

**THOUGHTS ON DEPOSING  
EXPERT WITNESSES**

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## **TOP TEN REASONS TO TAKE THE DEPOSITION OF THE OTHER GUY-S EXPERT**

1. To obtain sufficient ammunition to whack his expert on a Daubert challenge.
2. To obtain sufficient ammunition to whack his expert on a Daubert challenge.
3. To obtain sufficient ammunition to whack his expert on a Daubert challenge.
4. To obtain sufficient ammunition to whack his expert on a Daubert challenge.
5. To obtain sufficient ammunition to whack his expert on a Daubert challenge.
6. To obtain cross-examination material to make the other guy-s expert look like a fool if you can't Daubert him.
7. To obtain data for your snitch.
8. To take testimony from your victim without some pesky Judge looking over your shoulder and protecting their expert buddy.
9. The other side has to pay for it. . . . .well, sorta.
10. To stay out of trouble with your trial Judge.

## STATUTES OF INTEREST IN DEPOSING AN EXPERT

### TRCP 176. SUBPOENAS

**176.1 Form.** Every subpoena must be issued in the name of ~~A~~The State of Texas~~@~~ and must:

- (a) state the style of the suit and its cause number;
- (b) state the court in which the suit is pending;
- (c) state the date on which the subpoena is issued;
- (d) identify the person to whom the subpoena is directed;
5. state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;
- (6) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;
- (g) state the text of Rule 176.8(a); and
- (8) be signed by the person issuing the subpoena.

**176.2 Required Actions.** A subpoena must command the person to whom it is directed to do either or both of the following:

- (a) attend and give testimony at a deposition, hearing, or trial;
- (1) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

### **176.6 Response.**

- (2) *Production of documents or tangible things.* A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.
- (3) *Objections.* A person commanded to produce and permit inspection or copying of

designated documents and things may serve on the party requesting issuance of the subpoena before the time specified for compliance. Written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

## **TRCP 192. PERMISSIBLE DISCOVERY**

**192.1 Forms of Discovery.** Permissible forms of discovery are:

- (1) requests for disclosure;
- (2) requests for production and inspection of documents and tangible things;
- (3) requests and motions for entry upon and examination of real property;
- (4) interrogatories to a party;
- (5) requests for admission;
- (6) oral or written depositions; and,
- (7) motions for mental or physical examinations;

**192.2 Sequence of Discovery.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.

### **192.3 Scope of Discovery.**

- (a) *Generally.* In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
- (5) *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.

**192.7 Definitions.** As used in these rules

- (3) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

**TRCP 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES**

**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 and through depositions and reports as permitted by this rule.

**195.2 Schedule for Designating Experts.** Unless otherwise ordered by the court, a party must designate experts--that is, furnish information requested under Rule 194.2(f)--by the later of the following two dates: 30 days after the request is served, or

- (1) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;
- (2) with regard to all other experts, 60 days before the end of the discovery period.

**195.3 Scheduling Depositions.**

- (1) *Experts for party seeking affirmative relief.* A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

- (1) *If no report furnished.* If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the

expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot be due to the actions of the tendering party reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

(2) *If report furnished.* If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

(2) *Other experts.* A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

**195.4 Oral Deposition.** In addition to disclosure under Rule 194, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this 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.

**195.6 Amendment and Supplementation.** A party's duty to amend and supplement written discovery regarding a testifying expert is governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.

**195.7 Cost of Expert Witnesses.** When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.

## **TRCP 205. DISCOVERY FROM NONPARTIES**

**205.1 Forms of Discovery; Subpoena requirement.** A party may compel discovery from a nonparty—that is, a person who is not a party or subject to a party's control—only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

(1) an oral deposition;

- (2) a deposition on written questions;
- (3) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and
- (4) a request for production of documents and tangible things under this rule.

**205.2 Notice.** A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

#### **CPRC ' 22.001. WITNESS FEES**

- (2) Except as provided by Section 22.002, a witness is entitled to 10 dollars for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled.
- (3) The party who summons the witness shall pay that witness's fee for one day, as provided by this section, at the time the subpoena is served on the witness.
- (4) The witness fee must be taxed in the bill of costs as other costs.

## CASE LAW OF INTEREST IN DEPOSING AN EXPERT

### 1. *E. I. Du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995)

Requires that prior to an expert's opinion testimony being admitted into evidence:

1. A body of scientific, technical, or other specialized knowledge must exist that is pertinent to the facts in issue;
2. The witness must have sufficient experiential capacity in his field of expertise. This capacity encompasses knowledge, skill, experience, training, and education;
3. The facts evaluated must be within the witness's field of specialized knowledge.

and suggests that a Court may very well not allow an expert to testify if an expert's testimony:

- (1) was not grounded upon careful scientific methods and procedures;
- (2) was not shown to be derived by scientific methods or supported by appropriate validation;
- (3) was not shown to be based on scientifically valid reasoning and methodology;
- (4) was not shown to have a reliable basis in the knowledge and experience of his discipline;
- (5) was not based on theories and techniques that had been subject to peer review and publication;
- (6) was essentially subjective belief and unsupported speculation;
- (7) was not based on theories and techniques that the relevant scientific community had generally accepted; and,
- (8) was not based on a procedure reasonably relied upon by experts in the field.

2. **Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998)**

Supplies a handy list of factors that a court might consider in determining whether or not expert testimony is to be admitted:

- (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 an 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.

3. **ARMES v. Campbell, 603 S.W.2d 249 (Tex.Civ.App.-El Paso 1980, writ *ref'd n.r.e.*)**

States that all witnesses are created equal with regard to witness fees. A doctor wanted to be paid for coming down and testifying at a hearing on a motion for continuance. The court held:

The Legislature has set the amount of fees to be paid witnesses. . . We have been cited to no authority which permits or authorizes the Court to tax as costs fees for a witness other than that provided for in [CPRC ' 22.001]. There being no authority for the Court's order. . . directing that the [plaintiff] is ordered to pay as costs the sum of \$350.00 to Dr. Dickey, the cross-motion is sustained, and that order is set aside and held for naught.

Cool, huh?

4. **Valdez v. Valdez, 930 S.W.2d 725 (Tex.App.-Hous. (1 Dist.) 1996)**

Expert fees

In absence of evidence proving the amount charged by expert in custody proceeding was reasonable, award of expert fees is improper.

EXCERPTS FROM CROSS EXAMINATION DURING DAUBERT  
CHALLENGE OF DR. LARRY ABRAMS ON  
SEPTEMBER 19, 2000 IN THE 328<sup>TH</sup> JUDICIAL DISTRICT  
COURT OF FORT BEND COUNTY, TEXAS IN CAUSE NO. 79,352

Beginning on page 27 line 6

- (9) (By Mr. Brown) Test one, Rorschach...  
17. ... How may different scoring systems?  
1. At least five I can think of.

Ending on page 27 line 10

Beginning on page 29 line 3

17. Which ones did you use?  
1. I used a combination of the top three.  
17. And what study, if you know, have your peers put out there to urge the use of the combination of the first three?  
1. I don't know the study that does that.  
17. There is not one, is there?  
1. Not that I know of.

Ending on page 29 line 10

Beginning on page 30 line 17

17. (By Mr. Brown) Doctor, there is no publication on the blended method that you utilized in this case, is there?  
1. That's correct.  
17. Pardon me?  
1. That's correct.  
17. There has been no peer review of your blended application of the scoring protocols in the Rorschach?  
1. That's correct.  
17. You haven't presented a paper anywhere, have you?  
1. No, sir.  
17. You have never heard such a paper presented on Rorschach Test?  
1. Of my style, no, sir.  
17. That's correct.  
1. No, sir.  
17. And you said that your scoring of the tests are subjective; is that correct?  
1. Interpretation of scoring is subjective. Some of the scoring is arbitrary enough to be subjective.  
17. Because what you are doing is you are looking and seeing how you relate to the answers given to you by your very subjects when they see the ink blot test, right?  
1. How I relate?  
17. Yeah.  
1. To some degree, that's part of the subjective but there is a large battery of material and norms and what are commonly seen responses and what they mean.

17. But you didn't use any of that here?
1. I saw part - - it's all part of my background.
17. Didn't look up a single response to see what a longitudinal study has suggested that's been subjected to peer review regarding validity of like findings?
1. I looked up no research, no, sir.
17. Now in dealing with this type of Rorschach Test, when you have somebody look at ink blots and say, What does it look like? Right?
1. Kind of, yes, sir.
17. You would agree with me that the way that you score the test has a lot to do with whoever taught you how to score the test?
1. Yes, sir.
17. And also with your social and mythical beliefs?
1. More how I was taught.
17. For instance, if you saw someone, excuse me B if someone that you administered the test to scored the test - - excuse me. Told you that in looking at the ink blot, they saw a person that was pregnant obtaining an abortion. Okay. You agree with me that you would receive that information from them from the extent to your subjective point of view on how you feel about the right to life or the right of choice, correct?
1. Not this term of scoring, no, sir.
17. Well, if you see something that you personally think is wrong, then, that's a mark against someone when you have a subjective review of what they respond to, when you show them an ink blot card?

Ending on page 33 line 6

Beginning on page 33 line 19

- (4) Do you even have one scoring system only on Rorschach and we are not on the other two, yet? Do you have one scoring system that you have utilized that has been subjective to the validity testing?
1. Not mine, no. Parts of mine, certainly.
17. But not yours?
1. No, sir.
17. Because in the real world, this may very well be a true statement that no other psychologist on the face of this earth scores these exams exactly the way you do?
1. That's possible.
17. And that is because you utilized your subjective viewpoint?
1. My experience.
17. And experience is subjective?
- (8) Very much so.

Ending on page 34 line 10

Beginning on page 37 line 17

- (6) Thank you. Now, what scoring system did you use to score the TAT?
1. I did not score the TAT.
17. You just kind of listened to what they said, right?
1. Yes, sir.

17. And from your subjective point of view, made notes about what you thought was going on in their mind, correct?
  1. Yes, sir, to some degree, that's true.
17. I asked you in my subpoena duces tecum to bring documents that show the potential rate of error for any theory or techniques used to come to conclusions or response expressed to you on this matter. We went over this on the Rorschach Test. Now, I am asking about the Thematic Perception Test. Did you bring any of those documents here today?
  1. No, sir.
17. That is because none exist, is that correct, Doctor?
  1. Since I didn't use the scoring system, there is nothing to look at.
17. And none exists that show the potential rate of error or the system you used in scoring the Rorschach either, do they, Doctor?
  1. No, sir, I don't know the rate of error analysis.

Ending on page 38 line 18

Beginning on 40 line 15

17. Are you saying that the standard way of scoring the TAT is not to use a scoring protocol?
  1. That's fairly standard, yes, sir.
17. What does fairly standard mean? About 37 percent of people do it?
  1. I don't know the numbers there. It's a scoring system most physicians don't use it.
17. What potential rate of error on the way you did?
  1. I don't have that figure.
17. The way you do it?
  1. I don't have that figure.

Ending on page 41 line 1

Beginning on page 42 line 16

- (4) Sentence Completion was the third test you gave?
  1. Yes, sir.
17. What testing modality - - excuse me. What score modality did you use on these Sentence Completion?
  1. They were not scored.
17. Yet, you relied on the information you received on the Sentence Completion in coming to your opinions expressed herein?
  1. Yes, sir.
17. And even though the Thematic Apperception Test was, you put it not scored. You relied on the information you received in that inquiry in coming to your opinions contained in the report that you filed herein?
  1. Yes, sire.
17. And even though the Rorschach was scored in a rather unique manner by you, you relied on those also. When I say those, I mean findings that you got in Rorschach Test in finding your, excuse me, in preparing your report which contains your opinions relative to the folks in this lawsuit, correct?
  1. Yes, sir.

17. What is the potential rate of error for the way that you utilized these Sentence Completion Tests?
  1. What do you mean by utilize?
17. Well, you didn't just do it for busy work, did you, Doctor?
  1. No, sir.
17. You just didn't do it so you could say I spent an extra hour with these people doing an inquiry with them so I can get paid for an extra hour of work, did you?
  1. No, sir.
17. You did it for a reason, right?
  1. Yes, sir.
17. That reason is what I mean by utilized. Okay. Gave them the test. You received data, utilization of that data that you received on the Sentence Completion Test. What is the potential rate of error the way that you utilized it?
  1. I don't believe there is one.
17. You have no idea, do you?
  1. I don't believe so.
17. There is no potential rate of error or there is no way of determining it?
  1. No way of determining it in terms of its usage.
17. No way of determining it in terms of its usage.
17. And the same to be said for the way that you utilized data on the Thematic Apperception Test, correct? The way that you utilized it?
  1. The overall picture, yes. You would have to say individual components. There is research in some rates of error.
17. What is the potential rate of error?

MR. BROWN: May I finish my question?

17. (By Mr. Brown) Potential rate of error for when you utilized items that you received from the Thematic Apperception Tests?
  1. I do not know.
17. Who does?
  1. I don't know. I don't know how you figure it.

Ending on page 45 line 7

Beginning on page 47 line 7

11. And you cannot think of one test, excuse me, one study that your peers have made on the use of these three tests in custody determinations, can you, sir?
  1. I cannot name you one, no, sir.
17. Nor of the use of the other techniques that you used in your coming to your conclusions in custody determinations, can you, Doctor?
  3. No, sir, but - - no, sir.

Ending on page 47 line 15