

Presented:
Winning at Deposition: Skills and Strategy Seminar

June 28, 2018
Houston, Texas

BEATING THE EXPERT

Quentin Brogdon

Author contact information:
Quentin Brogdon
Cra in Lewis Brogdon, LLP
3400 Carlisle Street, Suite 200
Dallas, Texas 75204

qbrogdon@cra inlewis.com
214-598-1009 Cell
214-522-9404
214-969-5522 Fax

TABLE OF CONTENTS

- I. INTRODUCTION
- II. DEPOSITIONS OF DUAL FACT AND EXPERT WITNESSES
- III. DEPOSITIONS OF EXPERT WITNESSES
 - A. General Scope of Expert Discovery
 - B. Requests for Disclosure
 - C. Reports
 - D. Depositions of Experts - Timing and Authority
 - E. Opinion Testimony and Bases of Opinions
 - F. *Daubert/Robinson* Issues
 - 1. Four Hurdles
 - 2. The Knowledge Hurdle
 - 2. The Qualifications Hurdle
 - 4. The Helpfulness Hurdle
 - a. Reliability
 - b. Relevance
 - 5. The Foundation Data Hurdle
 - G. Keep the Following in Mind When Cross-Examining Experts
- IV. CONDUCT DURING DEPOSITIONS IN STATE COURT IN TEXAS
- V. KEY DIFFERENCES BETWEEN DEPOSITIONS IN FEDERAL COURT AND DEPOSITIONS IN STATE COURT IN TEXAS
 - A. Using Depositions at Trial
 - B. Objections
 - C. Instructing A Witness Not To Answer

D. Private Conferences

E. Time Limits

F. Bad Behavior

VI. PREPARATION FOR THE DEPOSITION OF THE KEY ADVERSE PARTY OR EXPERT

VII. STRATEGY AND GOALS

A. “Trial Depositions” Versus “Discovery Depositions”

B. “Discovery Depositions”

C. “Trial Depositions”

D. “Hybrid Depositions”

VIII. TECHNIQUES AND MINDSET

A. The Cross-Examiner’s Demeanor and Attitude

B. NITA’s “Funnel” Technique

C. Myths of Cross-Examination

D. Factors Dictating No Cross-Examination or Only Limited Cross-Examination

E. Irving Younger’s “Ten Commandments of Cross-Examination”

F. Non-Traditional Sources of Guidance for Cross-Examination

1. Non-Coercive Techniques Used By Spy Agencies and the Military

2. Police Techniques

IX. CONCLUSION

BEATING THE EXPERT

Quentin Brogdon

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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Beating the Expert

Also available as part of the eCourse

[Taking the Deposition of a Corporate Representative or Expert](#)

First appeared as part of the conference materials for the
2018 Winning at Deposition: Skills and Strategy session
"Beating the Expert"