

# **THE USE OF EXPERTS IN CONSTRUCTION LITIGATION:**

**THE TITLE MAY MAKE YOU SLEEPY, BUT THE  
SUBJECT MATTER WILL KEEP YOU UP AT NIGHT**

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State Bar of Texas  
**24TH ANNUAL CONSTRUCTION LAW CONFERENCE**  
March 3-4, 2011  
San Antonio, Texas

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# THE USE OF EXPERTS IN CONSTRUCTION LITIGATION: THE TITLE MAY MAKE YOU SLEEPY, BUT THE SUBJECT MATTER WILL KEEP YOU UP AT NIGHT

## I. INTRODUCTION<sup>1</sup>

When construction disputes result in litigation, the technical nature of the issues integral to construction oftentimes require the involvement of an array of dueling experts. As construction litigators are well aware, experts can mean the difference between winning and losing a lawsuit.

While the use of experts in litigation generally is a topic with which most attorneys are familiar, in highly technical fields—such as construction litigation—the proper qualification, retention, designation, and use of experts will keep a zealous advocate up at night. And while there are many practical and strategic considerations that come into play with the use of experts, this paper will analyze the technical aspects of compliance with the procedural rules and case law.

The scope of this paper is to examine the pretrial use of experts, under both federal and Texas law.

## II. WHO ARE EXPERTS?

As the Texas Supreme Court noted some fifteen years ago, “[t]o the jury[,] an ‘expert’ is just an unbridled authority figure.” *E.I. Du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (citation omitted). More recently, it defined

<sup>1</sup> The authors would like to thank Tony Jach and Sarah Mardock for their diligent efforts in preparing this article.

an expert witness as one who “may testify regarding ‘scientific, technical, or other specialized’ matters if the expert is qualified and if the expert’s opinion is relevant<sup>2</sup> and based on a reliable<sup>3</sup> foundation.” *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006) (citing TEX. R. EVID. 702).

More specifically, both the Federal Rules of Evidence (FRE) and Texas Rules of Evidence (TRE) define an expert as one who possesses “scientific, technical, or other specialized knowledge.” *See* FED. R. EVID. 702 (governing testimony by experts); TEX. R. EVID. 702 (same).

Conversely, lay witnesses are those witnesses whose opinions or inferences are: (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. FED. R. EVID. 702 ((1), (2), and (3) above); TEX. R. EVID. 701 ((1) and (2) above).

For a listing of the different types of subject matter upon which construction experts typically testify, please see Appendix A, *infra*. For a listing of various resources attorneys may use to locate a particular type of expert, please see Appendix B, *infra*.

### A. Types of Experts

Both the Federal Rules of Civil Procedure (FRCP) and Texas Rules of Civil Procedure (TRCP) provide for two types of experts: (1) consulting; and (2) testifying. Testifying

<sup>2</sup> *See* discussion *infra* Part IV.A.

<sup>3</sup> *See* discussion *infra* Part IV.B.

experts may be further broken down into two categories: those who are retained and those who are not. The distinction between consulting and testifying expert, aside from the obvious evidentiary value of a testifying expert at trial, is important throughout the litigation process, because they are treated differently under the rules including what information, communication, documents, and reports are discoverable to other parties.

## 1. Consulting Experts

### a. Federal Law

Under newly-amended FRCP 26, a consulting expert is one “who has been retained or *specialty employed by another party in anticipation of litigation* or to prepare for trial and who is not expected to be called as a witness at trial.”<sup>4</sup> FED. R. CIV. P. 26(b)(4)(D) (emphasis added) (amended effective December 1, 2010, renumbering without substantively changing subparagraphs (B) to (D)). Whether an expert has been retained in “anticipation of litigation” is a “question of fact ... for a judge to decide.” *Healy v. Counts*, 100 F.R.D. 493, 496 (D. Colo. 1984). While no clear or uniform standard has been applied, several ad hoc factors some courts have considered include: (1) the manner in which the consultation was initiated; (2) the nature and extent of material provided to the expert; (3) the length and intensity of the consultation; and (4) the contractual terms agreed to by the party and the expert (e.g., payment, confidentiality of testing data or opinions, etc.). *Ager v. Jane C. Stormont*

<sup>4</sup> This language may be contrasted with that of a retained testifying expert who is retained or *specialty 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) (emphasis added).

*Hosp. & Training Sch. for Nurses*, 622 F.2d 496, 501 (10th Cir. 1980).

Consulting experts are often those experts that are retained in such a way that a long-term relationship is developed between counsel and the expert or confidential information is shared by counsel to the expert. *See Formosa Plastics Corp., USA v. Kajima Int’l, Inc.*, 216 S.W.3d 436, 448 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1182 (5th Cir. 1996) (owner failed to prove elements to disqualify contractor’s consulting expert after expert switched party affiliation)).

### b. Texas Law

Similarly, TRCP 192.7 provides that a “consulting expert is an expert who has been consulted, retained, or specialty 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(d).

The Texas Supreme Court has defined “anticipation of litigation” to include both objective and subjective prongs. *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993) (orig. proceeding). The objective prong is whether “a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue.” *Brotherton*, 851 S.W.2d at 207. The subjective prong examines whether “the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.” *Id.* It should be noted, however, that an “employee who was employed in an area that becomes the

subject of litigation can never qualify as a consulting-only expert because the employment was not in anticipation of litigation.” *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990) (emphasis added).

## 2. Testifying Experts

### a. Federal Law

FRCP 26 provides that a testifying expert is any witness a party may use at trial to present evidence under FRE 702 (governing testimony by experts), 703 (stipulating permissible bases of opinion testimony by experts), or 705 (outlining disclosure of facts or data underlying expert opinion). FED. R. CIV. P. 26(a)(2)(A).

Like the Texas rules examined below, the federal rules also make a distinction between “retained” testifying experts and “nonretained” ones. *See* FED. R. CIV. P. 26(a)(2)(B) (pertaining to retained experts), FED. R. CIV. P. 26(a)(2)(C) (pertaining to unretained experts). Under the FRCPs, a *retained* testifying expert is one who is “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).

A nonretained testifying expert, however, is one who does not meet the retention or employment requirements set forth FRCP 26(a)(2)(B). *Compare* FED. R. CIV. P. 26(a)(2)(B), *with* FED. R. CIV. P. 26(a)(2)(C). Frequent examples of these types of experts include “professionals and employees of a party who do not regularly provide expert testimony.” FED. R. CIV. P. 26(a)(2)(C) cmt.; *see also Lindquist v. Union Pac. R.R. Co.*, 2008 U.S. Dist. LEXIS

81464, \*3 (E.D. Tex. 2008). This distinction is important, particularly in light of the new amendments to the Federal Rules of Civil Procedure, examined at depth, *infra*, at Parts IV.A.2.a.ii & V.A.2.

### b. Texas Law

TRCP 192.7 defines a testifying expert as one “who may be called to testify as an expert witness at trial.” TEX. R. CIV. P. 192.7(d).

Testifying experts may be further subdivided into “retained” and “nonretained” categories. A retained testifying expert is an expert who is “retained by, employed by, or otherwise subject to the control of the responding party.” TEX. R. CIV. P. 194.2(f)(4).

In contrast, a nonretained testifying expert is one who is not retained by, employed by, or otherwise subject to the responding party’s control. TEX. R. CIV. P. 194.2(f)(3); *see also Hooper v. Smallwood*, 270 S.W.3d 234, 246 (Tex. App.—Texarkana 2008, pet denied) (contact between owner’s expert witness and builder not improper because witness not retained). In *Hooper v. Smallwood*, the court allowed testimony from an expert that had previously provided a cost estimate for repairs related to the suit to an opposing party. *Id.* The court held the second party was allowed to present the expert witness because he had not been retained by the opposing party and no confidential information or litigation strategies were exchanged between the expert and the previous party. *Id.* Examples of a nonretained testifying expert may include the project architect or engineer, as well as various specialty trade contractors. —Much like the federal rules, the distinction between a retained and nonretained expert determines

the method by which a party may seek discovery of the testifying expert's opinions and mental impressions.

## **B. Qualification Requirements**

Both federal and Texas law provide similar guidelines governing the qualification of experts. Under both regimes, construction experts need to be particularly cautious when attempting to render opinions with respect to a specialized area outside their general qualifications. See Justin L. Weisberg et al., *Use of Experts: Part 2; Admission and Demonstrative Presentation*, 16 CONSTRUCT!, Fall/Winter 2006, at 13 [hereinafter *Use of Experts: Part 2*].

### **1. Federal Law**

FRE 702 requires that expert witnesses be qualified “by knowledge, skill, experience, training, or education.” FED. R. EVID. 702. In other words, an expert may be qualified as a result of rigorous academic study or years of experience in a particular trade or discipline, with a certain specialty (i.e., working on a specific machine or type of installation), coupled with a familiarity with industry and trade standards. *Use of Experts: Part 2*, at 13. The Fifth Circuit has held that, “to qualify as an expert, the witness must have such knowledge or experience in [that] field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for the truth.” *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004). In a subsequent opinion, the Fifth Circuit clarified that FRE 702 does not require an expert be “highly qualified in order to testify about a given issue,” noting that “[d]ifferences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility.” *Huss v. Gayden*, 571

F.3d 442, 452 (5th Cir. 2009). That said, the Fifth Circuit has required that an expert must be “qualified to testify in a particular field or on a given subject.” *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999).

While federal and Texas courts have largely similar standards governing the qualification of experts, federal courts are somewhat more lenient in qualifying experts on a particular subject, holding that a “broad range of skills” may qualify an expert. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008).

By way of example, in *Adams v. NVR Homes, Inc.*, the Maryland District court held a professor of environmental engineering with both a B.S. and M.S. in chemical engineering, as well as a Ph.D. in environmental engineering, was qualified to render opinions on the standard of care exercised in response to the discovery of methane gas in a subdivision. *Adams v. NVR Homes, Inc.*, 141 F. Supp. 2d 554, 561 (D. Md. 2001). The court found the expert's background and education in engineering was sufficient, regardless of whether the expert was licensed in a particular field. *NVR Homes, Inc.*, 141 F. Supp. 2d at 562; see also *Keel v. Titan Construction Corp.*, 721 P.2d 828, 831 (Okla Civ. App. 1986) (physics professor qualified to testify as an expert as to design plans for solar system of a residence based on education and experience). Indeed, the Fifth Circuit often decides the level of qualification goes to weight, not admissibility of the proffered expert's testimony.

### **2. Texas Law**

Similar to FRE 702, TRE 702 mandates experts be qualified “by knowledge, skill, experience, training, or education.” TEX. R.

EVID. 702. In addition, a proponent must establish the expert has the “knowledge, skill, experience, training, or education regarding the specific issue before the court, which would qualify the expert to give an opinion on that particular subject.” *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996) (holding general medical expertise not sufficient to qualify as expert in area with no particular experience or training). The *Broders* court explained that, when a party can show that a subject is substantially developed in more than one field, expert testimony can come from a qualified expert in any of those fields. *Broders*, 924 S.W.2d at 154. Moreover, an expert must possess experience and expertise regarding the specific issue before the court in order to be qualified. *Roberts v. Williamson*, 111 S.W.3d 113, 122 (Tex. 2003). Put another way, for an expert to be qualified, the trial court must “ensur[e] that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.” *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

Texas courts are often faced with whether an unlicensed expert may testify as to a professional’s standard of care, in addition to whether a professional licensed in another state may be allowed to testify as an expert Texas. To be sure, the Texas Board of Professional Engineers defines the practice of engineering to include presenting expert testimony. TEX. OCC. CODE § 1001.003. Oftentimes, parties use these definitions to argue that such “limitation” on the practice of a profession precludes those not licensed or licensed in a different state from tendering expert opinions. *See Goodwin v. Camp*, 852 S.W.2d 698, 699 (Tex. App.—Amarillo 1993, no writ).

Despite this strife, Texas courts have ruled that certain experienced and otherwise qualified experts can provide their opinions, regardless of their licensing status in Texas. *See Goodwin*, 852 S.W.2d at 699-700 (chiropractor qualified to testify in Texas despite only being licensed to practice in California).

In addition, professionals licensed in other states are not precluded from tendering an expert opinion merely because they are not licensed in Texas. *Camp*, 852 S.W.2d at 699-700; *see also Hart v. Van Zandt*, 399 S.W.2d 791, 798 (Tex. 1965); *Lee v. Andrews*, 545 S.W.2d 238, 245 (Tex. Civ. App.—Amarillo 1976, writ dismissed); *Johnson v. Hermann Hosp.*, 659 S.W.2d 124, 126 (Tex. App.—Houston [14th] 1983, writ refused n.r.e.). Other states have echoed this rule as well. *See, e.g., Baggerly v. CSX Transportation*, 635 S.E.2d 97 (S.C. 2006) (professional engineer licensed in California qualified to testify in South Carolina); *Thompson v. Gordon*, 221 Ill.2d 414 (Ill. 2006) (civil engineer licensed in the District of Columbia qualified to testify in Illinois).

Just as in federal courts, experts in Texas courts do not have to be the most qualified—or even highly qualified—in order to be qualified as an expert witness. *Compare Roberts*, 111 S.W.3d at 122, *with Huss*, 571 F.3d at 452. However, while the Fifth Circuit tends to allocate the level of expert qualification to weight, Texas courts tend to “focus more on the expert’s particular skills, experience, and training regarding the specific issue before the court.”

### III. WHEN IS EXPERT TESTIMONY REQUIRED?

Construction expert testimony may be merely advisable in some instances and required in others.

Construction disputes, which involve claims of design deficiencies, will almost certainly require expert testimony. However, disputes involving claims for payment or “extra work,” as heated as they may be, may not require any expert testimony.

That said, construction litigation is most often a battle of the experts. And while it is not always required to present expert testimony, it is almost always necessary to prove your case. Whether expert testimony is required in a construction case is a question of law for the trial court to determine. *Simmons v. Briggs Equip. Trust*, 221 S.W.3d 109, 114 (Tex. 2006) (expert testimony required to prove standard of care of inspection and maintenance of rail-car engine and hydraulic pump).

#### A. Requisite Expert Testimony Generally

Because both the FREs and TREs define an expert as someone who possesses “scientific, technical, or other specialized knowledge,”<sup>5</sup> and the FREs specifically exclude witnesses with such knowledge from qualifying as lay witnesses,<sup>6</sup> anytime testimony based upon scientific, technical, or other specialized knowledge is needed, it is an expert that must deliver it. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006) (citing TEX. R. EVID. 702).

<sup>5</sup> FED. R. EVID. 702; TEX. R. EVID. 702.

<sup>6</sup> FED. R. EVID. 701,

### B. Construction Matters Requiring Expert Testimony

#### 1. Claims Against Licensed Design Professionals

Construction disputes often center around the design of a project. Since 2003, the Legislature has required that, in order to join a design professional as a party to a dispute, a claimant must submit a certificate of merit contemporaneously with the complaint against the professional. TEX. CIV. PRAC. & REM. CODE. § 150.002.

Specifically, section 150.002 requires that an affidavit (i.e., the “certificate of merit”) be filed with the complaint in “any action or arbitration proceeding for damages arising out of the provision of professional services”<sup>7</sup> by a third-party “licensed architect, licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which such licensed or registered professional practices.”<sup>8</sup> The expert must be competent to testify and hold the same professional license as—and be knowledgeable in the same area of practice as—the defendant. §§ 150.002(a)(1)-(3). Moreover, the third-party expert must be licensed or registered in Texas and “actively engaged in the practice of architecture, surveying, or engineering.” §§ 150.001(2)-(3), .002(b) (referencing the definitions of “practice of architecture” and “practice of engineering” contained in Texas Occupations Code sections 1001.001, and .003).

For each theory of recovery, the affidavit must set forth specifically:

<sup>7</sup> TEX. CIV. PRAC. & REM. CODE. § 150.002(a).

<sup>8</sup> § 150.001(1).

[W]hich damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim.

§ 150.002(b). If the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff alleges that an affidavit could not be prepared, the plaintiff shall have thirty days after the filing of the complaint to supplement the pleadings with the affidavit. § 150.002(c). However, the trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires. *Id.*

Most importantly, failure “to file the affidavit ... shall result in dismissal of the complaint,” which “may be with prejudice. § 150.002(e) (emphasis added). Texas courts that have examined this statute have applied its threat of dismissal strictly. *See, e.g., Sharp Eng'g v. Luis*, 321 S.W.3d 748, 752 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (upholding dismissal for failure to file requisite certificate of merit with plaintiff’s original petition).

## **2. Establishing the Relevant Standard of Care**

A court can require expert testimony to establish a standard of care and its violation when “the alleged negligence is of such a nature as not to be within the experience of the layman.” *Simmons*, 221 S.W.3d at 114 (quoting *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982)). Ordinarily, courts

consider whether the conduct involves the use of specialized equipment and techniques unfamiliar to an ordinary person. *FFE Transportation Servs. Inc. v. Fulgham*, 154 S.W.3d 84, 91 (Tex. 2003) (expert testimony required to prove whether inspection and repair of aircraft was required to meet standard of care).

In determining whether expert testimony was required to prove certain inspections and repairs to an aircraft were a violation of a standard of care, the Texas Supreme Court noted that, “[w]hile the ordinary person may be able to detect whether a visible bolt is loose or rusty, determining when that looseness or rust is sufficient to create a danger requires specialized knowledge” provided by an expert. *Id.* By way of example in a construction context, the El Paso Court of Appeals held an expert was required to prove the standard of care of a construction-management firm in a supervisory capacity. *3D/I Perspectiva, A Joint Venture v. Castner Palms, Ltd.*, 310 S.W.3d 27, 29 (Tex. App.—El Paso 2010, no pet.). The court found it could not conclude “that a layman would know whether a construction management firm’s supervisory duties extended beyond simply overseeing the construction as set out in the approved contractors’ design plans.” *Id.* at 31. In addition, the court noted that such information “requires specialized knowledge in the construction-management firm industry.” *Id.* Thus, while a jury may be able to determine certain aspects of a construction case, in order to prove more technical or specialized points, a court may require the use of expert testimony. *Id.*

#### IV. WHEN IS EXPERT TESTIMONY ALLOWED?

Perhaps one of the most contentious areas of litigation regarding experts—construction or otherwise—is the admissibility of the proffered expert’s testimony.

While courts undoubtedly have discretion to admit or exclude expert testimony generally, both judicial rules and common law constrain the extent of that discretion.

In the United States Supreme Court’s landmark case in *Daubert v. Merrell Dow Pharms., Inc.*, the Court held scientific expert testimony under FRE 702 is only admissible if the testimony is both relevant and reliable. 509 U.S. 579, 589 (1993). Since then, the two central avenues of inquiry determining whether a given expert’s testimony will be allowed focus upon its relevance and reliability. *See, e.g., E.I. Du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (“In order to constitute scientific knowledge which will assist the trier of fact, the proposed testimony must be *relevant* and *reliable*.”) (emphasis added).

##### A. Relevance

Although reliability of an expert’s testimony is more often the issue before courts rather than its relevance, both federal and Texas courts readily exclude expert testimony on relevancy grounds. Because the federal and Texas evidentiary rules governing relevance are identical, both federal and Texas courts are equally apt to hold testimony inadmissible for lack of relevancy, whether that testimony is equivocal or merely based upon common knowledge.

#### 1. Federal Law

As the United States Supreme Court made clear in 1993, an expert’s testimony must be “relevant to the task at hand,” and evidence must “fit” the issues in the case. *Daubert*, 509 U.S. at 597, 591. Moreover, it must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* at 591. The evidence must have a valid “connection to the pertinent inquiry.” *Id.* at 591-92. The Court explained FRE 702’s requirement that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue” is the relevance inquiry. *Id.* at 591. “Expert testimony which does not relate to any issue in the case is not relevant.” *Id.* (citation omitted).

In applying *Daubert*, the Fifth Circuit has opined that equivocal testimony that one potential cause was as likely as the other was not relevant to the disputed cause, and was therefore inadmissible. *Pipitone v. Biomatrix*, 288 F.3d 239, 244 (5th Cir. 2002); *see* FED. R. EVID. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence.”) (emphasis added); FED. R. EVID. 402 (“Evidence which is not relevant is not admissible.”); *see also Villaje Del Rio, Ltd. v. Colina Del Rio, LP*, 2009 U.S. Dist. LEXIS 47714, at \*14 (W.D. Tex. June 8, 2009) (expert testimony on solvency relevant to case involving a failed construction project and the bankruptcy of its owner and developer).

## 2. Texas Law

In its 1995 opinion in *Robinson*, the Texas Supreme Court applied this threshold relevancy standard to expert testimony in Texas courts as well. 923 S.W.2d at 556. In order to meet this relevancy requirement, expert testimony must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* If the evidence proffered in a given case has no relationship to any issues in the case, it is irrelevant and inadmissible under TRE 702, as well as TRE 401 (“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”) and 402 (“Evidence which is not relevant is inadmissible.”). TEX. R. EVID. 401, 402, 702.

Tied to this inquiry is the requirement that, “if there are other *plausible* causes of the injury or condition that could be negated,” causation experts “must offer evidence excluding those causes with reasonable certainty.” *See Merrell Dow Pharms. v Havner*, 953 S.W.2d 706, 720 (Tex. 1997) (emphasis added). Such opinion testimony “is conclusory or speculative,” and thus, irrelevant evidence “because it does not tend to make the existence of a material fact ‘more or less probable.’” *Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470-71 (Tex. 2003) (quoting TEX. R. EVID. 401); *see also Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 840 (Tex. 2010) (“An expert’s failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory.”).

The Texas Supreme Court has also clarified that evidence which rests within the common knowledge of the jury, and therefore would not assist the jury in deciding fact issues, is inadmissible on relevancy grounds. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). Moreover, if the opinions presented are merely conclusions of law, Texas courts have held that such opinions are irrelevant. *See C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001); *Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696, 706 (E.D. Tex. 2006) (sub-subcontractor unable to prove the general contractor had a duty to the sub-subcontractor).

### B. Reliability

Perhaps the most-litigated issue regarding expert testimony is the touchstone inquiry of whether such testimony is reliable. Reliability under *Daubert* may be further categorized as separate methodological, connective, and foundational inquiries. *See* Hon. Harvey G. Brown, Jr., *Experts, in State Bar of Tex. Prof. Dev. Program, 27th Annual Advanced Civil Trial Course*, ch. 11, at 12, 22, 25 (2004) [hereinafter *Experts*].

#### 1. Federal Law

FRE 702 expressly requires expert testimony be:

- (1) ... based upon *sufficient facts or data*;
- (2) ... the product of *reliable principles and methods*, and
- (3) ... the principles and methods *reliably applied* to the facts of the case.

FED R. EVID. 702 (emphasis added). The “sufficient facts or data” prong forms the basis of foundational reliability, the “reliable principles and methods” prong authorizes the well-known methodological reliability inquiry, and the “reliably applied” prong intimates a connective reliability analysis.

**a. Methodological Reliability**

In *Daubert*, the United States Supreme Court outlined four nonexclusive factors for trial courts to consider when determining the methodological reliability of an expert’s opinion:

- (1) whether the theory or technique “can be (and has been) *tested*;”
- (2) whether the theory or technique “has been subjected to *peer review* and publication;”
- (3) whether the technique has a known or knowable “potential *rate of error*;” and
- (4) whether the technique is “*generally accept[ed]*” in the scientific community.

509 U.S. at 593-94 (emphasis added).

Although the Court did not rank the four factors, it did indicate the extent to which a theory has been or can be tested poses a “key question.” *Daubert*, 509 U.S. at 593. Indeed, an “untested theory probably has not been subjected to peer review or publication, its potential rate of error is unknown, and it has likely not been generally accepted by the scientific community.” Karen S. Precella & Heather Bailey New, *Federal and State Expert Testimony Under Daubert and*

*Robinson: What’s the Difference?*, in State Bar of Tex. Prof. Dev. Program, 23rd Annual Advanced Civil Appellate Practice Course, ch. 4, at 8 (2009). Several circuit courts have concurred that the failure of an expert’s opinion under this prong can be fatal to the admissibility of the testimony as a whole. *See, e.g., Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000) (holding that failure to test theory of causation justified exclusion of expert testimony); *Pride v. BIC Corp.*, 218 F.3d 566, 577-78 (6th Cir. 2000) (holding that theory of manufacturing defect properly excluded where experts failed to timely conduct reliable testing or validate theory by reference to generally accepted scientific principles); *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 536-38 (7th Cir. 2000) (holding that alternative design theory properly excluded where expert conducted no scientific testing in support of theory); *Garcia v. BRK Brands, Inc.*, 266 F. Supp. 2d 566, 574 (S.D. Tex. 2003) (rejecting opinion based on untested theory).

Six years after it handed down its opinion in *Daubert*, the United States Supreme Court clarified the *Daubert* factors applied to expert testimony generally, and not only testimony on scientific matters. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 140, 147 (1999). The Court also reiterated the *Daubert* factors were not exclusive but were instead “flexible,” and the ultimate choice of which factors to apply depends upon the nature of the issue, the expert’s area of knowledge, and the subject of the testimony. *Id.* at 150-51.

In applying *Kumho Tire* to the Fifth Circuit, the court observed that “*Kumho Tire* redefines in a common-sense way, but does not undermine, the use of the specific *Daubert* factors as a reference point for

gauging the reliability of potential expert testimony.” *Black v. Food Lion, Inc.*, 171 F.3d 308, 310 (5th Cir. 1999). Providing guidance to Fifth Circuit courts, the *Black* court advised that, “in the vast majority of cases, the district court first should decide whether the factors mentioned in *Daubert* are appropriate. Once it considers the *Daubert* factors, the court then can consider whether other factors, not mentioned in *Daubert*, are relevant to the case at hand.” *Id.* at 311-12; *see also Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 388 (5th Cir. 2009).

Combined with the constraints of FRE 702, the Fifth Circuit upholds exclusion of expert testimony that rests on unreliable methodology or a gap in data and methodology. *See, e.g., Paz*, 555 F.3d at 388-90. However, not all *Daubert* factors need always be met. *See Broussard v. State*, 523 F.3d 618, 631 (5th Cir. 2008) (affirming admittance of expert testimony based upon a method that was not peer-reviewed or utilized by other experts to his knowledge).

### **b. Connective Reliability**

In an oft-overlooked part of the *Daubert* opinion, the Court held the application of the expert’s methodology—which may be otherwise reliable—must itself be reliable as well. *Daubert*, 509 U.S. 592-93.

Indeed, in a subsequent opinion, the Court found an expert’s reasoning connecting facts to conclusions—rather than the expert’s methodology itself—was flawed and therefore inadmissible. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). While allowing that “experts commonly extrapolate from existing data,” a court is nevertheless not required “to admit opinion evidence that is connected to existing data

only by the *ipse dixit* of the expert.” *Id.*; “*Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (“[W]ithout more than credentials and a subjective opinion, an expert’s testimony that ‘it is so’ is not admissible.”). Accordingly, a “court may conclude that there is simply too great an analytical gap between the data and opinion proffered.” *Joiner*, 522 U.S. at 146..

### **c. Foundational Reliability**

The *Daubert* Court recognized that expert testimony must rest “on a reliable foundation.” *Daubert*, 590 U.S. at 597. Moreover, the Court reiterated this foundational reliability requirement in *Kumho Tire*, explaining that the “factual basis, data, [and] principles” must be reliable.” *Kumho*, 526 U.S. at 149.

## **2. Texas Law**

### **a. Methodological Reliability**

Similar to *Daubert*, the Texas Supreme Court enumerated a nonexclusive, six-factor methodological test in its 1995 opinion in *Robinson*:

- (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.

923 S.W.2d at 557 (emphasis added). Put another way, “the trial court does not decide whether the expert’s conclusions are correct; rather, the trial court determines whether the analysis used to reach those conclusions is reliable.” *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002). Methodological reliability must be shown because “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.” *Havner*, 953 S.W.2d at 714.

Just as in *Kumho Tire*, the Texas Supreme Court held in *Gammill v. Jack Williams Chevrolet, Inc.* that TRE “702’s fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule.” 972 S.W.2d 713, 726 (Tex. 1998); *see also Mack Trucks v. Tamez*, 206 S.W.3d 572, 579 (Tex. 2004). The *Gammill* court also reiterated that the *Robinson* factors are not exclusive. 972 S.W.2d at 726.

### **b. Connective Reliability**

Texas courts have applied connective reliability to expert testimony as well, holding that a “claim will not stand or fall on the mere *ipse dixit*<sup>9</sup> of a credentialed witness.” *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). Indeed, “[a] flaw in the expert’s reasoning from the data may render

reliance upon a study unreasonable and render the inferences drawn therefrom dubious.” *Havner*, 953 S.W.2d at 714. Following up on the United States Supreme Court’s *Joiner* opinion, the Texas Supreme Court in *Gammill* disallowed expert testimony where there is “simply too great an analytical gap between the data and the opinion proffered.” 972 S.W.2d at 726.

To this end, an expert’s conclusory statements are insufficient to raise a fact question to defeat summary judgment. *HIS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004). Instead, an expert’s opinions must be supported by facts in evidence, not merely conjecture. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam). That is, an expert’s opinions cannot rest on the expert’s subjective interpretation of the facts. *See TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 239 (Tex. 2010).

The San Antonio Court of Appeals also echoed this principle in *State Farm Lloyds v. Mireles*, 63 S.W.3d 491, 499 (Tex. App.—San Antonio 2001, no pet.). In *Mireles*, the Fourth Court of Appeals held the opinion of an engineer with experience in foundation design and commercial construction—who proffered a theory of leak-shifting based on loose soil in the foundation—was unreliable because there was too great an “analytical gap,” and he was unable to prove his opinion was more than subjective belief and unsupported speculation. *Id.*

Just this past year, the Fort Worth Court of Appeals found an expert’s proffered testimony unreliable as well. *Hanson v. Greystar Dev. & Constr., LP*, 317 S.W.3d 850, 853-54 (Tex. App.—Fort Worth 2010, pet. denied). In *Hanson v. Greystar*

<sup>9</sup> “Something asserted but not proved.” BLACK’S LAW DICTIONARY 905 (9th ed. 2010).

*Development and Construction*, the plaintiff could not remember how she came to fall down a flight of stairs. *Id.* at 854. The Second Court of Appeals confirmed the “law is well[-]settled that testimony such as [the plaintiff’s]—that she did not know or recall how she fell—is insufficient to raise a fact issue on proximate cause.” *Id.* Because her testimony was the only evidence of causation—and was itself insufficient on its face—any opinions and conclusions drawn from it by the plaintiff’s expert were held to be mere speculation and conjecture amounting to no evidence. *Id.*

### c. Foundational Reliability

Just as in *Daubert*, the *Robinson* court held TRE 702 “requires the proponent to show that the expert’s testimony ... is based upon a *reliable foundation*.” 923 S.W.2d at 556 (emphasis added). Where “an expert relies upon unreliable foundational data, any opinion drawn from that data is ... inadmissible”<sup>10</sup> because it is “likewise unreliable.”<sup>11</sup> In 2006, the Texas Supreme Court reiterated this principle, disallowing an expert’s testimony because the “foundational proof of such contamination was lacking.” *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 803 (Tex. 2006).

## C. Construction-Specific Cases

### 1. Federal Law

In the construction context, the four *Daubert* factors often prove difficult for some construction experts to meet.

<sup>10</sup> *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001).

<sup>11</sup> *Merrell Dow Pharms. v. Haver*, 953 S.W.2d 706, 714 (Tex. 1997).

For instance, in *Ballard v. Buckley Power*, the District Court of Kansas applied *Daubert* and excluded a plaintiff’s expert opinion that nearby blasting activity had damaged the plaintiff’s foundation. 60 F. Supp. 2d 1180 (D. Kan. 1999). Even though the expert was an engineer who had designed foundations to withstand seismic activity, his testimony was disallowed because the plaintiff failed to present any evidence that his methods were subjected to peer review, had a known or potential rate of error, or had attained general acceptance in the field of engineering. *Id.* at 1184.

Similarly, the Western District of Michigan found a plaintiff’s expert with fifty years of experience in the shipbuilding business, while qualified, presented opinions that were unreliable under *Kumho* and *Daubert* because he failed to adequately explain the methodology supporting his conclusions. *Lake Michigan Contractors, Inc. v. Manitowoc Co.*, 225 F. Supp. 2d 791, 795 (W.D. Mich. 2002). The expert in the case offered testimony that the defendants failed to adhere to the schedule, failed to perform work in a closed facility, and failed to perform that work in a timely and cost-efficient manner. *Id.* In excluding his opinion, the court held he did not set forth a clear factual foundation for his methodology, which resulted in an analytical gap between the underlying facts and the expert’s conclusions that was too great to ensure reliability. *Id.* at 796, 799.

Most intriguing of these cases potentially bearing upon the reliability of construction experts under *Daubert* is surprisingly a Second Circuit opinion issued in 1994, in which the court distinguished between the “‘junk science’ problems” *Daubert* was “meant to address” from the “type of methodology” and “inherently voluminous

and highly technical nature of the data” that is “typically used and accepted in construction litigation.” *Iacobelli Constr., Inc. v. Cnty. of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994). In *Iacobelli*, the Second Circuit held two experts—a geotechnical consultant and an underground-construction consultant—were not subject to *Daubert* because they relied upon the type of methodology and data typically used in construction litigation cases. *Id.* Furthermore, the court noted parties in construction-contract disputes usually must retain experts to summarize and interpret bid documents, geotechnical data, and interpretive reports, and, accordingly, were not required to satisfy the additional requirements of *Daubert*. *See id.*

## 2. Texas Law

Very few Texas cases have applied the *Daubert/Robinson* reliability factors to construction-related disputes. And of those that have, the construction issues have been secondary to the crux of the dispute. *Id.* One of the only areas where construction experts have been routinely challenged are in insurance “bad faith” cases. *Id.*

Most notably, the holding from *Iacobelli* was expressly referenced in then-Justice Cornyn’s dissent from *Robinson*, where he strikingly characterized *Iacobelli* as “concluding that *Daubert* addressed only ‘junk science’ cases and is *inapplicable to construction litigation*.” *Robinson*, 923 S.W.2d at 560 (Cornyn, J., dissenting) (emphasis added).

In its 2003 opinion in *Norstrud v. Trinity Universal Ins. Co.* arising from a residential home foundation suit, the Texarkana Court of Appeals reviewed a challenge to a soil expert’s methodology utilizing electrical

resistivity testing<sup>12</sup> under *Robinson/Daubert*. 97 S.W.3d 749, 752 (Tex. App.—Texarkana 2003, no pet.). The court upheld the reliability of the engineer’s opinion because his results were consistent with the United States Department of Agriculture soil survey of Denton County. *Id.* at 755. Because the reliability of the soil survey data was not challenged, the court concluded the expert’s opinion was not solely based on “assumptions, possibility, speculation and surmise.” *Id.*

In one of the more surprising and entertaining opinions to address the topic, the San Antonio Court of Appeals addressed whether an expert’s opinion that included his statement that allocating percentages to potential causes of the foundation movement would be a “wild-ass guess” was nonetheless reliable under *Robinson*. *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 319-20 (Tex. App.—San Antonio 2002, pet. denied). While generously allowing that a “‘wild ass guess’ does not sound very reliable” and was “not a term of art that can be deemed helpful to the Rodriguezes’ case,” its use—in and of itself—did “not make the opinion unreliable.” *Id.* The court reasoned the expert “was not required to assign precise percentages to potential contributing causes that he did not believe were even relevant in this case.” *Id.* at 320. Therefore, the court concluded his “inability to apportion damage among seven possible contributing causes goes to the weight of his testimony, not its admissibility.” *Id.*; *but see Wal-Mart*

<sup>12</sup> Of note, the expert had recently patented his testing method and a paper he authored on the topic had been recently accepted for presentation at the then-upcoming American Society of Civil Engineers national convention. *Norstrud v. Trinity Universal Ins. Co.*, 97 S.W.3d 749, 753 (Tex. App.—Texarkana 2003, no pet.).

*Stores, Inc. v. Merrell*, 313 S.W.3d 837, 840 (Tex. 2010) (“An expert’s failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory.”).

## V. DESIGNATION AND DISCLOSURE

Both federal and Texas law mandate strict deadlines for the designation or disclosure of testifying experts,<sup>13</sup> and each require that only testifying experts be designated. Compare FED. R. CIV. P. 26(a)(2)(A), (B), with TEX. R. CIV. P. 194.2(f), 195.2. However, whether an expert is a retained or nonretained testifying expert may affect how extensive the requisite information disclosed must be.

### A. Federal Law

#### 1. Generally

FRCP 26 requires that, absent a stipulation or court order, a party must disclose the identity of testifying expert “it may use at trial to present evidence under [FREs] 702, 703, or 705,” at “least [ninety] days before the date set for trial,” or—“if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party” (i.e., the other party’s disclosure)—“within [thirty] days after the other party’s disclosure.” FED. R. CIV. P. 26(a)(2)(A), (D).

As part of this disclosure—absent a court order or stipulation to the contrary—a retained testifying expert must provide a *written report* containing:

- (1) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (2) the facts or data considered by the witness in forming them;
- (3) any exhibits that will be used to summarize or support them;
- (4) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (6) a statement of the compensation to be paid for the study and testimony in the case.

FED. R. CIV. P. 26(a)(2)(B). Unlike the TRCPs below, the FRCPs require an expert report be tendered simultaneously with an expert’s designation. *Id.*

Under the previous version of FRCP 26, however, nonretained testifying experts were not required to produce a report of any kind. FED. R. CIV. P. 26(a)(2)(B), (C) advisory committee note (2010 amendments). Despite this, and prior to the December 2010 amendments, some federal courts often required parties to provide reports for *all* of their experts, even if an expert was designated as a nonretained testifying expert. FED. R. CIV. P. 26(a)(2)(C) advisory committee note (2010 amendments). The December 2010 amendments discussed below have attempted to handle this tension, by specifically stating what is required upon

<sup>13</sup> The FRCPs use the term, “disclosure,” in the same manner as the TRCPs use the term, “designation.” Compare FED. R. CIV. P. 26(a)(2), with TEX. R. CIV.P. 195.2.

designation of a nonretained testifying expert. *Id.*

## 2. Dec. 1, 2010 Amendments<sup>14</sup>

In order to “resolve the tension that has sometimes prompted courts to require reports” of nonretained experts, the December 1, 2010 [a]mendments have delineated the requirements of retained and nonretained testifying experts.” FED. R. CIV. P. 26(a)(2)(B) advisory committee note (2010 amendments).

Of note, the December 2010 amendments to FRCP 26 specifically changed FRCP 26(a)(2)(B)(ii) to provide the required disclosure include “all facts or data considered by the witness” instead of the prior formulation, which required “data or other information.” *Id.* The “refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” *Id.* At the same time, this phraseology is intended to be “interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.” *Id.* This disclosure obligation “extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.” *Id.* In short, this amendment was “intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.” *Id.* This represents a major shift in the way courts will manage their discovery dockets and resolve disputes that

arise regarding the scope of the disclosure offered by retained testifying experts.

The December 2010 amendments also added a new section explicitly addressing the disclosure requirements of nonretained testifying experts. *See* FED. R. CIV. P. 26(a)(2)(C). Specifically, subparagraph (a)(2)(C) was added, requiring these experts to provide “the subject matter on which [they] ... are expected to present evidence under [FRE] ... 702, 703, or 705,” as well as “a summary of the facts and opinions to which [they] ... are expected to testify.” FED. R. CIV. P. 26(a)(2)(C). This added provision is intended to “mandate summary disclosures of the opinions to be offered” by nonretained testifying expert witnesses. FED. R. CIV. P. 26(a)(2)(C) advisory committee note (2010 amendments). This requisite disclosure is “considerably less extensive” than the report required of retained testifying experts under FRCP 26(a)(2)(B). *Id.* The advisory committee notes expressly admonished “[c]ourts [to] ... take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.” *Id.*

## 3. De-Designation

An expert who is first designated as testifying expert but later de-designated (i.e., not called as a witness) is considered a consulting expert if, before the de-designation, no discovery of the expert was conducted and the expert did not conduct an examination under FRCP 35. *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984).

Conversely, if an expert is retained both to provide expert testimony and to consult on other matters outside the scope of the

<sup>14</sup> Please see Appendix C, *infra*, for a redline comparison showing the December 2010 amendments to FRCP 26.

expert's testimony, the expert is still discoverable as a retained testifying expert as to the subject matter for which he is retained to testify. *Constr. Indus. Servs. v. Hanover Ins. Co.*, 206 F.R.D. 43, 52-53 (E.D.N.Y. 2001). The scope of discovery in this instance can be limited, however, if a clear distinction is drawn between the expert's anticipated trial testimony and the expert's consulting advice. *B.C.F. Oil Ref., Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 61-62 (S.D.N.Y. 1997). Any ambiguity about which function was served by the expert when creating a particular document must be resolved in favor of discovery. *Id.* at 62.

## B. Texas Law

TRCP 195.2 requires that a plaintiff must designate its testifying experts by the later of thirty days after the request is served, or ninety days before the end of the discovery period. TEX. R. CIV. P. 195.2(a).<sup>15</sup> A defendant, on the other hand, must designate its expert by the later of thirty days after the request is served, or sixty days before the end of the discovery period. TEX. R. CIV. P. 195.2(b).

In order to be properly designated under the Texas rules, the following must be provided as part of a timely designation of any testifying expert:

- (1) the expert's name, address, and telephone number; [and]

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<sup>15</sup> Of note, this requirement applies even in the absence of a scheduling order or service of requests for disclosure by the opposing party. See TEX. R. CIV. P. 190.3(b)(1). This is because Texas Rule of Civil Procedure 190.3(b)(1) mandates a default discovery period. *Id.*

- (2) the subject matter on which the expert will testify.

TEX. R. CIV. P. 194.2(f)(1)-(2).

In addition, if the testifying expert is retained, a party must disclose as part of its expert designation "the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them,"<sup>16</sup> in addition to "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."<sup>17</sup> See, e.g., *Barr v. AAA Texas, LLC*, 167 S.W.3d 32 (Tex. App.—Waco 2005, no pet.) (holding the trial court did not abuse its discretion in excluding a non-retained expert's testimony on the issues of the reasonableness and necessity of the cost of repairs, when the sponsoring party did not identify him as an expert or identify the subject matter of his testimony or the general substance of his mental impressions and opinions); *Jennings v. Hatfield*, No. 14-04-00907-CV, 2005 Tex. App. LEXIS 8730, at \*13-14 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (holding the trial court did not abuse its discretion in excluding an expert's testimony when the expert failed to disclose his "general opinions about those matters, and likewise failed to provide a brief summary of the basis for his opinions").

For nonretained testifying expert witnesses, in addition to the designation and disclosure requirements in TRCP 194.2(f)(1)-(2), a party need only disclose the documents reflecting "the general substance of the

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<sup>16</sup> TEX. R. CIV. P. 194.2(f)(3).

<sup>17</sup> TEX. R. CIV. P. 194.2(f)(4).

expert's mental impressions and opinions and a brief summary of the basis for them." TEX. R. CIV. P. 194.2(f)(3).

Accordingly, one of the biggest differences between the federal and Texas rules regarding designation of testifying experts is that—unlike the federal rules which require the production of a testifying expert's report at the time of designation—the Texas rules allow for production of an expert report after the expert has been designated.<sup>18</sup> Compare FED. R. CIV. P. 26(a)(2)(B) (requiring a written report as part of an expert's initial disclosure), with TEX. R. CIV. P. 195.3(a)(1) (mandating deposition timelines when an expert report is not provided at the same time the expert is designated).

Indeed, the Texas Supreme Court Rules Advisory Committee (SCAC) recently met in January 2011 and specifically declined to amend the TRCPs to comport with FRCP 26(a)(2)(B)'s requirement that a retained testifying expert provide a written report. John Council, *Texas Supreme Court Rules Advisory Committee Rejects Federal Expert Witness Rules*, TEX PARTE BLOG (Jan. 31, 2011, 11:48 AM), [http://texaslawyer.typepad.com/texas\\_lawyer\\_blog/2011/01/committee-rejects-federal-expert-witness-rules.html](http://texaslawyer.typepad.com/texas_lawyer_blog/2011/01/committee-rejects-federal-expert-witness-rules.html); see Appendix E (containing a December 2010 memorandum from the SCAC detailing its recommendations to the Texas Supreme Court).

### 1. Cross-Designation

In construction litigation, parties often designate experts already designated by

opposing parties in order to elicit expert opinions from them without the opposing party's subject-matter limitation. In Texas, at least one court has allowed a party to cross-designate as its own expert the expert designated by the opposing party. *Hooper v. Chittlaluru*, 222 S.W.3d 103, 109-10 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

### 2. De- and Re-Designation

An expert may also be de-designated as a particular type of expert and/or re-designated as another type of expert. "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." *In re State Farm Mut. Auto. Ins. Co.*, 100 S.W.3d 338, 340 (Tex. App.—San Antonio 2002, no pet.) (citation omitted). If the law were to hold otherwise, the Texas Supreme Court has explained, "nothing would preclude a party in a multi-party case from in effect auctioning off a witness." *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990) (citation omitted) (disallowing attempted redesignation of testifying expert as a consulting expert because it constituted "an unacceptable use of [a] discovery mechanism intended to defeat the salutary objectives of discovery").

## VI. OBTAINING DISCOVERY FROM EXPERTS

Both the scope and discoverability of an expert's opinions vary greatly depending upon how an attorney has designated or disclosed the expert.

<sup>18</sup> Of course, an agreed scheduling order can always modify these or any other deadlines. See TEX. R. CIV. P. 11.

## A. Scope of Discoverability

### 1. Consulting Experts

#### a. Federal Law

Discovery of information about consulting experts is rarely allowed in federal court, including the expert's reports, notes, and identity. Cynthia J. Franecki & Kevin J. Malaney, *Protecting Attorney Work Product in Communications with Testifying and Consulting Experts*, in Lorman Education Services, *Protecting Attorney Work Product in Communications with Testifying and Consulting Experts*, at 6 (2009). FRCP 26(b)(4)(D) provides that:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness to trial.

FED. R. CIV. P. 26(b)(4)(D).

This protection has generally been extended to consulting experts' reports as well as notes. *See, e.g., Disidore v. Mail Contractors of Am.*, 196 F.R.D. 410, 418 (D. Kan. 2000) (applying protection of facts known and opinions held by consulting experts from discovery by interrogatories and depositions absent a showing of "exceptional circumstances" to reports and notes prepared by those experts); *Delcastor, Inc. v. Vail Assoc.*, 108 F.R.D. 405, 408-09 (N.D. Ind. 1993) (applying same standard to expert's report). In some cases, even the identity of the consulting expert has been allowed to be withheld. *See, e.g., Ager*, 622 F.2d at 501; *Perry v. W.S. Darley & Co.*,

54 F.R.D. 278, 280 (noting that, in the absence of exceptional circumstances, a party would not be required to reveal the identity of experts retained who will not be called to testify).

However, a party may obtain certain information, including facts and opinions developed by a consulting expert, if the party shows "exceptional circumstances" under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." FED. R. CIV. P. 26(b)(4)(D)(ii) (emphasis added).<sup>19</sup> Federal courts have held the "exceptional circumstances" burden is indeed exceptional. *See, e.g., Moore U.S.A., Inc. v. Standard Register Co.*, 206 F.R.D. 72, 75 (W.D.N.Y. 2001) (FRCP 26(b)(4)(D) "is intended to allow litigants to consult experts in order to evaluate a claim 'without fear that every consultation with an expert may yield grist for the adversary's mill'" (citations omitted)); *Adams v. Shell Oil Co.*, 132 F.R.D. 437, 440 (E.D. La. 1990) (FRCP 26(b)(4)(D) is "designed to prevent a party from building his case on the diligent preparation of his adversary," and therefore, "[a] party seeking to show exceptional circumstances under [FRCP 26(b)(4)(D)] carries a heavy burden") (citations omitted)).

However, while consulting-expert testimony is rarely allowed, it "is not an impenetrable fortress' against discovery." *Bank Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 43 (S.D.N.Y. 1997) (citation omitted). Both courts and commentators have commonly identified two general

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<sup>19</sup> FRCP 26(b)(4)(D)(i) also permits such discovery via a physical or mental examination under FRCP 35. FED. R. CIV. P. 26(b)(4)(D)(i). However, because this discovery method is rarely at issue in construction litigation, this paper does not address it.

situations where the “exceptional circumstances” standard has been met:

The first situation is where the object or condition observed by the non-testifying expert is no longer observable by an expert of the party seeking discovery .... The second situation commonly recognized as constituting exceptional circumstances is where it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive.

*Id.* Thus, absent a showing that the expert retains some factual information or observance that otherwise may not be obtained or is judicially prohibitive, an opposing party may not obtain a consulting expert’s mental impressions or report, if prepared.

#### **b. Texas Law**

Texas law has long enshrined a “consulting expert privilege” preventing the discovery of the “identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert.” TEX. R. CIV. P. 192.3(e); *see also* TEX. R. CIV. P. 195 cmt. 1 (“Information concerning purely consulting experts, of course, is not discoverable.”); *In re City of Georgetown*, 53 S.W.3d 328, 334 (Tex. 2001) (“The [TRCPs] expressly provide that a party is not required to disclose the identity, mental impressions, and opinions of consulting experts.”).

In explaining this privilege, the Texas Supreme Court observed that it “grants parties and their attorneys a sphere of

protection and privacy in which to develop their case.” *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997). If the “expert’s conclusions support the consulting party’s case, that expert may be designated as a witness for trial [(i.e., a testifying expert)]. If, on the other hand, the expert’s conclusions do not support the party’s case, the identity of the expert and his or her conclusions need not be revealed to the side.” *Id.* The policy behind the 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.” *McIlhany*, 789 S.W.2d at 559. The consulting-expert privilege is also “intended to allow ‘a consultant to investigate an accident without the risk of furnishing a potential expert witness or at least a theory of recovery or defense to the opposing party.’” *Id.* (quoting *Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979)). Without this privilege, “parties would be reluctant to test an uncertain theory, for fear that it would provide evidence for the other side.” *Gayle*, 951 S.W.2d at 474.

There are two ways in which consulting experts may be subjected to certain levels of discovery. First, when a consulting expert’s mental impressions and opinions have been reviewed by a testifying expert, the consulting expert’s work is discoverable to the same extent as that of testifying expert. *See* TEX. R. CIV. P. 192.3(e), 195 cmt. 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.”); *In re Ford Motor Co.*, 988 S.W.2d 714, 719 (Tex. 1998). Second, when a consulting expert has obtained knowledge of relevant facts either firsthand or in some other way apart from consultation about the

case, the expert may be discoverable as a fact witness. TEX. R. CIV. P. 192.3(c).

Often, parties seek to designate their own employees as experts in either capacity. Moreover, some parties attempt to designate their employees as consulting experts in an attempt to protect certain information from being discoverable by other parties. However, it is problematic for a party to designate one of its existing employees as an expert and expect them to be discoverable only as consulting experts. This is because TRCP 192.7 provides that 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(d) (emphasis added). However, an “employee who was employed in an area that becomes the subject of litigation can *never qualify* as a consulting-only expert because the employment was not *in anticipation of litigation*.” *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990) (emphasis added).

## 2. Testifying Experts

### a. Federal Law

#### i. Generally

In federal court, parties are entitled to full discovery of each other’s testifying experts. *See, e.g.*, FED. R. CIV. P. 26(a)(2)(A), (B), (b)(4)(A). FRCP 26(a)(2)(A) allows for the discovery of a testifying expert’s identity, whether they are retained or unretained. FED. R. CIV. P. 26(a)(2)(A).

Discovery may be had related both to the subject matter upon which—as well as a summary of the facts and opinions to which—an unretained testifying expert is

expected to present evidence. FED. R. CIV. P. 26(a)(2)C).

Discovery may be sought from a retained testifying expert that includes:

- (1) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (2) the facts or data considered by the witness in forming them;
- (3) any exhibits that will be used to summarize or support them;
- (4) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (6) a statement of the compensation to be paid for the study and testimony in the case.

FED. R. CIV. P. 26(a)(2)(B).

Under FRCP 26(a)(2)(B), a retained testifying expert is one who is “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) (emphasis added). Some parties seek to designate their own employees as testifying experts on the belief that the employee’s opinions will not be discoverable under FRCP 26(a)(2)(B) because the designated employee’s duties do not “regularly involve giving expert

testimony.” However, several federal courts have rejected this reasoning, theorizing instead that, “[w]hen a corporate party designates one of its employees as an expert, it typically authorizes the employee to perform special actions that fall outside of the employee’s normal scope of employment.” *KW Plastics v. United States Can Co.*, 199 F.R.D. 687, 689-90 (M.D. Ala. 2000) Indeed, in such cases, precisely because these employee experts do not regularly provide expert testimony as part of their employment duties, their retention and designation constitutes special employment to provide expert testimony. *Id.* at 690. Accordingly, under the reasoning favored by these courts, employee experts must provide a report and are discoverable to the same extent as any other retained testifying expert. *See Sarmiento v. Armour*, C.A. No. C-05-0082006, U.S. Dist. LEXIS 55039, at \*12-13 (S.D. Tex. 2006) (citing *Prieto v. Malgor*, 361 F.3d 1313, 1317-19 (11th Cir. 2004); *McCulloch v. Hartford Life & Accident Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004); *KW Plastics*, 199 F.R.D. at 689-90; *Minnesota Mining & Mfg. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460-61 (D. Minn. 1998)).

## ii. Dec. 1, 2010 Amendments<sup>20</sup>

As part of the 2010 amendments to FRCP 26, several new and important attorney work-protections were added that limit the discoverability of certain expert communications. *See* FED. R. CIV. P. 26(b)(4) advisory committee note (2010 amendments). Both subparagraphs (B) and (C) were added to FRCP 26(b)(4) and apply

<sup>20</sup> Please see Appendix C, *infra*, for a redline comparison showing the December 2010 amendments to FRCP 26.

to all forms of discovery. FED. R. CIV. P. 26(b)(4) advisory committee note (2010 amendments).

The protection for communications between the retained testifying expert and the party’s attorney “should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm.” *Id.* An example the advisory committee provides involves a situation where a “party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party’s behalf in several of the cases.” *Id.* In such instances, the newly-added work-product protection “applies to communications between the expert witness and the attorneys representing the party in any of those cases.” *Id.* Similarly, “communications with in-house counsel or the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action.” *Id.*

Specifically, FRCP 26(b)(4)(B) was added, clarifying that FRCPs 26(b)(3)(A) and (B) “protect drafts of any report or disclosure required under [FRCP] 26(a)(2), regardless of the form in which the draft is recorded.” FED. R. CIV. P. 26(b)(4)(B). FED. R. CIV. P. 26(b)(4)(B). This “protection applies to all witnesses identified under [FRCP] 26(a)(2)(A) [(regarding testifying experts)], whether they are required to provide reports under [FRCP] 26(a)(2)(B) [(regarding retained testifying experts)] or are the subject of disclosure under [FRCP] 26(a)(2)(C) [(regarding nonretained testifying experts)].” FED. R. CIV. P. 26(b)(4) advisory committee note (2010 amendments). The newly-enshrined work-product protection “applies regardless of the form in which the draft is recorded, whether

written, electronic, or otherwise.” *Id.* It “also applies to drafts of any supplementation under [FRCP] 26(e).” *Id.*

FRCP 26(b)(4)(C) was also added, explaining that:

[FRCPs] 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.

FED. R. CIV. P. 26(b)(4)(C). The addition of this provision was “designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.” FED. R. CIV. P. 26(b)(4) advisory committee note (2010 amendments). The protection is “limited to communications between an expert witness required to provide a report under [FRCP] 26(a)(2)(B) [(regarding retained testifying experts)] and the attorney for the party on whose behalf the witness will be testifying, including any ‘preliminary’ expert opinions.” *Id.*

Protected “communications” include those between a party’s attorney and expert witness’s assistants. *Id.* Notably, this rule “does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under [FRCP] 26(a)(2)(C) [(regarding nonretained testifying experts)].” *Id.* That said, the advisory committee also made clear the new rule “does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.” *Id.*

The advisory committee also clarified the three exceptions to the general attorney-expert communication protection created by FRCP 26(b)(4)(C) “do[] not extend beyond those specific topics.” *Id.* Moreover, a party seeking discovery “regarding attorney-expert communications on subjects outside the three exceptions in [FRCP] 26(b)(4)(C), or regarding draft expert reports or disclosures, ... must make the showing specified in [FRCP] 26(b)(3)(A)(ii)—that the party has a substantial need for the discovery and cannot obtain the subsequent equivalent without undue hardship.” *Id.*

FRCP 26(b)(4)(C)(i), which excepts communications relating to expert compensation, in fact may “extend[] to all compensation for the study and testimony provided in relation to the action.” *Id.* This includes “[a]ny communications about additional benefits to the expert, such as further work in the event of a successful result in the present case,” or “compensation for work done by a person or organization associated with the expert.” *Id.* The objective of this exception, the advisory committee explained, is “to permit full inquiry into such potential sources of bias.” *Id.*

While FRCP 26(b)(4)(C)(ii) permits discovery of facts or data the party's attorney provided to the expert, it applies "only to communications 'identifying' the facts or data provided by counsel"—further "communications about the potential relevance of the facts or data are protected," however. *Id.*

The last exception promulgated in FRCP 26(b)(4)(C)(iii) permitting discovery regarding attorney-expert communications to identify any assumptions that a lawyer provided to the expert and that the expert relied upon in forming his or her opinions excludes "more general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts." *Id.*

#### **b. Texas Law**

Under current Texas law, parties are entitled to full discovery of each other's testifying experts. TEX. R. CIV. P. 192.3(e), 192.5(c)(1), 194.2(f). The extent of this discovery may include:

- (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; [and]
- (7) the expert's current resume and bibliography.

TEX. R. CIV. P. 192.3(e). Under TRCP 192.3(e)(6), these materials are discoverable even if they are merely provided to a testifying expert, regardless of whether the expert actually reviewed the materials. TEX. R. CIV. P. 192.5(c)(1); *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 445-45 (Tex. 2007). Indeed, "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for" a retained testifying expert "in anticipation of the expert's testimony" is discoverable, including the expert's file and report drafts. TEX. R. CIV. P. 194.2(f)(4)(A).

As the Texas Supreme Court clarified in 2007, this discoverability extends even to otherwise protected work product *Christus*, 222 S.W.3d 438 (quoting TRCP 192.5(c)(1), which "specifically states that work product loses its protected status when it is provided to a testifying expert").<sup>21</sup> However, as the

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<sup>21</sup> Comment 8 to TRCP 192 makes clear that TRCP 192.5 defines work product "for the first time." TEX. R. CIV. P. 192 cmt. 8. Moreover, "[w]ork product replaces the 'attorney work product' and 'party communication' discovery exemptions from former Rule 166b." *Id.*

San Antonio Court of Appeals examined in *In re State Farm*, this work-product protection waiver applies only to “documents, tangible things, reports, models, or data compilations” that are “provided to, reviewed by, or prepared by or for the expert in anticipation of the expert’s testimony. 100 S.W.3d at 343; TEX. R. CIV. P. 194.2(f)(4)(A). Therefore, if such documentation was furnished to a retained testifying expert in anticipation of the expert’s testimony in another case, it may be undiscoverable. See *In re State Farm*, 100 S.W.3d at 343.

As discussed *supra*, because existing employees can rarely—if ever—qualify as consulting experts, their designation as experts will likely be treated as one for a retained testifying expert, with all the discoverability that entails. See *Axelson*, 798 S.W.2d at 555 (“employee who was employed in an area that becomes the subject of litigation can *never qualify* as a consulting-only expert because the employment was not *in anticipation of litigation*”) (emphasis added); see also TEX. R. CIV. P. 192.3(e)(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 the expert’s testimony”).

At its recent January 2011 meeting, the SCAC voted not to adopt work-product protections similar to those recently added to FRCP 26(b)(4). John Council, *Texas Supreme Court Rules Advisory Committee Rejects Federal Expert Witness Rules*, TEX PARTE BLOG (Jan. 31, 2011, 11:48 AM), [http://texaslawyer.typepad.com/texas\\_lawyer\\_blog/2011/01/committee-rejects-federal-expert-witness-rules.html](http://texaslawyer.typepad.com/texas_lawyer_blog/2011/01/committee-rejects-federal-expert-witness-rules.html); see Appendix E (containing a December 2010 memorandum from the SCAC detailing its

recommendations to the Texas Supreme Court).

## **B. Methods of Discovery**

### **1. Consulting Experts**

#### **a. Federal Law**

Only when a consulting expert has obtained knowledge about the case either firsthand or not in anticipation of litigation or preparation for trial may information about a consulting expert be discovered. See *Battle v. Mem’l Hosp.*, 228 F.3d 544, 551-52 (5th Cir. 2000). In this instance, discovery may be had from a consulting expert with firsthand factual knowledge of the case by: (1) initial disclosures (FRCP 26(a)(1)(A)); (2) interrogatories (FRCP 33); or (3) requests for admissions (FRCP 36). See, e.g. FED. R. CIV. P. 26(b)(1), 26(a)(2)(C) advisory committee note (2010 amendments).

#### **b. Texas Law**

Regardless of whether a consulting expert’s mental impressions and opinions have been reviewed by a testifying expert, neither (1) requests for production under TRCP 194.2(f) nor (2) depositions under TRCP 195 may be used to secure discovery from a consulting expert. Compare TEX. R. CIV. P. 194.2(f) (“for any testifying expert”), with TEX. R. CIV. P. 195 (“Discovery Regarding Testifying Expert Witnesses”). That said, the comments to TRCP 195 clarify it was not intended to limit any other permissible “methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert.” TEX. R. CIV. P. 195 cmt. 1.

While a request for production seeking the information described in TRCP 194.2(f) may not be sought from a consulting expert, requests for production seeking the information described in TRCP 194.2(e) may be served on a consulting expert who has obtained knowledge of relevant facts either firsthand or in some other way apart from consultation about the case. *See* TEX. R. CIV. P. 194.2(e), 192.3(c).

## 2. Testifying Experts

### a. Federal Law

Several methods of securing discovery from testifying experts exist at federal law, including: (1) oral deposition (FRCP 26(b)(4)(A), 30); (2) deposition by written questions (FRCP 31); (3) requests for production (FRCP 34); or (4) subpoena (FRCP 45). In addition, if a testifying expert witness has acquired factual knowledge about the case before litigation was anticipated or pending, the expert is discoverable as a fact witness, including by: (1) initial disclosures (FRCP 26(a)(1)(A)); (2) interrogatories (FRCP 33); or (3) requests for admissions (FRCP 36). *See, e.g.* FED. R. CIV. P. 26(b)(1).

### b. Texas Law

In Texas, there are four avenues to discovering information about or from a retained testifying expert. TEX. R. CIV. P. 194.2(f), 195.1, 195.4, 195.5. Specifically, a party may utilize: (1) requests for disclosure;<sup>22</sup> (2) an expert report;<sup>23</sup> (3) an

oral deposition;<sup>24</sup> or (4) a court-ordered expert report and deposition.<sup>25</sup>

If an expert report is provided voluntarily, the expert need not be made “available for deposition until reasonably promptly after all other experts have been designated.” TEX. R. CIV. P. 195.3(a)(2). On the other hand, if an expert has not been furnished, the “party must make the expert available for deposition reasonably promptly after the expert is designated.” TEX. R. CIV. P. 195.3(a)(1). As the comments to TRCP 195 make clear, a plaintiff “must either produce an expert’s report or tender the expert for deposition before an opposing party is required to designate experts.” TEX. R. CIV. P. 195 cmt. 3. If a party doesn’t wish to incur the expense of procuring an expert report, may instead “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. *Id.*

Nothing in TRCPs 194 or 195 limits their application to only retained testifying experts, but the comments to TRCP 195 intimate that it and TRCP 194 “do not address depositions” of nonretained testifying experts. TEX. R. CIV. P. 195 cmt. 2. The comments suggest that parties may obtain this discovery, however, through subpoenas issued pursuant to TRCP 176 and discovery of nonparties under TRCP 205. *Id.*

In addition, TRCP 194.2(f) makes clear that requests for disclosure may obtain only the following from a nonretained testifying

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<sup>22</sup> TEX. R. CIV. P. 194.2(f).

<sup>23</sup> TEX. R. CIV. P. 195.1.

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<sup>24</sup> TEX. R. CIV. P. 195.4.

<sup>25</sup> TEX. R. CIV. P. 195.5; *Loftis v. Martin*, 776 S.W.2d 145, 147 (Tex. 1989).

expert: (1) the expert's name, address, and telephone number; (2) the subject matter on which the expert will testify; (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them; or (4) documents reflecting the expert's mental impressions and opinions and basis for them. TEX. R. CIV. P. 194.2(f)(3). However, retained testifying experts may seek (1)-(3) above, but may also be requested to disclose: (1) 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 (2) the expert's current resume and bibliography. TEX. R. CIV. P. 194.2(f)(4).

### C. Contents of Expert Reports

Under both the FRCPs and TRCPs, only testifying experts need provide expert reports. Compare FED. R. CIV. P. 26(a)(2)(A), (B), with TEX. R. CIV. P. 194.2(f), 195.2.

#### 1. Federal Law

Under the FRCPs, an expert report must include:

- (1) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (2) the facts or data considered by the witness in forming them;
- (3) any exhibits that will be used to summarize or support them;
- (4) the witness's qualifications, including a list of all publications authored in the previous 10 years;

- (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (6) a statement of the compensation to be paid for the study and testimony in the case.

FED. R. CIV. P. 26(a)(2)(B).

#### 2. Texas Law

If an expert report is produced, the TRCPs require that it include the "factual observations, tests, supporting data, calculations, photographs, or opinions" of the expert,"<sup>26</sup> and "must fully disclose the breadth and substance of the expert's mental impressions and their basis." *Mauzey v. Sutliff*, 125 S.W.3d 71, 84 (Tex. App.—Austin 2003, pet. denied). Failure to provide all of the information required under the rule, including an expert's impressions and opinions, absent a showing of good cause or lack of surprise or prejudice, results in *automatic exclusion* of the expert's testimony under TRCP 193.6. See TEX. R. CIV. P. 193.6; *Vingcard A.S. v. Merrimac Hospitality Sys.*, 59 S.W.3d 847, 855-859 (Tex. App.—Fort Worth 2001, pet. denied) (district court should have excluded expert's testimony when party failed to provide general substance of expert's impressions and opinions and brief summary of them and failed to supply required documents); see also *Brook v. Brook*, 865 S.W.2d 166, 170 (Tex. App.—Corpus Christi 1993), *aff'd on other grounds* by 881 S.W.2d 297 (Tex. 1994); *Kreymer v. North Texas Mun. Water Dist.*, 842 S.W.2d 750, 753 (Tex. App.—

<sup>26</sup> TEX. R. CIV. P. 195.5.

Dallas 1992, no writ); *University of Texas at Austin v. Hinton*, 822 S.W.2d 197, 202 (Tex. App.—Austin 1991, no writ) (because identification of expert supplied in discovery but not expert's opinions, testimony could not be offered at trial). Failure to timely provide such information may result in an expert being precluded from providing his opinion at trial.

## **VII. CONCLUSION**

As has hopefully been shown herein, and although the labyrinthine requirements governing the wise and proper use of experts in construction litigation may cause even a diligent litigator to fight off drowsiness at times, the thoughtful study of these mandates may wind up saving many a sleepless night in the long run.

## **Appendix A**

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Below is a list of some of the substantive areas in which a construction litigation expert's testimony may be helpful:

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| <b>1.</b> Acoustics                                 | <b>21.</b> Construction Inspection                   |
| <b>2.</b> Americans with Disabilities Act (ADA)     | <b>22.</b> Construction and Project Training         |
| <b>3.</b> Architecture                              | <b>23.</b> Cost Estimating                           |
| <b>4.</b> Boilers                                   | <b>24.</b> Cost Accounting and Control               |
| <b>5.</b> Building Engineering                      | <b>25.</b> CPM Schedule / Delay Analysis             |
| <b>6.</b> Building Envelope / Exterior              | <b>26.</b> Damages Quantification / Evaluation       |
| <b>7.</b> Building Fires                            | <b>27.</b> Design Performance / Certificate of Merit |
| <b>8.</b> Buildings Code Compliance and Inspections | <b>28.</b> Disabled Access Cost Analysis             |
| <b>9.</b> Building Remodeling                       | <b>29.</b> Doors                                     |
| <b>10.</b> Carpentry                                | <b>30.</b> Drainage                                  |
| <b>11.</b> Civil Engineering                        | <b>31.</b> Drilling                                  |
| <b>12.</b> Claims and Litigation Consulting         | <b>32.</b> Electrical                                |
| <b>13.</b> Codes and Compliance                     | <b>33.</b> Elevators                                 |
| <b>14.</b> Commercial Construction                  | <b>34.</b> Engineering and Design Development        |
| <b>15.</b> Concrete                                 | <b>35.</b> Environmental                             |
| <b>16.</b> Construction Accidents                   | <b>36.</b> Equipment                                 |
| <b>17.</b> Construction Defect Analysis             | <b>37.</b> Escalators                                |
| <b>18.</b> Construction Delays                      | <b>38.</b> Estimating                                |
| <b>19.</b> Construction Engineering                 | <b>39.</b> Failure Analysis                          |
| <b>20.</b> Construction Equipment                   | <b>40.</b> Fasteners                                 |

41. Fire Suppression Systems
42. Flooring
43. Foundations
44. Framing
45. General Contracting
46. Geology
47. Geotechnical Engineering
48. Glass
49. Grading
50. Groundwater
51. Hazardous Materials
52. Heavy Construction
53. Heavy Equipment
54. Heavy Highway
55. Heating, Ventilation, and Air Conditioning (HVAC)
56. Hydraulics
57. Hydrology
58. Industrial Hygiene
59. Labor / Productivity Analysis
60. Land Development / Site Work
61. Landscaping
62. Latches
63. LEED Certification
64. Lighting
65. Machining
66. Masonry
67. Molds and Fungus
68. Mechanical Engineering
69. Occupational Safety and Health (OSHA)
70. Paints
71. Pipelines
72. Plaster
73. Plumbing
74. Procurement
75. Project and Construction Management
76. Project Start-Up and Close-Out
77. Program Management
78. Pumps
79. Railroad Construction
80. Regulations
81. Remodeling
82. Resins
83. Rigging
84. Risk Evaluation / Analysis
85. Risk Management
86. Roads

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|---|--|
| <ul style="list-style-type: none"> <li><b>87.</b> Roof Inspection</li> <li><b>88.</b> Roofing</li> <li><b>89.</b> Safety Engineering</li> <li><b>90.</b> Scaffolding</li> <li><b>91.</b> Scheduling and Project Controls</li> <li><b>92.</b> Scissor Lifts</li> <li><b>93.</b> Seismic Retrofit</li> <li><b>94.</b> Sewage</li> <li><b>95.</b> Sheet Metal</li> <li><b>96.</b> Site Planning and Inspections</li> <li><b>97.</b> Slopes</li> <li><b>98.</b> Staff Extension</li> <li><b>99.</b> Standard of Care (Design, Construction, etc.)</li> <li><b>100.</b> Steel</li> <li><b>101.</b> Structural Engineering</li> <li><b>102.</b> Surveying</li> <li><b>103.</b> Swimming Pools</li> <li><b>104.</b> Termites</li> <li><b>105.</b> Tools</li> <li><b>106.</b> Troubled Project Turn-Around</li> <li><b>107.</b> Tunneling</li> <li><b>108.</b> Underground Tanks</li> <li><b>109.</b> Urban Development and Planning</li> </ul> | <ul style="list-style-type: none"> <li><b>110.</b> Utility Construction</li> <li><b>111.</b> Water and Moisture Intrusion</li> <li><b>112.</b> Waterproofing</li> <li><b>113.</b> Welding</li> <li><b>114.</b> Windows</li> <li><b>115.</b> Wood</li> <li><b>116.</b> Workers' Compensation</li> <li><b>117.</b> Worker Safety</li> <li><b>118.</b> Zoning<sup>27</sup></li> </ul> |
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<sup>27</sup> These categories were drawn, in part, from an amalgamation of expert witness lists, compiled by ALM Experts, Synergen Consulting International, SEAK Inc., and Forensis Group.

## Appendix B

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A number of commercial expert procurement services are available to practitioners which may be helpful in locating an expert who can competently testify as to a particular field. From directories to consultants to expert firms, these services include:

### **DIRECTORIES:**

<b><u>Company</u></b>	<b><u>Website</u></b>
ALM Experts	<a href="http://www.almexperts.com">www.almexperts.com</a>
ConstructionRisk.com	<a href="http://www.constructionrisk.com">www.constructionrisk.com</a>
Experts.com	<a href="http://www.experts.com">www.experts.com</a>
Expert Pages	<a href="http://www.expertpages.com">www.expertpages.com</a>
Expert Witness	<a href="http://www.expertwitness.com">www.expertwitness.com</a>
Forensic Expert Witness Association	<a href="http://www.forensic.org">www.forensic.org</a>
JurisPro	<a href="http://www.JurisPro.com">www.JurisPro.com</a>
Law Info	<a href="http://www.lawinfo.com/expert-witnesses.html">www.lawinfo.com/expert-witnesses.html</a>
SEAK, Inc.	<a href="http://www.seakexperts.com">www.seakexperts.com</a>

### **REFERRAL SERVICE AND CONSULTING FIRMS:**

<b><u>Company</u></b>	<b><u>Website</u></b>
Arcadis U.S., Inc.	<a href="http://www.arcadisccs.com">www.arcadisccs.com</a>
Capital Project Management, Inc.	<a href="http://www.cpmiteam.com">www.cpmiteam.com</a>
CED Investigative Technologies, Inc.	<a href="http://www.cedtechnologies.com">www.cedtechnologies.com</a>
Construction Process Solutions, Ltd.	<a href="http://www.cpsconsulting.com">www.cpsconsulting.com</a>
CTL Group, Inc.	<a href="http://www.ctlgroup.com">www.ctlgroup.com</a>
Delta Consulting Group	<a href="http://www.delta-cgi.com">www.delta-cgi.com</a>
Demand Construction Services, Inc.	<a href="http://www.demandinc.com">www.demandinc.com</a>
Exponent, Inc.	<a href="http://www.exponent.com">www.exponent.com</a>
FTI Consulting, Inc.	<a href="http://www.fticonsulting.com">www.fticonsulting.com</a>
Forensis Group	<a href="http://www.forensisgroup.com">www.forensisgroup.com</a>
Greyhawk	<a href="http://www.greyhawk.com">www.greyhawk.com</a>
Guardian Group, Inc.	<a href="http://www.guardiangroup.com">www.guardiangroup.com</a>
Hill International, Inc.	<a href="http://www.hillintl.com">www.hillintl.com</a>
IMS Expert Services	<a href="http://www.IMS-expertservices.com">www.IMS-expertservices.com</a>
Interface Consulting International, Inc.	<a href="http://www.interface-consulting.com">www.interface-consulting.com</a>
Loewke, Brill Consulting Group	<a href="http://www.loewkebrill.com">www.loewkebrill.com</a>
Marsh USA, Inc.	<a href="http://www.global.marsh.com">www.global.marsh.com</a>
McCullough & Associates	<a href="http://www.mccullough-group.com">www.mccullough-group.com</a>
McDonough Bolyard Peck, Inc.	<a href="http://www.mbpc.com">www.mbpc.com</a>

McLaren Engineering Group	<a href="http://www.mgmclaren.com">www.mgmclaren.com</a>
Nautilus Consulting, L.L.C.	<a href="http://www.nautcon.com">www.nautcon.com</a>
Navigant Consulting, Inc.	<a href="http://www.navigantconsulting.com">www.navigantconsulting.com</a>
Nelson Architectural Engineers, Inc.	<a href="http://www.nae-us.com">www.nae-us.com</a>
PMA Consultants, L.L.C.	<a href="http://www.pmaconsultants.com">www.pmaconsultants.com</a>
Rimkus Consulting Group, Inc.	<a href="http://www.rimkus.com">www.rimkus.com</a>
Round Table Group	<a href="http://www.roundtablegroup.com">www.roundtablegroup.com</a>
SEA Limited.	<a href="http://www.sealimited.com">www.sealimited.com</a>
Secretariat International, Ltd.	<a href="http://www.secretariat-intl.com">www.secretariat-intl.com</a>
Synergen Consulting International	<a href="http://www.synergenconsulting.com">www.synergenconsulting.com</a>
The Duggan Rhodes Group	<a href="http://www.dugganrhodes.com">www.dugganrhodes.com</a>
Veritas Advisory Group, Inc.	<a href="http://www.veritasag.com">www.veritasag.com</a>
Warner Construction Consultant, Inc.	<a href="http://www.warnercon.com">www.warnercon.com</a>

- The information provided in this Appendix is a compilation of resources intended to be for the reader's use in investigating experts. The list is not an endorsement of any particular person or services by either the author or the Construction Section of the State Bar of Texas. The inclusion or omission of any particular service, company or individual is not a comment upon the quality or applicability of the services provided.

## Appendix C

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The following is a redline comparison showing the changes made to Federal Rule of Civil Procedure 26 by the December 1, 2010 amendments.

4 FEDERAL RULES OF CIVIL PROCEDURE

**Rule 26. Duty to Disclose; General Provisions Governing  
Discovery\*\***

1 **(a) Required Disclosures.**

2 \* \* \* \* \*

3 **(2) *Disclosure of Expert Testimony.***

4 **(A) *In General.*** In addition to the disclosures  
5 required by Rule 26(a)(1), a party must  
6 disclose to the other parties the identity of  
7 any witness it may use at trial to present  
8 evidence under Federal Rule of Evidence  
9 702, 703, or 705.

10 **(B) *Witnesses Who Must Provide a Written***  
11 ***Report.*** Unless otherwise stipulated or  
12 ordered by the court, this disclosure must be  
13 accompanied by a written report — prepared

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\*\*In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

14 and signed by the witness — if the witness is  
15 one retained or specially employed to provide  
16 expert testimony in the case or one whose  
17 duties as the party’s employee regularly  
18 involve giving expert testimony. The report  
19 must contain:

20 (i) a complete statement of all opinions the  
21 witness will express and the basis and  
22 reasons for them;

23 (ii) the facts or data ~~or other information~~  
24 considered by the witness in forming  
25 them;

26 (iii) any exhibits that will be used to  
27 summarize or support them;

28 (iv) the witness’s qualifications, including a  
29 list of all publications authored in the  
30 previous 10 years;

- 31 (v) a list of all other cases in which, during  
32 the previous 4 years, the witness  
33 testified as an expert at trial or by  
34 deposition; and
- 35 (vi) a statement of the compensation to be  
36 paid for the study and testimony in the  
37 case.

- 38 **(C)** Witnesses Who Do Not Provide a Written  
39 Report. Unless otherwise stipulated or  
40 ordered by the court, if the witness is not  
41 required to provide a written report, this the  
42 Rule 26(a)(2)(A) disclosure must state:
- 43 (i) the subject matter on which the witness  
44 is expected to present evidence under  
45 Federal Rule of Evidence 702, 703, or  
46 705; and

- 47                    **(ii)** a summary of the facts and opinions to  
48                    which the witness is expected to testify.
- 49                    **(D~~E~~)** *Time to Disclose Expert Testimony.* A  
50                    party must make these disclosures at the  
51                    times and in the sequence that the court  
52                    orders. Absent a stipulation or a court  
53                    order, the disclosures must be made:
- 54                    **(i)** at least 90 days before the date set for  
55                    trial or for the case to be ready for trial;  
56                    or
- 57                    **(ii)** if the evidence is intended solely to  
58                    contradict or rebut evidence on the  
59                    same subject matter identified by  
60                    another party under Rule 26(a)(2)(B) or  
61                    (C), within 30 days after the other  
62                    party's disclosure.

63                    **(E)**     *Supplementing the Disclosure.* The  
64                    parties must supplement these  
65                    disclosures when required under Rule  
66                    26(e).

67                    \* \* \* \* \*

68                    **(b) Discovery Scope and Limits.**

69                    \* \* \* \* \*

70                    **(3) Trial Preparation: Materials.**

71                    **(A) Documents and Tangible Things.** Ordinarily,  
72                    a party may not discover documents and  
73                    tangible things that are prepared in  
74                    anticipation of litigation or for trial by or for  
75                    another party or its representative (including  
76                    the other party's attorney, consultant, surety,  
77                    indemnitor, insurer, or agent). But, subject to  
78                    Rule 26(b)(4), those materials may be  
79                    discovered if:

- 80                   (i) they are otherwise discoverable under  
81                   Rule 26(b)(1); and
- 82                   (ii) the party shows that it has substantial  
83                   need for the materials to prepare its case  
84                   and cannot, without undue hardship,  
85                   obtain their substantial equivalent by  
86                   other means.
- 87                   **(B)** *Protection Against Disclosure.* If the court  
88                   orders discovery of those materials, it must  
89                   protect against disclosure of the mental  
90                   impressions, conclusions, opinions, or legal  
91                   theories of a party's attorney or other  
92                   representative concerning the litigation.
- 93                   **(C)** *Previous Statement.* Any party or other  
94                   person may, on request and without the  
95                   required showing, obtain the person's own  
96                   previous statement about the action or its

97 subject matter. If the request is refused, the  
98 person may move for a court order, and Rule  
99 37(a)(5) applies to the award of expenses. A  
100 previous statement is either:

101 (i) a written statement that the person has  
102 signed or otherwise adopted or  
103 approved; or

104 (ii) a contemporaneous stenographic,  
105 mechanical, electrical, or other  
106 recording — or a transcription of it —  
107 that recites substantially verbatim the  
108 person’s oral statement.

109 (4) *Trial Preparation: Experts.*

110 (A) Deposition of an Expert Who May Testify. A  
111 party may depose any person who has been  
112 identified as an expert whose opinions may  
113 be presented at trial. If Rule 26(a)(2)(B)

114 requires a report from the expert, the  
115 deposition may be conducted only after the  
116 report is provided.

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

123 **(C)** Trial-Preparation Protection for  
124 Communications Between a Party's Attorney  
125 and Expert Witnesses. Rules 26(b)(3)(A) and  
126 (B) protect communications between the  
127 party's attorney and any witness required to  
128 provide a report under Rule 26(a)(2)(B),  
129 regardless of the form of the

130 communications, except to the extent that the

131 communications:

132 (i) ~~r~~Relate to compensation for the expert's  
133 study or testimony;

134 (ii) ~~i~~Identify facts or data that the party's  
135 attorney provided and that the expert  
136 considered in forming the opinions to  
137 be expressed; or

138 (iii) ~~i~~Identify assumptions that the party's  
139 attorney provided and that the expert  
140 relied upon in forming the opinions to  
141 be expressed.

142 **(DB)** *Expert Employed Only for Trial*  
143 *Preparation.* Ordinarily, a party may  
144 not, by interrogatories or deposition,  
145 discover facts known or opinions held  
146 by an expert who has been retained or

147 specially employed by another party in  
148 anticipation of litigation or to prepare  
149 for trial and who is not expected to be  
150 called as a witness at trial. But a party  
151 may do so only:

152 (i) as provided in Rule 35(b); or  
153 (ii) on showing exceptional circumstances  
154 under which it is impracticable for the  
155 party to obtain facts or opinions on the  
156 same subject by other means.

157 ~~(E)~~ *Payment.* Unless manifest injustice  
158 would result, the court must require that  
159 the party seeking discovery:

160 (i) pay the expert a reasonable fee for time  
161 spent in responding to discovery under  
162 Rule 26(b)(4)(A) or ~~(D)~~; and

14

FEDERAL RULES OF CIVIL PROCEDURE

163

(ii) for discovery under (DB), also pay the

164

other party a fair portion of the fees and

165

expenses it reasonably incurred in

166

obtaining the expert's facts and

167

opinions.

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\* \* \* \* \*

## Appendix D

The following table is taken from Professor Alex Albright, Charles Herring, and Justice Bob Pemberton's 2007 treatise detailing the then-newly-revised Texas Rules of Civil Procedure (the "Rules"). ALEX ALBRIGHT ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 9.9, p. 224 (Thomson West 2007). Of note, Justice Pemberton was the Rules Attorney at the Texas Supreme Court when the current Rules governing expert discovery were adopted.

§ 9.9 HANDBOOK ON TEXAS DISCOVERY PRACTICE

	Expert disclosure [Rule 194.2(f)]	Expert report [Rule 195.5]
1. Name, address, telephone number	Yes	Not explicitly required, but presumably implied
2. Subject matter of testimony	Yes	Yes (implicitly—see categories below)
3. "General substance" of the expert's mental impressions	Yes <sup>a</sup>	Not specifically, but see categories below
4. "General substance" of the expert's opinions	Yes <sup>b</sup>	Yes ("the opinions" are discoverable, which presumably may be more detailed than just the "general substance" of opinions) <sup>c</sup>
5. A "brief summary" of the basis for the expert's impressions and opinions	Yes <sup>d</sup>	Not specifically, but see category 7 below
6. All documents, tangible things, reports, or models provided to, reviewed by, or prepared by or for the expert	Yes <sup>e</sup>	Not specifically, but see category 7 below
7. All "data compilations" provided to, reviewed by, or prepared by or for the expert	Yes <sup>f</sup>	All "supporting data" <sup>g</sup>
8. The expert's current resume and bibliography	Yes <sup>h</sup>	No
9. All discoverable factual observations, calculations, photographs	No	Yes

<sup>a</sup> This is required only for experts retained, employed by, or otherwise subject to the control of the responding party. Rule 194.2(f)(3). For other experts, the responding party may produce "documents reflecting such information." *Id.*

<sup>b</sup> This is required only for experts retained, employed by, or otherwise subject to the control of the responding party. *Id.* For other experts, the responding party must produce "documents reflecting such information." *Id.*

<sup>c</sup> As opposed to the disclosure obligation, this apparently is required even for experts not under the control of a party. Compare Rule 195.5 with Rule 194.2(f)(3).

<sup>d</sup> This is required only for experts retained, employed by, or otherwise subject to the control of the responding party. *Id.* For other experts, the responding party must produce "documents reflecting such information." *Id.*

<sup>e</sup> This is required only for experts retained, employed by, or otherwise subject to the control of the responding party. Rule 194.2(f)(4)(A).

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## Appendix E

The following is a memorandum from the Texas Supreme Court Rules Advisory Committee (SCAC)'s discovery subcommittee, which was produced at the request of Texas Supreme Court Justice Nathan Hecht, who serves as the Court's liaison to the SCAC. Dec. 1, 2010 SCAC Memorandum, *available at* [http://www.supreme.courts.state.tx.us/rules/pdf/SCAC\\_FRCP26\\_subcommittee\\_report.pdf](http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_FRCP26_subcommittee_report.pdf) (last visited Feb. 3, 2011). The memorandum below details the reasoning and recommendations of the SCAC in response to certain amendments to Federal Rule of Civil Procedure 26, which became effective December 1, 2010.

**To:** Supreme Court Rules Advisory Committee  
**From:** Discovery Rules Subcommittee  
**Date:** December 1, 2010  
**Subject:** Amendments to Federal Rule of Civil Procedure 26

The Texas Supreme Court has asked the SCAC to examine whether the recently adopted amendments to Federal Rule 26 should be incorporated in some fashion as part of the Texas Rules of Civil Procedure. Federal Rule 26 has two significant differences from state practice.

The first is that Rule 26(a)(2) requires that a party produce a written report for any expert who is "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." In contrast, current Texas practice provides that a party must request an expert report, and the responding party may either tender the expert for deposition or provide the report. If the requesting party desires a report in addition to an expert's deposition, it must seek a court order requiring a report. In other words, under Texas practice, an expert report is not required absent a request and a court order, so long as the party produces the expert for deposition. Under the new federal rule, a written report is required absent an agreement of the parties or a court order relieving the parties of the obligation to produce written reports. Here is the text of the Texas Rules and the new federal rule on this matter:

I. Current Texas Rule of Civil Procedure 195: Discovery Regarding Testifying Expert Witnesses

A. Rule 195.1. Permissible Discovery Tools:

A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 > [FN1] and through depositions and reports as permitted by this rule.

B. Rule 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.

II. Federal Rule 26(a)(2) (as amended). Disclosure of Expert Testimony:

- A. In General . . . a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
- B. Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--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. The report must contain:
- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
  - (ii) the facts or data considered by the witness in forming them;
  - (iii) any exhibits that will be used to summarize or support them;
  - (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
  - (v) a list of all other cases in which, during the previous 4 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.
- C. Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
  - (ii) a summary of the facts and opinions to which the witness is expected to testify.

**Recommendation:** The subcommittee recommended that the SCAC keep the current Texas court practice on this matter for two reasons. First, and primarily, it is the subcommittee's view that the Texas state practice is more cost effective. It does not require reports when a deposition and initial disclosures will do, thus saving the cost of drafting and preparing

formal reports in the many cases that do not warrant them. Second, the subcommittee is not aware that current Texas practice has presented any problems for the practitioner or the courts. The sub-committee notes, however, that, under the new federal rule, a party seeking the deposition of an expert who has provided a written report must pay that expert's reasonable fee for time spent in "responding to discovery," (i.e. preparing for and testifying by deposition?) and this cost-shifting should be factored into the analysis of whether to incorporate the federal rule in state practice.

\* \* \*

The second difference has to do with work product protection for testifying experts. Under the new Federal Rule 26, a work product privilege is extended to the work a testifying expert does to prepare his report in a case, including discussions with counsel and draft reports. In contrast, Texas practice provides that any draft reports and discussions between counsel and a testifying expert are discoverable. Here is the text of the Texas Rules and the new Federal Rule on this matter:

#### I. Current Texas Rule of Civil Procedure 192: Expert Work Product

##### A. Rule 192.3(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.

##### B. Rule 192.5 (b). Protection of Work Product:

(1) Protection of Core Work Product-Attorney Mental Processes. Core work product--the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories--is not discoverable.

(2) Protection of Other Work Product. Any other work product is discoverable only 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.

(3) Incidental Disclosure of Attorney Mental Processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) Limiting Disclosure of Mental Processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

C. Rule 192.5(c). Exceptions: Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;

## II. Federal Rule 26(b)(3) and (4) (as amended). Trial Preparation, Materials and Experts:

A. Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

B. Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

C. Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is

either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

A. Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

B. 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.

C. 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.

D. Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

E. Payment. Unless manifest injustice would result, the court must require that the

party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

**Recommendation:** The subcommittee has no recommendation on this matter, and would like the input of the SCAC. Arguments for adopting the federal rule include that it is desirable in matters of privilege that conformity exist in state and federal practice so as not to trip up the practitioner, and that it allows for a healthy examination of the case between a retained expert and counsel in preparing a case for trial. In addition, a wide array of lawyer groups favored the adoption of the federal rule. Arguments against adopting the federal rule include that it cloaks at least some aspects of an expert's thought processes in secrecy and makes that expert's opinions less susceptible to testing by cross-examination. In addition, the sub-committee is unaware of any problems in current Texas practice, but it would like to hear the input of the entire committee before proceeding further.