I. OBTAINING VITAL DOCUMENTS

A. Discovery methods

Financial information will be obtained from the opposing party primarily through requests for production under Tex. R. Civ. P. 196. Financial information relied upon by an expert must be produced in response to a request for disclosure under Tex. R. Civ. P. 194. Rule 195 mandates that expert discovery is *only* through requests for disclosure, depositions and reports. The applicable request for disclosure for expert witnesses is as follows:

> Rule 194 Requests for Disclosure
>
> 194.2. *Content.* --A party may request disclosure of any or all of the following:
>
> (f) for any testifying 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 if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
>
> (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
>
> (A) 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
>
> (B) the expert's current resume and bibliography;

TEX. R. CIV. P. 194.

The scope of a partyôs request for financial documents will be determined not only by the type of case but by the type of accounting system used by the opposing party. Many small businesses use Quickbooks and thus a party can request (in addition to more specific and detailed requests) the complete Quickbooks database. In Quickbooks and most other accounting

packages, the data is typically all part of one company file, and if the data is produced the receiving party can create its own reports and examine the information in any format it chooses.

In any case where a partyôs accounting practices or records are at issue it is critical to make sure the data is complete, including all adjusting entries of any kind that have been made. It is often possible for people to get into the accounting system and change a prior classification. Without an audit trail of some kind it will be very difficult to determine if this has been done. Thus, in addition to ensuring production of the complete database, a party should request copies of all financial statements previously produced, whether for transmittal to third parties or for purely internal purposes.

B. Ensuring completeness

The producing party should be required, typically through depositions of key witnesses, to verify that a full and complete set of accounting data was produced. The importance of ensuring a complete set of data was illustrated in the case of *In re Gupta*, 263 S.W.3d 184 (Tex. App.ð Houston [1st Dist.] 2007, no pet.) A number of issues were involved in the case but the genesis of the dispute was a contract between the parties whereby the defendant purchased scrap metal from the plaintiff. The price was determined by the weight of each shipment, which was measured by weighing the trucks when they came in to pick up the scrap metal and when they left with the cargo. Tickets were kept of each shipment. According to the plaintiff, the defendant frequently intercepted the tickets and as a result was not charged for the particular shipment.

The plaintiff sought complete accounting records and data from the defendant. After a hearing on a motion to compel, the trial court ordered defendants "to make available for copying, downloading, or replicating by electronic format all computerized accounting records é from

1998 to 2001 including but not limited to its QuickBooks accounting data . . . no later than August 28, 2003." In response to this order the defendants produced five diskettes containing accounting information. The plaintiffôs expert reviewed the information and opined that ñthe entries were maintained elsewhere and transferred to QuickBooks after the fact with an artificial rather than an actual date or recordation. This evidence suggests that the accounting records produced by [the defendants] are not the actual accounting records of the company, but represent a selective modification of such records.ò

Following another ruling on another motion to compel, the defendants produced four additional computer files containing purchase and sales information. Again not satisfied that the records represented a complete set of accounting information, the plaintiff sought the deposition of the defendantsô controller. The defendants failed to comply with that request, resulting in another motion to compel and further orders of the court. Then the defendants produced a computer which they represented as "THE computer" on which they maintained their accounting data from 1998 through 2001. However, after analyzing the computer, the plaintiff's experts concluded that it contained a hard drive that had been manufactured in June 2004 and that the data on the computer had been loaded onto it within 48 hours before its production. The shenanigans continued, and as one could expect this led to further motions to compel and orders of the court and finally, a death penalty sanction for discovery abuses which was upheld by the appellate court.

II. INTRODUCING FINANCIAL EVIDENCE AT TRIAL

A. Business records affidavit

When presenting financial evidence from your client, or from a cooperative witness, the most simple and effective method is through a business records affidavit under TEX. R. CIV. P.

902(10). The form of affidavit is prescribed by the rules of evidence and simultaneously satisfies authentication requirements and establishes the business records exception to the hearsay rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ , who, being by me duly sworn, deposed as follows:

My name is _____ , I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____ . Attached hereto are _____ pages of records from _____ . These said ___ pages of records are kept by_____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____ , with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____

Affiant

SWORN TO AND SUBSCRIBED before me on the day of _____.

_____

Notary Public, State of Texas

It is not necessary that the person signing the affidavit be the creator of the records or have personal knowledge of the contents of the records; the witness is required only to have personal knowledge of the manner in which the records were kept. *Damron v. Citibank (S.D.) N.A.*, 2010 Tex. App. LEXIS 7054 (Tex. App.--Austin 2010, pet. denied).

The records must be filed at least fourteen days prior to the day of trial and the other parties must be given prompt notice of the filing. See TEX. R. CIV. P. 902(10)(a). The notice must identify the name and employer, if any, of the person making the affidavit, and such

records must be made available to the counsel for other parties to the action or litigation for inspection and copying (at their expense). The following form suffices for the required notice:

[CASE CAPTION]

NOTICE OF FILING OF RECORDS AND AFFIDAVIT

> You are hereby notified that _____ [the party] has filed in this cause certain business records of _____[business] together with an affidavit by _____[name of affiant], an employee of _____ [business]. The affidavit and records will be offered in evidence at the trial.
>
> The records are available from the court clerk so that counsel for any party in the case may inspect them and make copies at that party's expense.

_____
Attorney

B. Affidavit for services rendered

A plaintiff seeking to recover the costs of a service, whether that service was performed by an autobody shop repairing a car or a surgeon repairing a broken leg, must show that the costs were reasonable and necessary. Proof of payment for repairs or medical treatment is not enough; there must also be evidence that the costs were reasonable and were necessary. Without that proof the evidence will be insufficient to sustain a damage award. See e.g. *Whitaker v. Rose,* 218 S.W.3d 216, 223 (Tex. App.ð [14th Dist. 2007] no pet); *Merchants Fast Motor Lines v. State*, 917 S.W.2d 518, 523 (Tex. App.ð Waco 1996, writ denied).

The Texas Civil Practice and Remedies Code prescribes a form affidavit and procedure for this type of evidence. Section 18.001 provides in pertinent part as follows:

> (b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

TEX. CIV. PRAC. & REM. CODE § 18.001.

The affidavit must be made by the person who provided the service or a person in charge of the records of the service provider, and must include an itemized statement of the service and charge. See § 18.001 (c). It must be filed at least 30 days before the trial. If the opposing party intends to controvert the claim reflected by the affidavit it must, within thirty days after receiving the affidavit and at least 14 days before trial, file an affidavit by a qualified witness giving fair notice of the basis for contesting the claim. See § 18.001(d)-(f).

Although a live witness or an affidavit from the service provider is undoubtedly the better way to go, the proof can still be made if neither is available. An owner can testify that certain repair costs were reasonable and necessary if the owner can establish himself or herself as familiar with the reasonable costs. *International Services Ins. Co. v. Hanna*, 515 S.W.2d 175, 176 (Tex. Civ. App.– Eastland 1974, no writ).

C. Depositions on Written Questions

A professional records service is often the best way to go in obtaining business records along with the necessary affidavits to prove damages. See Tex. R. Civ. P. 200. The records company will submit a list of questions to prove up the admission predicates for the documents and the testimony that the services and charges were reasonable and necessary.

D. Summaries

The traditional use of summaries involves boxes of documents or a lengthy database summarized into a short and readable format. Additionally, a party may have a need to take raw electronic data and create new reports from that data. Often those reports may take the form of expert testimony and illustration, but the case for admissibility will be greater if the documents are admissible as a summary. Rule 1006 provides as follows:

> The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

TEX. R. CIV. P. 1006.

III. IDENTIFYING POTENTIAL EXPERTS

A. Background and Qualifications

Obviously a practicing CPA is a natural choice for an expert to present financial testimony. It is a near-universally recognized designation signifying financial expertise. In addition to the CPA designation there are a number of other organizations that can lend credibility to an expert. For example, in 1988 an organization was founded called the Association of Certified Fraud Examiners. It is becoming common for financial experts to have the CFE designation in fraud cases. The ACFE website has a directory of certified fraud examiners in the area, and virtually all states have websites run by the state society of CPAs, either of which can be a good place to start the search for the right expert. Many accountants now claim an expertise in ñforensicò accounting, which seems to be more of a marketing-driven title than an actual area of study. Nevertheless, the title is often used to describe experts who investigate and testify in financial fraud cases.

The practitioner should fully understand the designations next to an expertôs name. While many are widely recognized and accepted, other acronyms may be industry designations that donôt necessarily require a rigorous course of study or continuing professional education. In bankruptcy cases or the like a Certified Insolvency and Restructuring Advisor (CIRA) designation may be helpful. When a business valuation is needed there are a host of applicable acronyms that suggest special competence and knowledge, including:

Accredited Senior Appraiser (ASA) (most difficult to obtain)

Certified Business Appraiser (BCA)

Accredited in Business Valuation (ABV) (administered by the American Institute of Certified Public Accountants)

Certified Valuation Analyst (CVA)

The Appraisal Institute designates three classes of appraisers, including (in order of least to most prestigious), SRPA, SPA and MAI. These designations, and any other letters used, must be understood by the hiring attorneys. The right designation can certainly make a difference in qualifying the expert to give an opinion in court, and if explained properly and without overkill can enhance the credibility of the witness in front of a judge or jury. Conversely, the attorney should not assume the opposing partyôs expert is qualified simply because he or she lists out an impressive number of acronyms.

If there is room in the case budget it makes good sense to bring a financial expert on board early. Even if the expert is purely for consulting purposes, he or she can help a great deal in crafting proper discovery requests and ensuring that the right questions are asked to get all of the necessary information. As the *In re Gupta* case described above demonstrates, having an expert evaluate the discovery responses, all the way down to the date of manufacture of the hard drive, can be invaluable and is easily overlooked by a lawyer untrained in such review.

There is no more magic to finding the right financial expert than any other. A good opposing counsel is sure to examine prior writings and prior testimony by the expert and counsel needs to be certain the expert isnôt going to take a position directly contrary to something he or she put in writing a few years ago. Selecting a consulting expert to assist in discovery and case preparation will largely be based on industry expertise. Testifying experts must be trustworthy and likable just like any other witness. A pompous expert who gets on the stand and talks first

and foremost about how great he or she can quickly alienate the jury and once that happens it often doesn't matter what is said because the jurors aren't listening.

B. The Trial Court's Gatekeeping Function

Since the infamous *Daubert v. Merrell Dow Pharmaceuticals Inc.* case it seems most cases involve a challenge to the admissibility of expert testimony. The starting point in Texas is Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. CIV. P. 702.

A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and be based on a reliable foundation. *Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001)*. The trial court makes the initial determination about whether the expert and the proffered testimony meet these requirements. The trial court has broad discretion to determine admissibility, and its rulings will be reversed only if there is an abuse of discretion. In deciding if an expert is qualified, trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion. *Id.* No bright-line test exists to determine whether a particular witness is qualified to testify as an expert, the focus is on "whether the expert's expertise goes to the very matter on which he or she is to give an opinion." *Broders v. Heise,* 924 S.W.2d 148, 153 (Tex. 1996).

In assessing the reliability of the foundation of an expert's testimony, the Supreme Court has identified a non-exclusive list of factors--the *Robinson* factors--which can be considered in

assessing reliability. *See Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998). Those factors are as follows:

> (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.

Gammill, 972 S.W.2d at 720 (citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The *Gammill* court noted that some situations are not susceptible to scientific analysis, and thus the *Robinson* factors do not strictly govern those instances. See *id*. at 724-726 (distinguishing between "scientific" and "non-scientific" expert testimony). That is not to say the trial court is not required to perform a gatekeeping function in non-scientific cases; that function is mandatory whenever expert testimony is challenged. In such cases, the court must consider whether there is too large of an "analytical gap" between the data and the expert's testimony.

The importance of a thorough understanding of the expert witness standards and the methodologies used by supporting and opposing experts cannot be overstated. Assuming the expert knows what he or she is doing and will package the testimony and explain the methodology property can lead to a bad result in trial or on appeal. This topic continues to get substantial attention from the courts, so the practitioner should ensure that the expert is familiar with the standards for admissibility of the evidence and do everything possible to ensure and document the record in a manner to make sure the testimony is upheld. See, e.g. *U.S. Renal Care, Inc. v. Jaafar*, 2011 Tex. App. Lexis 2282, Tex. App.ð San Antonio 2011, pet. filed)(judgment in favor of Plaintiff reversed because financial expert, though qualified, used

unreliable methodology); *Spin Doctor Golf, Inc. v. Paymentech, L.P.* 296 S.W.3d 354 (Tex. App.– Dallas 2009, pet. denied)(upholding trial court's decision to exclude expert; despite thirty years of experience expert was not qualified to offer opinion on lost profits); *Rogers v. Alexander* 244 S.W.3d 370 (Tex. App.– Dallas 2007, pet. denied) (upholding accountant's qualifications and methodology after extensive review). The *Rogers* case, in particular, illustrates the importance of belaboring the methodology and is well worth reading.

C. Recovery for lost profits

Recovery for lost profits has received so much commentary from the courts that it seems to be a specialized subset of accounting testimony. The basic standard is well established: Lost profits is a fact-intensive determination that must be based on objective facts, figures, or data from which the amount may be ascertained. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 504 (Tex. 2001). There must be competent evidence showing the lost profits amount with reasonable certainty. *Id*. While the injured party is not required to provide an exact calculation of its lost profits, it must do more than show that it suffered some lost profits. *Id*.; *Holt Atherton Industries, Inc. v. Heine,* 835 S.W.2d 80, 84 (Tex. 1992). Recovery of lost profits must be predicated on one complete calculation. There is no set method for determining lost profits. *Southwest Battery Corp. v. Owen,* 115 S.W.2d 1097 (Tex. 1938). However, once a party has chosen a particular method for measuring their lost profits, they must provide a complete calculation. *Holt Atherton*, 835 S.W.2d at 85.

While the standard is well established at least in principle, application is still very difficult. If the damages involve lost profits the practitioner must be knowledgeable about the standards and the methodology. An accountant who testifies may be largely unaware of the difficulty in putting on a lost profits calculation that will stand up on appeal, or conversely, determining how to challenge such a calculation in a manner that will result in reversal on

appeal. It is not enough to simply turn the matter over to the expert and let him or her make all the decisions about what to consider or not consider. Of course the ultimate opinion expressed by the testifying expert must be his or her own opinion, but the attorney has to ensure that opinion will be admitted in the trial court and upheld on appeal.