

Presented:

Winning at Deposition: Skills and Strategy Seminar

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BEATING THE EXPERT

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I. INTRODUCTION

All trial lawyers experience a degree of fear and trepidation when facing the prospect of cross-examining the sophisticated adverse expert – the head of surgery for the hospital, the author of the authoritative textbook, or the airline’s chief pilot, for example. How can we possibly offset the expert’s superior knowledge, intellect, and experience? We can do it with meticulous preparation and a carefully formulated game plan.

Cross-examining expert witnesses presents the trial lawyer with unique challenges and opportunities. As Francis Wellman wrote over 100 years ago in his seminal work, *The Art of Cross-Examination*, you must “[a]ssume that an expert witness called against you has come prepared to do you all the harm he can, and will avail himself of every opportunity to do so which you may inadvertently give him.” The trick is minimizing the opposing expert’s opportunity to do harm to your case.

II. DEPOSITIONS OF DUAL FACT AND EXPERT WITNESSES

Some witnesses are dual fact and expert witnesses. In advance of a deposition of any expert witness who also is a fact witness, discover all that is allowed under the rules for fact witnesses about the dual fact/expert witness from your opponent.

A party may obtain discovery of persons having knowledge of relevant facts, and information concerning the identity and location of persons with knowledge of relevant facts cannot be protected from discovery. *See* Tex. R. Civ. P. 192.3(c) & 192.5(c)(3). A party is entitled to: 1) names, addresses and telephone numbers of person having knowledge of relevant facts, 2) a brief description of the person’s connection to the suit, and 3) any witness statements made by fact witnesses. *See* Tex. R. Civ. P. 192.3(c), 192.4(e) & 192.3(h). Before amendments to the Rules of Civil Procedure, witness statements could be shielded from discovery if taken in anticipation of litigation, but that is no longer true, and witness statements now must be produced by your opponent.

The discovery rules also allow any party to obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. *See* Tex. R. Civ. P. 192.3(d) & 192.5(c)(1). A party is not entitled to obtain information about rebuttal or impeachment witnesses, unless the necessity of the testimony can reasonably be anticipated before trial. Tex. R. Civ. P. 192.3(d).

III. DEPOSITIONS OF EXPERT WITNESSES

The Texas Rules of Civil Procedure set the boundaries for what you discover about your opponent's experts before and during the experts' depositions. Depositions are one of only three exclusive ways that a party can discover information about an opponent's experts in state court in Texas. The rules allow a party to discover information about testifying expert witnesses only through: 1) requests for disclosure, 2) depositions and 3) reports as permitted by the rules. *See* Tex. R. Civ. P. 195.1.

A. General Scope of Expert Testimony

Rule 192.3(e) of the Texas Rules of Civil Procedure controls the general scope of discovery for testifying and consulting experts. The rule provides:

(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 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 for the expert in anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.

Tex. R. Civ. P. 192.3(e).

B. Requests for Disclosure

In advance of the deposition of the adverse expert, the deposing attorney should send the adverse party a request for disclosure.

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