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## Experts and Disqualifications Materials

1. Experts Punchlist, Kelsi Stayart White, AZA
2. *Tactical Considerations in Modern Business Trials*, John Zavitsanos, AZA\*\*

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Galveston Division

## Experts Punchlist<sup>1</sup>

This Punchlist contains case citations for legal principles relating to expert witnesses. It is intended to help an attorney locate case support for a general proposition or to begin further legal research. The cases cited state the legal principle referenced, but please be advised to check ultimate holdings prior to using for your own case.

### 1. Foundational Cases

- a. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995)
- b. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993)
- c. *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999)

### 2. Disclosure Obligations

- a. Court has discretion to exclude opinions that were not timely disclosed. *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990); *Sharp v. Broadway Nat. Bank*, 784 S.W.2d 669, 671 (Tex. 1990).
  - i. Federal courts assess (1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose. *Texas A&M Res. Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003)
  - ii. Texas courts assess if there is good cause for the untimely disclosure or there is a lack of unfair surprise or unfair prejudice. Tex. R. Civ. P. 193.6(b).
- b. Disclosing expert's subject matter, but not actual opinions, may warrant exclusion. *Izaguire v. Cox*, No. 10-07-00318-CV, 2008 WL 4427272, at \*6 (Tex. App.—Waco Oct. 1, 2008, no pet.)
- c. Complete exclusion of an expert may count as a death-penalty sanction, so the trial court must first consider whether excluding portions of opinion remedies disclosure issues. *In re First Transit, Inc.*, 499 S.W.3d 584, 594 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

### 3. Common Bases for Challenges

- a. In a multi-expert case, experts' opinions must be consistent with one another, and a party cannot pick and choose parts of inconsistent experts' opinions to create a "hybrid" opinion. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 472 (Tex. 2005).
- b. If an expert relies on another expert's opinion, both opinions must be admissible and consistent. *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 352 (Tex. 2015).
- c. Expert opinion cannot be based solely on subjective interpretation of facts based on skill and experience. *Volkswagen v. Ramirez*, 159 S.W.3d 897, 905-06 (Tex. 2004).
- d. Experts cannot opine on truthfulness of a witness. *Yount v. State*, 872 S.W.2d 706, 712 (Tex. Crim. App. 1993)
- e. Expert must use available, objective facts to support assumptions and analysis, rather than disregarding those objective facts for creative assumptions. *Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 720-21 (Tex. 2016).
- f. If witness testimony provides the basis for expert opinion but is incomplete and lacks key information, the underlying data is untrustworthy. *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423-24 (5th Cir. 1987).

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<sup>1</sup> Kelsi Stayart White, AZA, created for 43<sup>rd</sup> Annual Page Keeton Civil Litigation Conference on Nov. 22, 2019.

- g. Experts cannot opine on issues that the jury can assess using common experience and knowledge. *Peters v. Five Star Marine Service*, 898 F.2d 448, 450 (5th Cir. 1990).
- h. Experts cannot merely critique opposing expert's methodology without testing the method or proposing his own method. *Advanced Telemedia, L.L.C. v. Charter Communications, Inc.*, C.A. No. 1:05-CV-2662, 2008 WL 6808442, at \*1 (N.D. Ga. July 17, 2008).
- i. A witness cannot testify as to the belief, feelings, knowledge, or intentions of another party. *Davis v. Peck, Wright, Peck Inv. Co.*, 94 S.W.2d 1245, 1247 (Tex. App.—Amarillo 1936, writ dismissed).

#### **4. Admissibility of Expert Reports**

- a. Expert reports are inadmissible hearsay. *Balfour Beatty Rail, Inc. v. Kansas City Stouerhn Railway Co.*, 173 F. Supp.3d 363, 413 (N.D. Tex. 2016); *Bianco v. Globus Med. Inc.*, 30 F.Supp.3d 565, 570 (E.D. Tex. 2014); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994).

#### **5. “Legal” Experts**

- a. An expert cannot testify directly to his understanding of the law, but can apply legal terms to his understanding of the facts. The trial court defines legal principles applicable to a case, not an expert. *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Fleming v. Kinney ex rel. Shelton*, 395 S.W.3d 917, 928-31 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

#### **6. No Expert Needed**

- a. A business owner or officer can testify about matters that relate to business affairs without qualifying as an expert. An officer or employee of a company can testify about industry practices and pricing as a lay witness. *Tex. A&M Res. Found. v. Magna Transp., Inc.*, 338 F.3d 394, 403 (5th Cir. 2003)
- b. Even if a lay witness's testimony requires some specialized knowledge, it is admissible if the witness presents straightforward conclusions from observations informed by his own experience. *United States v. Sanjar*, 876 F.3d 725, 738 (5th Cir. 2017).

#### **7. Procedural Issues**

- a. A party can preserve a complaint about expert testimony by objecting before trial or when the testimony is offered. See *D.L.E.B. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00186-CV, 2019 WL 3721330, at \*4 (Tex. App.—Austin Aug. 8, 2019, pet. denied).
- b. A party can re-urge a challenge to an expert during trial. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005) (allowing challenge to expert when cross-examination brought new problems to light); *North Dallas Diagnostic Ctr. v. Dewberry*, 900 S.W.2d 90, 93, 96 (Tex. App.—Dallas 1995, writ denied) (affirming striking of expert based on *voir dire* examination during trial); *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2005); *United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000).
- c. Trial court is not required to consider live evidence at a *Robinson* hearing. *Piro v. Sarofim*, 80 S.W.3d 717, 720 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

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