

How to Prepare For and Take Your First Expert Deposition

By **Barry J. Koopmann**

You are a young lawyer who has spent long hours researching, preparing discovery requests, writing briefs, and taking fact witness depositions. You have worked hard to produce excellent work to gain the trust of the partner on the case, and that effort has finally paid off. The partner decides that it is time you took your first expert deposition. You are thrilled at finally getting the opportunity to tackle one of the most significant events in the course of a lawsuit and eager to get this much sought-after experience. Then reality sets in: You have never deposed an expert before and you are not well versed in the subject matter of the expert's testimony.

An expert deposition is unquestionably an important part of the discovery process, so taking your first expert deposition can be an exciting and nerve-racking experience. As with most tasks, thorough preparation is the best way to alleviate your concerns and ensure you do a good job. There are a number of strategies you can use to properly prepare for your first expert deposition as well as some guidelines for taking the deposition. Following these strategies will allow you to go into the deposition feeling confident that you know what you are doing, and most importantly, that you will do a good job.

Preparing for the Deposition

Determine what you need to accomplish. You will save yourself a lot of time during the deposition—and your client a lot of money—by knowing exactly what you need to accomplish well in advance. Figuring out the ultimate objective of the deposition should be your first step in the preparation process.

If it seems likely that the case you are working on is heading to trial, your primary goal in the deposition will be to learn all of the expert's opinions and all

of the bases for those opinions. Indeed, this is the primary purpose of almost any expert deposition. It is only by gathering this information that you will be able to fully evaluate the strengths and weaknesses of your case and lay the groundwork for cross-examination of the expert at trial. Discovering this information at the expert's deposition will also prevent you from being surprised by any new opinions or bases at trial, as the expert will likely be limited to testifying regarding only those opinions and bases that were discussed in the deposition.

Being familiar with the applicable cases, rules, and statutes addressing the admissibility requirements for expert testimony will enable you to lay the foundation for a motion to exclude the expert's opinions.

Discovering the experts' opinions and the bases for these opinions will provide you with the case-specific knowledge you need for substantive cross-examination at trial, but you also must obtain the testimony you need for a more general cross-examination. Consider exploring subjects, such as the witness's educational and work background, how much of the expert's time is spent testifying for either the plaintiff or the defense in lawsuits, and how much the witness is being compensated for his time. Note that if the witness has been testifying as an expert for many years, and if you have access to some or all of those transcripts, you may not need to dwell on these subjects. Instead, focus on obtaining any necessary updates to these general background areas that have arisen since the most recent deposition to which you have access. This is one way that taking stock of the ground you need to cover during

the deposition as you prepare can save you valuable time during the deposition.

Your objective at the deposition, however, may be more than just discovering all of the experts' opinions and their bases. It may also be necessary to cross-examine the expert on some of her opinions during the deposition itself. For example, if you are attempting to position your client favorably in advance of an upcoming mediation, you may want to take a more aggressive and adversarial approach to the expert deposition and conduct some cross-examination normally reserved for trial. This strategy has the added advantage of revealing weaknesses in the opposition's case of which opposing counsel may not be aware, or emphasizing those problems of which opposing counsel is already aware. One potential downside to cross-examining the expert during the deposition, however, is that it can reveal portions of your overall trial strategy. This will afford both opposing counsel and the expert ample time to prepare for those questions prior to trial, and may result in opposing counsel eliciting during direct examination some of the information you had hoped to elicit during cross-examination. This will lessen or eliminate the otherwise powerful impact the information could have made during cross-examination at trial. Therefore, you will have to decide on a case-by-case basis whether you employ this approach, as it may be best to just save all cross-examination for trial.

Know the facts better than the expert. The expert's superior education, experience, and knowledge on her particular subject area will give her a considerable advantage at the deposition. You need to level the playing field any way you can. The best way to do this is through knowing the facts of the case better than the expert does. The expert may not have read any of the discovery responses or

deposition transcripts, or may have only read a summary of some of the depositions. Therefore, reading all of the prior depositions that have been taken in the case, as well as the opposition's and any other parties' discovery responses, will give you a leg up on the expert in this regard. Additionally, knowing the facts better than the expert can potentially lead to excellent cross-examination ammunition. Experts often will offer an opinion that is not supported by—or is actually contradicted by—the facts of the case. If you know those facts better than the expert does, you can more effectively fence the expert into her untenable position.

Know the law. In order to take full advantage of your opportunity to depose the expert, you need to know the law regarding the requirements for admitting expert testimony in your jurisdiction. For instance, if your case is venued in federal court, you need to be familiar with cases such as *Daubert*, *Joiner*, and *Kumho Tire*, and tailor your questions to the guidelines and requirements set forth in the cases. Being familiar with the applicable cases, rules, and/or statutes addressing the admissibility requirements for expert testimony will enable you to lay the foundation for a motion to exclude the expert's opinions. If you go into the deposition without knowing the applicable law for the admissibility of expert testimony, you are less likely to ask the kinds of questions that will be most helpful in uncovering unscientific opinions, reasoning, or methodologies, and you will compromise your ability to exclude the expert's opinions prior to trial.

Knowing the elements the opposition must prove to establish their claims or defenses is as important as knowing the law applicable to the admissibility of expert testimony. Tailor your questions to gain admissions from the expert that hurt the opposition's case. While experts are well equipped to fend off factual or scientific questioning that is contrary to their opinions, their knowledge of the law behind their clients' claims will be much weaker. If you also do not know the necessary elements of the opponent's case prior to the deposition, you will lessen

your chances of obtaining testimony helpful to an eventual motion for summary judgment.

Learn the vernacular. If experts sense they are dealing with a novice, they might try to pepper their answers with technical jargon in the hope that your unfamiliarity with the terms will cause you to move on to other areas of inquiry rather than fully exploring the subject at hand and risk looking foolish. You can avoid this by learning the vernacular of the relevant subject prior to the deposition. Use all of the tools at your disposal to accomplish this—the dictionary, library, Internet, and more-experienced colleagues. Reading technical articles in the expert's field of expertise and/or prior deposition transcripts or trial transcripts—where esoteric terms might have been defined for the jury—are also excellent ways to acquaint yourself with the necessary terminology.

If you have done your best to learn the relevant technical terms before the deposition, but the expert still uses words or phrases in the deposition with which you are unfamiliar, then you simply have to learn the meaning of the additional terminology during the deposition. Do not let your fear of looking foolish prevent you from asking questions. If the expert gives you an overly technical definition of the term, ask the expert to explain the concept in layman's terms, or to explain it like she would explain it to the jury. After all, it is better to come off as a greenhorn to the expert than to leave the deposition without a full understanding of one of the expert's opinions.

Talk to your experts. One of the most valuable resources at your disposal as you prepare for your first expert deposition is your own expert. If the other side saw fit to retain an expert, it is likely that you have a consulting expert on your side who can address the same issues as the witness you are about to depose. Touch base with your experts well in advance of the deposition, and let them know that you would like their assistance as you prepare for the deposition. They can answer any questions you might have about the subject matter, and they will likely have some specific issues

for you to address or questions for you to ask during the deposition.

For instance, your expert might have done a particular analysis or used a particular methodology in your case and would like to know if the opposing expert has conducted that same analysis or employed that same methodology. In one products liability case, for example, I asked the opposition's product design expert if he had used a particular technique for determining the fracture origin of a pane of glass in an automobile. When he said no, I asked him what his understanding of that methodology was. His answer revealed that he did not know what that methodology was, but he was unwilling to admit it. That answer provided excellent fodder for cross-examination.

Read prior transcripts of the expert's depositions. Professional witnesses often earn a living by doing little or nothing but providing expert testimony in civil litigation. Such persons leave a vast collection of prior deposition transcripts in their wake. It can be extremely helpful to review some of those transcripts before you depose that expert. Your local bar association, your firm, or colleagues at other firms may have on file scores of transcripts from prior depositions of the expert. Reviewing just one or two of these transcripts can give you a feel for what the expert is like in terms of how cooperative or evasive the expert is, and possibly even what the expert's testimony will likely be in your case. Experts typically seek to provide consistent testimony from case to case but do not always succeed. You can also gain valuable insight into what some of their typical responses are to certain questions, or how they may try to evade your questions. Having this knowledge going into the deposition will serve you well, as it will enable you to be ready to ask the appropriate follow-up questions, or even to prepare in advance of the deposition a carefully worded question that the expert cannot dodge.

Prepare an outline. If you are nervous about the deposition or fear that you might get off track during the deposition, preparing a thorough outline will

help calm your nerves. It will enable you to ask the necessary follow-up questions on various subjects during the deposition and then resume your original line of questioning in a logical manner. Perhaps most importantly, it will help you ensure that you do not walk out of the deposition and suddenly realize you forgot to ask the expert something about a pertinent subject.

Many experienced attorneys will tell you that an outline should simply contain subject areas or keywords for questioning. While that is generally sound advice, it may be necessary—or at least helpful—to write out some questions completely. This is particularly true with respect to questions on subjects of vital importance to the case, or questions that are highly technical. At the end of a long, mentally taxing day, you might not be as articulate as you think you are, and an outline where important questions are written out in full will prove very helpful. There will come a day in your career when it will not be necessary to write out any questions in this manner (or maybe even to use an outline at all). But until that day comes, and especially for your first expert deposition, it is best to err on the side of thorough preparation and walk into the deposition with a comprehensive outline.

Taking the Deposition

How to get started. It's a good idea to start the deposition with some sort of brief introduction. A review of the applicable rules of the deposition is a common means of accomplishing this. Some jurisdictions actually specify what a witness must be told at the start of the deposition. The rules to be recited at the beginning of an expert deposition are essentially the same as you would recite at the beginning of a fact witness deposition, but you may be able to dispense with a recitation of many of the rules when you are dealing with an expert who has been deposed many times before. If the expert acknowledges that she is comfortable with the deposition process and believes an explanation of the applicable rules is unnecessary, you should nonetheless get the expert to affirmatively acknowledge that she understands the obligation to tell

the truth in the deposition, that she will advise you if she does not understand one of your questions, and that she will ask you to repeat or rephrase any such questions.

You should also ask the expert whether she has complied with the document requests attached to the deposition notice, which generally seek a copy of the expert's file, including all documents on which the expert has relied upon in forming her opinions, and any documents the expert plans on using as an exhibit at trial. Ask the expert to confirm that she has brought all the requested documents to the deposition, and find out what

One of the most effective tips for taking an excellent deposition is to simply listen intently to the expert's answers.

materials have been omitted if any.

Next, you should ask the expert whether she has finished her work in the case and whether she is ready to testify regarding the final opinions she will be offering at trial in the case. Doing so will help you exclude any new opinions the expert might try to offer at trial as well as any modified opinions that the expert tries to offer at trial with the explanation that the original opinion was only preliminary at the time of her deposition.

Finally, you should confirm the scope of the expert's testimony. One way to do this is to ask the expert what she was asked to do in this case. Once the expert tells you what she was asked to do in the case and what she will be addressing, you should also specifically ask the expert whether it is correct that she will *not* be offering opinions on any other issues or subjects that will be relevant in your case. For example, if the expert has been retained to reconstruct how an accident occurred, seek out specific admissions that she will not be testifying about the cause of plaintiff's injuries or the presence of alleged defects in the product plaintiff was using at the time of the injury.

Get an overview of the expert's opinions. Once you have covered the preliminary matters discussed above, you can get into the true substance of the deposition. There is no right and wrong way to proceed from this point forward. Some believe that a natural starting point is to discuss the expert's qualifications, but it is usually more helpful to those who read the transcript at a later date if you start by asking the expert for an overview of her opinions. This allows anyone reading the deposition transcript to quickly gain at least a general understanding of the opinions to which the expert will testify at trial.

Once the expert provides the general overview of her opinions, it is helpful to restate those opinions and get the expert to acknowledge that you have correctly done so, thereby ensuring you have a complete understanding of the expert's opinions in at least a general sense. If the expert has a limited number of opinions and has not produced a report in your case, consider simply writing each opinion on a sheet of paper and asking the expert to acknowledge on the record that those are all of her opinions in the case. When the expert agrees the list is accurate and complete, mark the list as an exhibit to the deposition. You will, of course, ask many more questions regarding all of the details of these opinions and the expert's bases for these opinions as the deposition proceeds, but it helps to have them all on the table at the beginning of the deposition.

Determine what work the expert has done in the case. Once you have obtained an understanding of the expert's opinions, have the expert provide an overview of the work she has done on the case. Ask the expert when she was retained, and then ask detailed questions regarding all of the work she did on the case and when she performed each of the tasks. Determining the dates on which the expert performed her work on the case will enable you to develop a timeline of the expert's involvement in the case, which can sometimes reveal areas where the expert rushed to do work at the last minute in preparation for

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23. See Cummings, *supra* note 4, at 111–13 (quoting a partner at Jenner & Block who noted the value of a young lawyer with hands-on experience gained through pro bono work to the firm’s main practice areas).

24. See Motorola, Inc. v. J.B. Rogers Mechanical Contractors, Inc., 177 Fed. Appx. 754 (9th Cir. Apr. 27, 2006).

25. See Lardent, *supra* note 5, at 8; see also Gertner, *supra* note 21 (recounting the experience of an associate who represented a pro bono client in an appeal of a removal order before the Eleventh Circuit).

26. Donald W. Hoagland, “Community Service Makes Better Lawyers,” in THE LAW FIRM AND THE PUBLIC GOOD 104, 109 (Robert A. Katzman ed., 1995) (citing Keynote

Address, Judge Frank M. Coffin, Program on Professional Ethics and Responsibility, Boston University School of Law, January 8, 1990).

27. Justice Brandeis once wrote, in a memo to himself, “Know not only whole cases, but whole subjects. . . . Know not only those facts which bear on direct controversy, but know all the facts and law that surround.” Urofsky, *supra* note 2, at 33 (citing undated memorandum, “What the Practice of Law Includes,” Louis D. Brandeis Papers, University of Louisville Law Library, Louisville, Kentucky).

28. Urofsky, *supra* note 2, at 36 (noting the effectiveness of the original “Brandeis Brief,” a 100+ page treatise on the facts of the Muller v. Oregon case, which drew note in Justice David Brewer’s opinion, unanimously holding in

favor of Brandeis’s client, the state of Oregon).

29. *Id.* at 38–40 (discussing the evolution of Brandeis’s First Amendment jurisprudence and noting that Brandeis used long dissents to educate the Court and illustrate the factual basis for his opinions).

30. See Hoagland, *supra* note 26, at 115 (noting attorney’s increased attention to more specialized areas of expertise).

31. See *id.* at 114.

32. Tchekmou v. Gonzales, 495 F.3d 785 (7th Cir. 2007).

33. Luban, *supra* note 10, at 721 (quoting Louis Brandeis, The Opportunity in the Law, in Business—A Profession 315, 321 (1914)).

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a deposition, or an overall theme of hastily and poorly done work.

Also, ask the expert whether she has spoken to any fact witnesses or other expert witnesses in the course of preparing her opinions. It may not be necessary in all cases that the expert speak to these people, but in cases in which the expert’s testimony should be based on information from fact witnesses or other experts, having the expert confirm that she had no such conversations can indicate to the jury that the expert cut corners in preparing her opinions, and that the opinions therefore lack the foundation necessary to be reliable. What’s more, discovering the subject matter of conversations between the opposing expert witnesses can reveal valuable information regarding your opponent’s case strategies or themes.

It is vitally important to ask detailed questions regarding any particularly important pieces of work the expert did, such as testing or experiments that support a key opinion. Because any such work will be among the most powerful evidence the expert presents at trial, and because it may well form the foundation for all of the expert’s opinions in the case, you must develop a full understanding of it. Find out the purpose of the test, what hypothesis the expert was testing, what assumptions the expert made in the course of the test, why she made

those assumptions, and what the results of the test or experiment were. Also ask the expert what conclusions she reached based on the test. Finally, and perhaps most importantly, be sure to ask questions designed to elicit the information needed to analyze the admissibility of the expert’s testing under applicable case law, such as whether the expert’s testing methodology has been subjected to peer review and publication, its known or potential error rate, and whether the technique has been generally accepted in the relevant scientific community.

Get the details of the opinions. Once you’ve made a thorough record of all of the work the expert did—or failed to do—in the case, you are ready to delve into the expert’s opinions in greater detail. If the expert has prepared a well-organized report, it may be helpful to use the expert’s report as your outline. Ask for an explanation of each opinion and ask any other follow-up questions you might have about the expert’s opinions to ensure you have a complete understanding of each one. As with any unfamiliar terminology, if you don’t fully understand one of the expert’s opinions, ask the questions necessary for you to reach that understanding before you leave the deposition. Don’t unnecessarily risk a surprise at trial by assuming your experts or more experienced members of your case team will know what the expert is talking about.

Once the expert has testified regarding what seems to be all of her opinions, fence the expert in by asking her

if there are any other opinions to which she has not testified. Getting a clear no to that question will help you preclude the expert from attempting to offer any new opinions at trial and will enable you to fully prepare for the cross-examination of the expert at trial, confident that you know all of the expert’s opinions.

Cover all the bases. Getting the expert’s opinions is the easy part of the process. It’s in gathering the bases for those opinions that difficulties often arise. Some experts are forthcoming with this information, but many are not. This is because the expert knows that it is not the opinion itself that will be most susceptible to attack on cross-examination, but rather the basis for the opinion that will be most vulnerable. This is often due to the fact that the expert’s opinion is based on insufficient work or study, or on studies and tests that utilize flawed methodologies. An expert whose opinion rests on a shaky foundation may try to hide the bases for the opinion in the hope that doing so might prevent opposing counsel from analyzing the legs upon which the opinion stands and possibly finding some contradictions between the two.

As you are questioning the expert regarding her opinions, be sure to ask her what *all* of the bases are for each of those opinions. If the expert tells you what one of the bases is, ask what the other bases are. If the expert vaguely refers to her experience as the basis for an opinion, ask her if there is one particular case she is relying on. If she vaguely refers to

all the literature on a subject as the basis for an opinion, ask which specific articles or treatises support the opinion. If the expert is unable to do so, confirm with the expert that she is unable to specify for the jury which articles or treatises support the opinion. As with the opinions themselves, be certain to have a thorough understanding of each of those bases prior to leaving the deposition.

When you believe the expert has testified regarding all the bases for an opinion, ask her if there are any other bases for that opinion. If the expert fails to answer no to that question, continue to ask follow-up questions about any other bases until the expert confirms you have discussed each of the bases for an opinion. Again, this will fence in the expert, precluding her from surprising you at trial with another article, treatise, witness statement, or test that supports her opinion.

Establish areas of agreement. If you know in advance of the deposition that there are certain key facts or concepts that are necessary to establishing your claims or defenses that the opposing expert will likely agree with, be sure to make a record of those agreements. That way, you can elicit those areas of agreement during cross-examination of the expert at trial. This is a good technique for showing the jury that those foundational facts or concepts important to your claims or defenses are undisputed.

Make a record of the expert's file. One of the most daunting tasks during an expert deposition can be making sense of the expert's file materials. In some cases, the expert will have a single file folder of materials, but oftentimes, the expert's file will consist of many boxes of documents. To ensure you have a full understanding of the contents of the expert's file, you should consider an arrangement in which the parties' exchange copies of their respective experts' files a few days prior to the deposition so that you can thoroughly review the file. If one of the parties is hesitant to enter into such an arrangement due to scheduling difficulties requiring the expert to do some last-minute work prior to the deposition, you should at least request that the witness arrive at

the deposition an hour early so you have time to familiarize yourself with the expert's file materials before the deposition begins. While doing so, mark as exhibits those documents about which you know you will ask questions. During the deposition, be sure to mark as exhibits those documents significant to the expert's opinions, any documents of which you do not already have a copy, and those documents you already have that contain the expert's notes or highlighting. For any documents in the file that you do not mark as exhibits, be sure to, at the very least, state on the record that they appear in the expert's file.

Take your time, relax, and listen. If opposing counsel knows you are not a seasoned veteran when it comes to taking expert depositions, he or she may try to shake your confidence. Counsel might suggest you're taking too long, either by threatening to terminate the deposition, or by more subtle means such as making an off-hand comment before the deposition like "I've never seen anyone take longer than two hours for the deposition of an economist, so I'm guessing we'll be done before lunch." Don't fall victim to these tactics. Take as much time as you need (or as the applicable rules allow) to make sure you've accomplished what you set out to accomplish. If it ends up being one of the longest depositions of an economist opposing counsel has ever seen, so be it.

Opposing counsel might also make indignant (and improper) objections that suggest your question was improper in some way. A simple reminder that the rules prohibit such objections might improve counsel's behavior, but if it continues, don't hesitate to call the court to put a stop to such obstructionist tactics.

Taking your time and doing your best to relax will greatly improve your chances of doing a good job during the deposition, but one of the most effective tips for taking an excellent deposition is to simply listen intently to the expert's answers. Resist the temptation to take detailed notes regarding the witness's responses. After all, that is why you hired a court reporter. Simply take brief notes of some key points or items on which

you need to follow up. Putting down your pen will enable you to make sure you understand the expert's answers and ask all necessary follow-up questions.

Wrap it up. Once you have covered everything in your outline and you think you are finished with the deposition, take a five-minute break to review your notes and outline one more time to be sure that you have covered everything you set out to cover in the deposition. Once you are satisfied that you have done so, ask the expert if she has discussed during the deposition: (1) all of the opinions she plans on offering at trial; (2) all of the bases for those opinions; and (3) all of the work she has done in the case. The expert will likely agree that she has done so, but if not, question the witness as to which opinions, bases, or work she did not discuss. Finally, ask the expert whether she has any plans to do further work on the case prior to trial. If she has some task in mind, ask the expert what she expects that work to show and/or why she is going to do that work, and reserve the right to depose the expert on any post-deposition work.

There are, of course, many ways to prepare for and take an excellent expert deposition. As you gain more experience, you will develop your own style and techniques, and you will learn what works best for you. As you work to gain that experience, however, thorough preparation through the use of the strategies and guidelines discussed in this article will enable you to walk into the deposition confident that you are up to the task before you, and to walk out of the deposition confident that you accomplished exactly what you set out to accomplish. ■

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