

**TAKING ON THE ADVERSE EXPERT: PRE-TRIAL, TRIAL,  
AND THE ETHICS CONSIDERATIONS INVOLVED**

William P. Coates, Jr.  
Wallace Saunders, Chartered  
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- I. Pre-trial Activities with Adverse Expert.
  - A. Experts are, today, viewed as essential in most cases. KRPC 1.1
    - 1. Examples vs. experts in the past.
  - B. Selection of experts important. KRPC 1.4
    - 1. Various methods discussed.
  - C. What to do with the Adverse Expert. KRPC 3.3
    - 1. Counter with own expert.
    - 2. Handle in discovery deposition.
    - 3. Motion *in limine*/Daubert.
    - 4. Handle with cross-examination.
  - D. Your own expert. KRPC 3.4
    - 1. Can you do better?
    - 2. What will be said if you do not counter?
  - E. Taking expert on in discovery deposition. KRPC 3.4
    - 1. Prepare and get to know the “baggage.”

2. What to bring out and what to omit in deposition

F. Motion practice about adverse expert. KRPC 3.1

1. Daubert, motion *in limine*, motion to strike?
2. Some benefits even if you lose the pre-trial motion.

G. Examples

1. Video depo., Richard Gardner (Kuhn v. BNSF et al.)
2. Video depo., Jos Lichtor. (Kohl v. BNSF et al.)

## II. Trial

A. Rule 1: prepare, prepare, prepare. KRPC 1.1 and 1.3

1. Background, C.V., depositions.
2. Have exhibits ready and marked.

B. How to do it. KRPC 4.1

What are your client's objectives?

1. Choreograph a "dance" you can control.
2. Precisely word all questions, keyed to depo testimony.
3. Voir dire witness at trial.
4. Don't leave the floor open.
5. Always maintain control.
6. Word questions in the form of statements.

7. “Wallow.”
8. Never refresh, always impeach (invites explanation).
9. Never repeat the same questions for dramatic effect.

The regulation of your opponent expert’s testimony can have an important effect on the jury and the resulting verdict. Be aggressive in ferreting out information on experts and be relentless in your efforts to exclude them or limiting their testimony

C. Ten Rules of Cross-Examination. KRPC 4.4

1. Be brief
2. Short questions, plain words
3. Always ask leading questions.
4. Don’t ask a question if you do not know the answer in advance.
5. Listen to the answers.
6. Do not quarrel with the witness.
7. Do not allow witness to repeat his direct testimony.
8. Do not permit the witness to explain his testimony.
9. Do not ask the “one question too many.”

10. Save the ultimate point of your cross-examination for summation.

### III. Adversarial Ethics: “Dirty Tricks”

A. Are there antidotes to curb abuses? KRPC 8.3

B. Types of unethical practices. KRPC 3.3 (a) (1-3) and 3.4(a).

1. Injection of inadmissible evidence.

2. Deceptive trial briefs: distorted quotations, deliberate omission of controlling authority, unsupported statement of purported fact.

C. The coached witness. KRPC 3.4 (b)

D. Leading questions. KRPC 3.2