

Tips and Tricks to Taking an Expert's Deposition

Taking an expert's deposition can be a daunting task. Experts are typically highly educated, well credentialed, and a wealth of knowledge in their particular field. A well reasoned expert opinion can also be the difference at trial before the trier of fact or in negotiating a favorable early settlement. As such, the importance in thoroughly conducting an expert's deposition cannot be understated. These tips and tricks will help you prepare to take your first expert deposition.

Review the CV

Long before the deposition, you should have received the expert's curriculum vitae ("CV"). The CV will have the expert's education, experience, past articles or publications and other background information. Do not wait until the night before or during the deposition to review the CV for the first time. Determine whether the expert has educational experience, professional experience, both, or none in the area they are rendering their opinion. Finding out the basis of the expert's testimony during the deposition is critical. Some experts may have no practical experience regarding the subject they are testifying about and their knowledge on the subject is purely academic; question them on their lack of practical experience. Other experts may have significant experience in the field, but have no publications on the issue; question them on why they have never published literature on the subject. Knowing the expert's background prior to the deposition is critical in helping to prepare questions during the deposition.

Know the Lingo

As litigators, we are well versed in legalese. Language that is commonplace to us sounds foreign to those outside the legal world. Similarly, experts are well versed in the language of their trade or field and you need to be too.

Typically, an expert will have submitted an expert report or expert opinion prior to their deposition. Review the report and make sure that you are familiar with all of the terms it contains. If you are deposing a medical expert, make sure that you know all of the medical terms contained in the expert's report. Nothing will handcuff you more during the deposition than being unsure of what the expert just said because you are unfamiliar with the terms used. Consult trade dictionaries, research terms on the internet, or consult one of your own experts for definitions of terms that you are unfamiliar with. If an expert realizes during the deposition that you are unfamiliar with the terms being used, the expert will continue to use those terms to confuse you and trip you up so that you are unable to ask the questions to which you want answers.

Know the Report

Often times, the expert will have been consulted or retained in hundreds if not thousands of other cases. The expert may have completed their respective report in this case and then forgot about the case or what exactly their opinion stated. You need to know every word of every line of the expert's report or opinion. A misstep by the expert as to what is, or is not, contained in their report is huge for credibility purposes. If you are unfamiliar with the report, you are unable to pounce on any mistakes the expert may make during their testimony with regards to their report.

If you know the report inside and out, you can make the expert pay for any mistakes and draw serious questions as to the expert's credibility and the weight to be given to the expert's opinions at trial.

Time

Some experts are extremely thorough in forming their opinion. Others are not. Delve into how much time the expert spent on the matter, how much investigation was done, how long the expert spoke to the subject, etc. These are important topics to question the expert on during the deposition. If you find out during the deposition that the expert spent little time in formulating their opinion or with the subject, you can highlight this point during trial.

If you find out that the expert spent significant time on the matter, ask how much the expert has been or will be paid for their testimony and opinions. Experts do not provide their opinions for free and are often well-paid for their services. Bringing to light the fee that the expert is being paid at trial to the jury, individuals who often times are not nearly as well paid as the expert, can sometimes cause the jury to look skeptically at the expert and question if the expert is simply testifying for their own monetary gain. Obviously this is a double edged sword if you have your own highly paid expert who will testify at trial, so approach the fee topic at trial with caution.

Do Not Argue

It goes without saying that the expert you are deposing is highly knowledgeable in their field and more than likely more knowledgeable than you in that field. As such, arguing with the expert regarding their opinion is often a waste of time and will cause you unnecessary frustration. Instead of arguing with the expert, question the expert as to issues or factors they may not have considered and whether those issues or factors would have changed their opinion. "Did you take into consideration _____?", "Did you consider this _____?", "How would your opinion change if you were told that _____ this happened?" are often great questions because the expert may have only looked at the case from one point of view – the point of view of the party that hired them and is paying them for their opinion. Being able to establish that the expert may not have thoroughly reviewed the matter or overlooked important facts is very persuasive as to how much weight the trier of fact should give, or not give, the expert's opinion if the matter proceeds to trial.

Review the Expert's Other Articles, Publications or Opinions

Most expert witnesses are retained because of past articles or publications on the subject at issue or favorable opinions previously rendered. Try and obtain copies of the expert's previous articles, publications or opinions. Often times there will be previous opinions rendered or statements made by the expert that you can use to call into question their opinion and credibility in your matter. Nothing calls into question an expert's credibility more than two conflicting opinions rendered with similar fact patterns. If you find conflicting opinions, determine factual similarities with your case. If it is a factually similar case to yours, and the expert previously rendered a different opinion, determine why the expert rendered two differing opinions during

the deposition. Discovering conflicting opinions from the expert during the deposition can be used at trial to really call into question their credibility before the trier of fact.

You may also discover that the expert only testifies one way or the other; i.e. always rendering opinions favorable for the defense or plaintiff. If that is the case, you will be able to inquire into the expert's propensity to always testify favorably for one side during the deposition. Ask how many other cases the expert has rendered similar opinions. Find out if the expert has testified in cases with similar factual circumstances. Painting the expert as the "hired gun" who only looks at one side of the case before the trier of fact can be very effective in calling into question the expert's credibility. Conducting the research and taking the time to read past opinions rendered by the expert can be well worth the effort.

Knowledge is power when deposing an expert. It is an honor to be entrusted by your client to take the expert's deposition - so make sure you honor that trust by properly preparing for the expert's deposition. And with proper preparation, you will have the information and confidence to thoroughly conduct the expert's deposition. Good luck!

Brandon Schwartz

Brandon is a *cum laude* graduate of William Mitchell College of Law, graduating in the top ten students in his class following his Division I and professional hockey career. He is a trial attorney at the Schwartz Law Firm, practicing in the areas of business litigation, family law, personal injury, and civil litigation. Brandon is admitted to practice in the states courts of Iowa, Minnesota, and Wisconsin and the federal District Courts of Colorado, Iowa, Minnesota, and Wisconsin. He has been published multiple times by the Minnesota State Bar Association, ABA, and Michigan Bar journals. Brandon is a life-member of the Multi-Million Dollar Advocates Forum and the Million Dollar Advocates Forum – membership in these forums is awarded to fewer than 1 percent of U.S. lawyers. *Attorney At Law Magazine* also featured Brandon in its The Next Generation edition and Brandon was selected by Super Lawyers as a 2014 and 2015 Rising Star.

