearsay in making their conclusions. As you know, hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay is not admissible unless there is an exception to the hearsay rule that will allow the statement into evidence. However, this problem does not occur when you are dealing with experts. Rule 703 states: "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware or, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." TEX. R. EVID. 703. Under this Rule, and expert can rely on facts or data "that are not themselves admissible into evidence as long as they are the kinds of facts or data on which experts in the field would reasonable rely [upon in forming opinions or inferences regarding the subject at issue]." Harvey Brown & Melissa Davis, *Eight Gates For Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 81 (2014); *see* TEX. R. EVID. 703 *and Niche Oilfield Servs., LLC v. Carter*, 331 S.W.3d 563, 574 (Tex.App.—Houston [14th Dist.] 2011, no pet.). Experts may also base their opinion "solely on inadmissible hearsay [as long as] the other requirements of [Rule 703] are satisfied." *Id*. at 181; *citing Wood v. State*, 299 S.W.3d 200, 212 (Tex.App.—Austin 2009, pet. ref'd); *see also Stam v. Mack*, 984 S.W.2d 747, 750 (Tex.App.—Texarkana 1999, no pet.) (testifying experts are allowed to relate the reasonably reliable facts and data relied on in forming opinion).

Additionally, that same inadmissible evidence must "not be admitted into evidence if its prejudicial effect outweighs its probative value as explanation or support for the expert's opinion." *Id*. at 81. The "more prejudicial than probative" objection is a common way for opponents to challenge the hearsay material that an expert relies upon in making their conclusion, and the court must give a limiting instruction to the jury if the inadmissible material will be "used for a purpose other than as explanation or support of the expert's opinion." *Id*. at 81. Therefore, as long as the requirements are met, experts are allowed to rely on hearsay in forming their ultimate opinion. For example, this can be helpful

in fiduciary litigation when your financial expert has to examine a third-party investment report—prepared outside of court and offered to prove the truth of the matter asserted—to determine whether the corporate trustee met the requirements to invest trust funds in accordance with the reasonably prudent investment standard. Even if a court determines the third-party investment report does not fit into a hearsay exception, the expert who reviewed that report in reaching their ultimate opinion is allowed to rely on that report. Overall, your expert can rely on hearsay in forming their ultimate opinion.

2. Texas Rule of Evidence 702.

Texas Rule of Evidence 702 deals with the admissibility of expert testimony. TEX. R. EVID. 702. Rule 702 states: "[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." TEX. R. EVID. 702.

Using Rule 702, "an expert's opinion is admissible if it satisfies three requirements: (1) the expert is qualified; (2) the opinion is sufficiently reliable under *Robinson* and its progeny; and (3) the testimony assists the trier of fact." *McMahon v. Zimmerman*, 433 S.W.3d 680, 685 (Tex.App.—Houston [1st Dist.] 2014, no pet.); *citing* TEX. R. EVID. 702 *and E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). The *McMahon* Court also determined that part two of the test, the "reliability inquiry," has three requirements that must be examined: (1) "the expert's methodology;" (2) "foundational data;" and (3) "whether too great an analytical gap exists as the expert connects the foundational data, or methodology, with the opinion." *Id*. at 686; *citing Wilson v. Shanti*, 333 S.W.3d 909, 913 (Tex.App.—Houston [1st Dist.] 2011, pet. denied) *and Harris Cnty. Appraisal Dist. v. Hous. 8th Wonder Prop., L.P.*, 395 S.W.3d 245, 253-54 (Tex.App.—Houston [1st Dist.] 2012, pet. denied). *See also Barnett v. Schiro*, No. 05-16-00999-CV, 2018 Tex.App. LEXIS 235, at *17 (Tex.App.—Dallas Jan. 9, 2018, no pet.) (mem. op.) (the expert's opinion was too conclusory and failed to "link his conclusions to the facts and explain why the alleged [harm] caused the injury;" therefore, the analytical gap was too great).

This rule of evidence requires that expert testimony must assist the trier of fact. David F. Johnson, *Appellate Issues Regarding the Admission or Exclusion of Expert Testimony in Texas*, 52 S. TEX. L. REV. 153, 154 (2010). The party presenting the expert testimony has the burden of proof to show that the testimony will assist the trier of fact. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 718 (Tex. 1998). Additionally, whether the expert is qualified is a preliminary question for the court to decide. *Gammill*, 972 S.W.2d at 718; *see* TEX. R. EVID. 104(a). The standard adopted in *Robinson* applies to all scientific expert testimony. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 722 (Tex. 1998); *see Robinson*, 923 S.W.2d at 556. Use case law discussing Rule 702 to challenge your opponent's expert and to bolster your own expert (*see* infra).

3. Texas Rule of Evidence 705.

Rule 705 deals with the disclosure of underlying facts or data relied upon by the expert and examining the expert about them. TEX. R. EVID. 705. Rule 705 states "[u]nless the court orders otherwise, an expert may state an opinion, and give the reasons for it, without first testifying to the underlying facts or data, but . . . may be required to disclose those facts or data on cross-examination." *Id*. 705(a). This part of the rule is procedurally important for how, and when, you can ask your expert about their conclusion. Although the expert will be required to disclose the basis for the opinion on cross, you are free to ask the expert about their ultimate opinion once you begin direct examination. Beware, under 705(b), opposing counsel is allowed to take your witness on voir dire before the "expert states an opinion or discloses the underlying facts or data." *Id*. 705(b).

4. Does the Expert need to retain their work product?

Your expert may ask whether or not they can destroy files acquired during the case. Do not let the expert destroy those files, or you could face sanctions. An expert is "required to preserve his work product [even if the expert was never paid by the retaining party] and the party who retained the expert may be sanctioned if the expert destroys his work product." *Vela*, 203 S.W.3d at 58; *citing Walton v. City of Midland*, 24 S.W.3d 853, 861-2 (Tex.App.—El Paso 2000, no pet.), *abrogated on other grounds*, 130 S.W.3d 144 (Tex.App.—El Paso 2003, no pet.). When a party or the expert destroys the expert's work product, the Texas Supreme Court stated, "the loss or destruction of evidence may seriously impair a party's ability to present its case." *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003). Even if your expert is paid, you and/or they could still be sanctioned if they destroy the material they used to reach their ultimate conclusion. Therefore, the important takeaways are: (1) the expert is not allowed to destroy his/her work product; and (2) don't forget to pay the expert. *See Vela*, 203 S.W.3d at 58.

5. Can the Expert testify as to a legal conclusion?

One of the major areas of controversy is whether experts are allowed to testify as to a legal conclusion or other legal issues. This can cause major headaches in fiduciary litigation because there really is no way to describe to the jury what a fiduciary duty—a legal term—is without the expert giving a legal opinion. You will often hear judges say that they will be the ones to instruct the jury on what the law is, not your expert!

The pivotal case that deals with this question came out of Houston's 14th Court of Appeals in 2004. The case involved securities fraud allegedly committed on Texas investors by a business owner who was represented by a New York law firm (Greenberg Traurig of New York). *Greenburg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 62 (Tex.App.—Houston [14th Dist.] 2004, no pet.). On appeal, the Court discussed whether the trial court erred when it allowed two experts to testify on questions of law rather than questions of fact. *Id.* at 93. One of the experts testified as to whether there was a violation of the Texas Securities Act by the business owner, the other expert testified as to whether the law firm, who represented the business owner, owed a duty to the investors. *Id*. At 92-93. The law firm argued that both experts should be excluded from testifying because the testimony involved pure questions of law that were reserved exclusively for the judge to decide. *Id*. Additionally, the law firm argued that the testimony would be contrary to established law, even pointing out that one expert "[opined] on the duty to disclose based on incorrect law, i.e., Texas disciplinary rules rather than New York disciplinary rules." *Id*.

The Court determined that an expert cannot give testimony on pure questions of law. *Id*. at 94; *citing Mega Child Case, Inc. v. Texas Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex.App.—Houston [14th Dist.] 2000, no pet.). The Court did say that experts are allowed to testify on mixed questions of law and fact, and that a "mixed question of law and fact is when the law fixes a standard and the issue is whether the person, or conduct, meets that standard." *Id*. The Court also concluded an expert can apply legal terms to the factual questions in issue, but that experts may not testify as to their understanding of the law. *Id*. at 94; *citing Welder v. Welder*, 794 S.W.2d 420, 433 (Tex.App.—Corpus Christi 1990, no writ.). It is the role of the court—not the expert—to define and explain legal principles. *Id*. at 95.

Additionally, of the two experts in question, one was a former law school professor at the University of Oklahoma, the other was James P. Wallace, a former Justice on the Texas Supreme Court. *Greenburg*, 161 S.W.3d at 90, 98-99. The Court opined that when it came to the retired Justice, his testimony and presence likely "gave the appearance that he had more authority [on discussing the law] than the [presiding] trial judge," which was improper. *Id*. at 99. As for the former law school professor, the Court opined "it may appear to the jury that the [former law professor] had more experience and knowledge of the law than the [presiding] trial judge. *Id*. Therefore, this could "have a prejudicial impact" on the jury because a layperson may think that these experts are smarter and have more authority than the judge. *Id*. Because of the expert's designation, the layperson may "accept the opinion as true, simply because of the designation as an expert. *Id*; *citing Robinson*, 923 S.W.2d at 553. When an attorney gives "an opinion [as an expert] . . . the judge allows his role as the legal expert in the courtroom to be usurped." *Id*; *see also United Way of San Antonio, Inc. v. Helping Hands Lifeline Found, Inc.*, 949 S.W.2d 707, 713 (Tex.App.—San Antonio 1997, writ denied) (the testifying expert—a law school dean—gave testimony that likely caused "an improper judgment.") *and Fleming v. Kinney ex rel. Shelton*, 395 S.W.3d 917, 928 (Tex.App.—Houston [14th Dist.] 2013, pet. denied) (legal experts may not testify on a "pure question of law.").

Inevitably there will be some situations where a lawyer will need to testify as an expert, such as testifying to the legal fees accrued in a case or whether a lawyer was negligent and committed malpractice against their former client. *McMahon*, 433 S.W.3d at 686; *citing Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex.App.—Houston [1st Dist.] 1995, no writ) (attorney used as expert to determine negligence elements in attorney malpractice case); *see also Twin City Fire Ins. Co. v. Vega-Garcia*, 223 S.W.3d 762, 770 (Tex.App.—Dallas 2007, pet. denied) (attorney fees must be proved by expert testimony). For fiduciary litigation, good practice would be to have the judge define and explain to the jury the definition of "fiduciary duty" and then have your expert apply the stated definition to your factual argument. Remember, although this is a gray area, the best way to protect your expert's testimony from exclusion is to make sure it is mixed with legal and factual questions.

6. What is the "common knowledge and experience of laypersons" (jurors)?

Can experts opine about issues that are within the common knowledge and experience of the jury? In *Decker*, the court concluded that "requisite proof regarding mental capacity may reside with the common knowledge and experience of [jurors,]" so "expert testimony on the matter [of mental capacity] is not required." *Decker v. Decker*, 192 S.W.3d 648, 652 (Tex.App.—Fort Worth 2006, no pet.). One legal scholar has found many different cases that help define what is not within the common knowledge and experience of jurors. *See* David F. Johnson, *Appellate*

Issues Regarding the Admission or Exclusion of Expert Testimony in Texas, 52 S. TEX. L. REV. 153, n.3 (2010) (*citing FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 90-91 (Tex. 2004) (expert testimony required to determine standard of care on the maintenance of a refrigerated trailer); *Haddock v. Arnspigner*, 793 S.W.2d 948, 954 (Tex. 1990) (expert required because knowledge of "flexible colonoscope" and its usage was not common knowledge of jurors); *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982) (expert testimony needed in diagnosing skull fractures); *Turbines, Inc. v. Dardis*, 1 S.W.3d 726, 738 (Tex. App.—Amarillo 1999, pet. denied) (expert needed for aircraft engine inspection and repair); *Hagar v. Romines*, 913 S.W.2d 733, 734-735 (Tex.App.—Fort Worth 1995, no writ) (expert required to discuss the operation of a crop-dusting airplane)); *see also Norman v. Grove Cranes*, No. 17-20632, at *8 (5th Cir. Sept. 10, 2018, unpublished) (crane design and "feasible safer alternative designs" are not within the common experience and knowledge of the jury).

Conversely, other cases have determined that an expert is not required because the issue is within the common knowledge of jurors. *See generally Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007) (expert testimony not necessary to find causation when "the occurrence and condition complained of are such that the general experience and common sense of laypersons are sufficient"); *Edwards v. Dunlop-Gates*, 344 S.W.3d 424, 433 (Tex.App.—El Paso 2011, pet. denied) (In a case of legal malpractice, expert testimony is not required if the "lack of care and skill is so obvious that the [jury] can find negligence as a matter of common knowledge"); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (expert testimony not required on certain house repairs); *and Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (expert testimony not required to determine that "[failing] to connect a washing machine drain would not be considered good and workmanlike"). Therefore, the court should not admit testimony of an expert to testify on a matter "within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." *Grieve v. Red Roof Inns, Inc.*, No. 13-99-660-CV, 2001 Tex.App. LEXIS 6098, at *9-10 (Tex.App.—Corpus Christi, Aug. 31, 2001, pet. denied) *quoting K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000).

7. Can Experts opine on the ultimate issue?

Although there are many cases that discuss whether an issue is or is not within the common knowledge and experience of jurors, an equally important issue is whether the expert can opine on the ultimate issue in the case. Luckily, Rule 704 answers that question directly: "an opinion is not objectionable just because it embraces an *ultimate issue*." TEX. R. EVID. 704 (emphasis added). The Texas Supreme Court determined that although there used to be confusion on whether experts could give testimony on the ultimate issue for fear that it would invade the province of the jury, that confusion was a "carryover from the time before Rule 704 was adopted." *See Louder v. De Leon*, 754 S.W.2d 148, 149 (Tex. 1988); *citing* TEX. R. EVID. 704. The Texas Supreme Court determined this confusion was "illogical" and that "jurors realize that they are the final triers to decide the issues[,] [t]hey may accept or reject an expert's view . . . [and therefore] there is little danger in [allowing] and expert [to] answer an all embracing question . . . ." *De Leon*, 754 S.W.2d at 149. Although the final decision on factual matters is for the jury to decide, experts are *always allowed to opine on the ultimate issue* if "the opinion is confined to the relevant issues and is based on proper legal concepts." *Id*. at 149; *citing Birchfield v. Texarkana Mem'l. Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987). Ultimately, the experts are the ones who help the jury make the correct decision.

8. What else can the Expert base their conclusion on? (*Ipse Dixit*?)

Can the expert conclude simply by stating that their conclusion is true because they say it is true; i.e. *ipse dixit*? For the Texas Supreme Court in their discussion on whether an expert can base their opinion on *ipse dixit*, the Court determined: "[s]omething is not true simply because an expert says it is so." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997); *see also Burrow v. Acre*, 997 S.W.2d 229, 235 (Tex. 1999) (stating that a claim will not be determined "on the mere *ipse dixit* of a credentialed witness") (emphasis added). In *Marathon*, the Texas Supreme Court concluded that expert opinions must be supported by facts in evidence, not conjecture. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003). The Court rejected the expert's opinion because the only way to reach his proffered opinion was "to pile speculation on speculation and inference on inference," and that "the circumstances 'could give rise to a number of inferences, none more probable than [the other].'" *Id*. Although there were multiple explanations as to how the plaintiff was injured, the expert needed to have a solid basis to form their opinion, which the Court never found. *Id*. Overall, the Texas Supreme Court has concluded on multiple occasions that the expert who bases their opinion on inference and speculation, and therefore opines to the jury it is true, is nothing more than mere *ipse dixit* that will not pass legal muster. *See also Gammill*, 972 S.W.2d at 726 (expert's opinion is conclusory *ipse dixit* if "there is . . . too great [of] an analytical gap between the data and the [expert's] opinion.")

(emphasis added). Therefore, do not let your expert take the easy way out, be sure their opinion is connected to the underlying facts and data.

V. CHALLENGING & BOLSTERING AN EXPERT.

A. Weak spots that should stand out.

Whether you are looking for weak spots in the opposing expert's opinion, or looking to avoid weak arguments in your own expert's opinion, the following are common mistakes you should watch out for:

1. Excessive use of adjectives, adverbs, and complex words/phrases.

The attorney should start with the expert's use of grammar. Often, when a harried writer is short for words, or cannot find a more acceptable way to bolster their lacklustre argument, the writer resorts to using an abundance of adjectives, adverbs, and complex words or phrases, as is in this sentence. Be aware that, for some situations, there will always be a need to use complex words because there is no other way to properly explain the point to the jury. Solid arguments need few adjectives or adverbs and can likely be explained without using an abundance of complex words. This method should catch your eye when you see something like the following examples:

- "This method for calculating overall return on investment is undoubtedly the superior method."
- "John Smith's repugnant refusal to disburse income to the poor, needy, financially strapped beneficiary George Washington is the classic example of a breached fiduciary duty."
- "This position they take, though unsurprising, is of course still deeply unsettling and flagrant proof of the unwillingness to abide by undisputed and transparent statutory authority."
- "The beneficiary wants nothing more than to resort to the dreadful and draconian remedy of a receivership."
- "Rather than respond to the allegation of misusing trust assets, the trustee responded with a baseless, vindictive, spiteful, and troubling ad hominem attack."
- "The retort was nothing more than an unnecessary impugning of the helpless beneficiary."
- "Jane Doe gleaned critical financial knowledge in her brief employment with Trustworthy Financial."
- "The trustee had to push back to constrain the malign behaviour of the rambunctious beneficiary."
- "When asked to respond, the trustee's diatribe against the beneficiary provided nothing more than superfluous information."

2. Examine the Expert under *Robinson* factors.

Although this subsection could be an independent article by itself, it is important to know some of the basics of determining whether the expert's opinion will make it past the "gatekeeper." As you should remember from law school, there are major expert cases from the U.S. Supreme Court—*Daubert* and *Kumho Tire*—that discuss methods the courts should use to in determining whether to admit expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *and Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Texas Supreme Court adopted the admissibility test created in *Daubert* and added two additional factors. *Id*. In *Robinson*, the Texas Supreme Court listed six different factors in determining the reliability, and therefore admissibility, of expert testimony under Rule 702: "(1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique." *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995); TEX. R. EVID. 702. The Texas Supreme Court also explained that this list of factors is "non-exclusive," that "trial courts may determine other factors which are helpful to determining the reliability of the scientific evidence," and those factors that are helpful "in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case." *Robinson*, 923 S.W.2d at 557.[2] Remember that if the expert's testimony fails to survive these six factors, it is nothing more than "subjective belief or unsupported speculation." *Id*; *citing Daubert*, 509 U.S. at 590.

When presenting an expert, be sure that their testimony will survive a challenge on each factor. If you are trying to think of questions to ask during your cross-examination of an expert, these six factors are a great starting point. Additionally, remember that although the opposing expert will always have a

[2] *See also Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, No. 17-30742, at *6 (5th Cir. Oct. 10, 2018, unpublished) (although the District Court for the Middle District of Louisiana excluded the plaintiff's expert from testifying when the court found the expert to be "misleading because [the expert] only plotted some data points from the testing of the pond [that supported his argument and] omitted data points [that] were inconsistent with [his argument]," the Fifth Circuit determined that excluding the expert from testifying was unnecessary because "the basis for [the expert's] opinion is fodder for cross-examination").

conclusion you disagree with, the way to challenge that conclusion is by attacking the method the expert used in reaching their conclusion. One of the most common disputes involving experts is whether their testimony is reliable and admissible under *Robinson*. Therefore, no matter if you are bolstering or challenging an expert, it is critical that you understand these basic factors.

3. Does the Expert have a background as a "professional" witness?

A critical step in either challenging or bolstering a witness is to determine whether the expert has a history of being a "professional" witness. Ideally, once you receive the list of cases the expert (your expert or the opposing expert) previously testified in, you will be able to tell if the expert fits into this definition. Although some of the best experts will have inevitably testified on a sizeable number of cases, to be deemed a "professional" witness the expert must have flip-flopped on various sides of an issue. Being called a professional witness means that "during cross-examination an expert is likely to face accusations that his testimony has been bought rather than based on his studied professional opinion." David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 13 (2013).

For example, let's say that opposing counsel retains an expert who plans to testify that the trustee breached the fiduciary duty he owed to the beneficiary when the trustee refused to purchase the beneficiary a Maserati. Additionally, assume that the trust document specifically states that the trustee "may buy the beneficiary an affordable car once he reaches the age of majority," and that the trust has a current value of $300,000. From your research, it is revealed that this same expert previously testified in a different case involving a breach of fiduciary duty, arguing that a trustee did not breach her fiduciary duty when she refused to purchase a $900,000 lake house when the trust documents stated that the trustee "may buy the beneficiary a starter home once she reaches the age of majority." This is a clear example of a "professional" witness who will make any argument as long as the price is right. Bringing this up in front of the jury would likely be a death sentence on the expert's credibility.

VI. CONCLUSION.

Overall, using an expert witness is not as simple as it may sound. Experts can make or break your fiduciary litigation case, so be sure you devote ample time to your expert. Unfortunately, expert practice can be full of peril and no matter what, you must follow the rules to a T, or you may find your expert is unable to take the stand. Once you understand what to look for and know what the expert can do, you may still run into areas that can cause many long days at the office. But, if you follow the guidance in this article, hopefully you will be able to avoid the common pitfalls. Good luck!