

HOW TO PREPARE YOUR EXPERT WITNESS FOR DEPOSITION

Presented by the
American Bar Association
Center for Professional Development,
Section of Litigation,
Young Lawyers Division,
Solo, Small Firm and General Practice Division,
Section of Intellectual Property Law and
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James J. Mangraviti, Jr., and Steven Babitsky

How to Prepare Your Expert Witness for Deposition

By Steven Babitsky, Esq. and James J. Mangraviti Jr., Esq.

Thursday, January 10, 2013 | 1:00 PM Eastern

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About the Presenters

Steven Babitsky and **James J. Mangraviti, Jr., Esq.** have trained thousands of expert witnesses through seminars, conferences, corporate training, and training for professional societies. Steve and Jim are also frequently called to train and prepare individual expert witnesses for upcoming testimony – either by the expert personally, the expert’s employer, or the expert’s retaining law firm. They have helped expert witnesses and their attorneys prepare for deposition in a broad range of cases, including antitrust, patent, medical malpractice, wrongful death, computer forensics, and many others. They currently serve as Principals of SEAK, Inc.

(www.testifyingtraining.com) - the expert witness training company.

Steve and Jim are the authors of numerous books on expert witnesses including *How to Prepare Your Expert Witness for Deposition* (SEAK 2012). In 2000 they founded SEAK’s National Directory of Expert Witnesses (www.seakexperts.com), which contains over 1,300 expert witnesses.

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Preparation of an Expert Witness for Deposition

- How your expert performs at deposition is likely to have a critical, and sometimes dispositive, influence on the outcome of your case.
- How you prepare your expert may well determine how he/she performs.
- Preparation of your expert is within your control and is your responsibility as retaining counsel.

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Preparation of an Expert Witness for Deposition (Cont'd)

- Prepare your expert well and enjoy the rewards.
- Fail to prepare your expert and risk the consequences.
- This webinar will provide you with a proven protocol to effectively prepare your expert witness for deposition.

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Time spent on preparing your expert witness is usually a good investment of your client's money

- Many/most poor expert witness depositions could have been prevented with proper preparation.
- Even well-seasoned experts should be prepared – never assume an experienced expert witness needs no preparation

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It can be helpful to obtain past deposition transcripts of your expert witness and opposing counsel

- Reviewing your expert's deposition transcript will allow you to quickly identify past performance issues
- Issues could include:
 - Poor active listening.
 - Rambling on.
 - Interrupting the questioner.

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It can be helpful to obtain past deposition transcripts of your expert witness and opposing counsel (Cont'd)

- Getting outside of sandbox.
- Responding to non-questions.
- Failure to put a period down (e.g. “I don’t know, but...”).
- Reviewing past expert witness deposition transcripts of opposing counsel will help identify style, approaches and questions likely to be asked.

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Schedule the deposition for a favorable time and location

- Pick a time when your expert is likely to be fresh and will have time to become well-prepared.
- Explain to your expert why it is ill-advised to have the deposition in their own office
 - Informal discovery
 - Accessibility to records
 - Distraction

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Orient Your Expert Witness

- Go over housekeeping issues such as anticipated length, parking, dress, attorneys likely to be present, whether the deposition will be on video, and how the expert will be paid.

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Orient Your Expert Witness (Cont'd)

- Explain the basic legal rules of a deposition
 - Opposing counsel has tremendous leeway in asking questions
 - The objections available to you as retaining counsel are limited and in most instances your expert will still need to answer the question, even if it has been objected to.
 - The rules of discoverability of expert witness-retaining counsel communication in the jurisdiction in question.

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Explain the likely goals of retaining counsel

- Size up your witness
- Lock your expert down into absolute answers
- Build a record to exclude your expert under *Daubert*, *Frye*, or Rule 702.
- Fish around for damaging information.

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Provide your expert with general advice

- Tell the truth.
- Actively listen.
 - “Do you know what time it is?”
 - Picture question as if written on white board.
- This is a deposition, they are not having a friendly conversation with opposing counsel.
- Their job is to answer the questions truthfully and articulately.
- They should focus on the actual question asked.

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Provide your expert with general advice (Cont'd)

- Leave wiggle room where appropriate.
 - “Will you be offering any other opinions?”
 - “Did you discuss this case with anyone else?”
- The deposition is open book – if your expert needs to look something up they should.
- If your expert doesn't know or doesn't remember, they should just say so.

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Provide your expert with general advice (Cont'd)

- Don't have your expert answer an unintelligible or confusing question.
- Have your expert do their homework and be very well prepared to answer key questions using headlines and bullet points.
 - Headline e.g. Opposing Expert's Opinion is Incorrect, I am Qualified to Opine, My Opinion is based on, etc.
 - » Bullets are specific reasons supporting each headline

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Identify areas of vulnerability for your expert witness

- Prepare for your expert witness a series of the 10-20 issues they must be prepared to answer questions on, truthfully and articulately.
- Independently ask your expert to identify additional areas of concern.
 - The expert is often concerned with trivial matters
 - However, the expert's concerns can bring important insights
 - Unresolved issues can and do become a distraction.

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Conduct a mock deposition with your expert

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Explain to your expert how he should prepare on his own. This involves the following steps:

1. Having a full, complete, and exhaustive knowledge of the facts in the case, which will help:

- Your expert identify questions based on incorrect facts
- Identify mischaracterizations
- Make your expert more confident
- Your expert make a favorable impression as a witness

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

2. Review important dates such as:

- when the expert was first contacted by counsel,
- when the expert was retained,
- when the records were received and from whom they were received,
- when the expert formed his opinion(s) in the case,
- the date of the accident in question, and
- the date(s) key tests were performed.

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

3. Knowing his CV cold.
4. Possessing intimate and complete familiarity with any reports or other documents that the expert has authored or signed in the case as well as any expert declaration

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

5. If the expert has not drafted a report, you should go over the following with your expert:
 - Can the expert make and bring notes, timelines, etc. to the deposition?
 - Can the expert highlight records or excerpt them and bring along?
 - Can and should the expert bring a list of the opinions they expect to be offering at the trial, along with the concise reasons for the opinions?
 - What other aids, if any, can the expert bring to the deposition?

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

6. Personally touching every piece of paper in the file.
7. Organizing the file oneself to allow quick and easy access to information even while under great stress.

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

8. Researching answers to common and expected “money” questions:
 - Their hourly rate.
 - How much they have billed to date.
 - How much they are owed on the case to date.
 - The % of their income that comes from legal matters.
 - What % of their work is plaintiff v. defense.

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Explain to your expert how he should prepare on his own. This involves the following steps: (Cont'd)

9. Thinking of the most difficult questions that counsel might ask and being prepared to truthfully and artfully reply to them.
10. Being able to express and defend each and every opinion the expert has expressed in the case.

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Demonstrate to your expert the deposition tactics they are likely to face, such as:

1. Catchall questions
2. Fishing for contradictions
3. The Wide Eyed Student
4. The Silence Gambit
5. Hypothetical Questions
6. Magic Words

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Demonstrate to your expert the deposition tactics they are likely to face, such as: (Cont'd)

7. Wearing Your Expert down
8. Getting Your Expert into a rhythm
9. *Daubert* set up
10. Repetitive Questioning
11. Button Pushing

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Major areas of concern to review with your expert:

- What he/she is an expert on
- What he/she will be offering opinions on
- What they will not be offering opinions on
- The basis of the opinions to be offered

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Major areas of concern to review with your expert: (Cont'd)

- The assumptions the opinions are based on
- Wording of opinions
- Understanding of legalese and magic words
- Areas the expert is concerned about

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Show your expert techniques for how to
appear confident and make a positive
impression on camera

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Expose your expert to trick and difficult questions such as:

- What exactly are you an expert in?
- Is your opinion engraved in stone?
- What is your margin of error?
- Did you do your best work on this case?
- What are the weakest parts of your case?
- How do you define “reasonable degree of certainty?”
- Will you be expressing any other opinions at trial?

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Expose your expert to trick and difficult questions such as:
(Cont'd)

- When did you first form your opinion?
- Is your opinion subjective?
- Have you done everything necessary to give me your full and final opinions?
- Is opposing expert a recognized expert in your field?
- Are you nervous?
- Do you keep current with the literature in your field?
- Is your CV current, accurate, and complete?

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Case Examples

- Smirker
- Not as qualified as
- No relevant experience
- Guestimate
- Evidence-based
- Standard of care
- \$6 million dollar man

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Questions?

Thank you

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How to Prepare Your Expert Witness for Deposition

Executive Summary¹

Overview of Expert Witness Deposition Preparation

The authors recommend the following regarding preparing your expert witnesses for deposition:

- Time spent on preparing your expert witness is usually a good investment of your client's money.
 - Many/most poor expert witness depositions could have been prevented with proper preparation.
 - Even well-seasoned experts should be prepared. Never assume an experienced expert witness needs no preparation.
- It can be helpful to obtain past deposition transcripts of your expert witness and of opposing counsel.
 - Reviewing your expert's deposition transcript will allow you to quickly identify past performance issues.
 - Reviewing past expert witness deposition transcripts of opposing counsel will help identify style, approaches, and questions likely to be asked.
- Schedule the deposition for a favorable time and location.
 - Choose a time when your expert is likely to be fresh and will have time to prepare.
 - Explain why it is ill-advised to have the deposition in one's own office.
- Orient your expert witness.
 - Go over housekeeping issues such as anticipated length, parking, dress, attorneys likely to be present, whether the deposition will be on video, and how the expert will be paid.
 - Explain the basic legal rules of a deposition.
 - Opposing counsel has tremendous leeway in asking questions.
 - The objections available to you as retaining counsel are limited and, in most instances, your expert will still need to answer the question, even if it has been objected to.
 - The rules of discoverability of expert witness-retaining counsel communication in the jurisdiction in question.
- Explain the likely goals of opposing counsel.
 - Size up your witness.
 - Lock your expert down into absolute answers.
 - Build a record to exclude your expert under *Daubert*, *Frye*, or Rule 702.
 - Fish around for damaging information.

¹ Reprinted with permission from Mangraviti JJ and Babitsky S, *How to Prepare Your Expert Witness for Deposition* (SEAK 2012).

- Provide your expert with general advice.
 - Tell the truth.
 - Actively listen.
 - This is a deposition. It is not a friendly conversation with opposing counsel.
 - Their job is to answer the questions truthfully and articulately.
 - They should focus on the actual question asked.
 - The deposition is open book. Your expert can look things up.
 - If your expert doesn't know or doesn't remember, she should just say so.
 - Don't answer an unintelligible or confusing question.
 - The expert should do her homework and be prepared to answer key questions using headlines and bullet points.
- Identify areas of vulnerability for your expert witness.
 - Create a series of the 10–20 issues your expert must be prepared to answer questions on truthfully and articulately.
- Independently ask your expert to identify additional areas of concern.
- Conduct a mock deposition with your expert.
- Explain to your expert how he should prepare on his own. This involves the following steps:
 - Having a full, complete, and exhaustive knowledge of the facts in the case. This will help your expert:
 - Identify questions based on incorrect facts,
 - Identify mischaracterizations,
 - Be more confident, and
 - Make a favorable impression as a witness.
 - Review important dates, such as:
 - When the expert was first contacted by counsel,
 - When the expert was retained,
 - When the records were received and from whom they were received,
 - When the expert formed his opinion(s) in the case,
 - The date of the accident in question, and
 - The date(s) key tests were performed.
 - Knowing his CV cold.
 - Possessing intimate and complete familiarity with any reports or other documents that the expert has authored or signed in the case as well as any expert declaration.
 - If the expert has not drafted a report, you should go over the following with him:
 - Can the expert make and bring notes, timelines, etc. to the deposition?
 - Can the expert highlight records or excerpt them and bring them along?
 - Can and should the expert bring a list of the opinions he expects to offer at the trial, along with the concise reasons for them?
 - What other aids, if any, can the expert bring to the deposition?
 - Personally touching every piece of paper in the file.
 - Organizing the file oneself to allow quick and easy access to information even while under great stress.
 - Researching answers to common and expected “money” questions:
 - Their hourly rate.

- How much they have billed to date.
- How much they are owed on the case to date.
- The percentage of their income that comes from legal matters.
- What percentage of their work is plaintiff versus defense?
- How often have they testified? In which jurisdictions? For which sides?
- Thinking of the most difficult questions that counsel might ask and being prepared to truthfully and artfully reply to them.
- Being able to express and defend each and every opinion the expert has expressed in the case.

Explain Deposition Law and Procedure to Your Expert Witness

It is usually important to explain to your expert witness some of the rules and procedures governing depositions *and why these are important to the expert witness*. The authors have found that even very experienced expert witnesses often do not appreciate the law and procedures governing depositions, such as:

- “Off the record” merely means that the court reporter is not recording what is said.
 - Off-the-record remarks can and will be used against your expert witness.
 - Experts should always assume that what they say in the presence of opposing counsel will be “on the record” and potentially used against them.
- Whether the deposition will be videotaped.
- What the standard stipulations mean.
- Lawyers are allowed under the rules to ask all sorts of fishing expedition questions at a deposition. They are allowed to probe with questions that may lead to information on the expert’s credibility.
 - Your expert should not get flustered. Rather, he should roll with the punches and just answer the questions. Remind him that he is getting paid for his time.
 - The deposition time may be limited, so opposing counsel wasting time on trivialities can actually help the expert witness in the long run.
 - Just because opposing counsel can ask your expert a question at deposition does not mean the answer would be admissible over an objection at trial.
- The rules in your jurisdiction as to what must be answered regarding communications between you as retaining counsel and your expert witness.
- What reading and signing means—the opportunity to review the transcript for transcription errors or to change testimony.
 - Your expert should not waive his right to read and sign.
- The jurisdictional rules regarding the appropriateness, limits, and discoverability of conversations between you and your expert at breaks in the deposition.
- Explain to your expert that you are only allowed to object at a deposition for limited reasons.
 - In most cases, even with an objection, your expert will still need to answer the question.
 - The expert should listen closely to the stated reason for the objection as this may contain helpful information.

Explain the Likely Strategies and Goals of Opposing Counsel

Opposing counsel generally can have one or more overall objectives for deposing an expert witness. Counsel may want to set up the expert for a *Daubert* challenge or use her answers for another pre-trial motion. Opposing counsel can be expected to prepare very diligently for an expert's deposition. To excel, your expert must prepare as hard or harder.

Opposing counsel's questioning techniques and demeanor are likely to be far different than what an expert might face at trial. Explain to your expert that at deposition she is likely to face a seemingly friendly attorney who asks open-ended questions with the goal of getting the expert to talk as much as possible.

The goals of opposing counsel when deposing your expert witness for discovery purposes will include some, if not all, of the following, which should be reviewed with your expert:

- Learning the opinions of your expert.
 - The deposing attorney wants to eliminate new or different opinions offered by the expert at trial.
- Learning the expert's qualifications.
 - Juries will consider the expert's education, experience, and other qualifications when weighing the expert's opinion in the case.
- Locking down the expert.
 - Opposing counsel can impeach your expert at trial with her prior inconsistent testimony if the expert attempts to change her answers to questions posed at deposition.
- Sizing up your expert's likely effectiveness as a witness.
- Determining if your expert is biased.
 - Experts should be advised to refuse to get involved in cases where they are biased or where they can be reasonably perceived to be biased.
- Discover factual assumptions used by your expert.
 - An expert's credibility can be damaged if his assumptions are incorrect.
 - Your expert should be prepared to answer the question of how his opinion would change if certain assumptions turned out to be incorrect.
- Gather as much information as possible.
 - Counsel may also size up the witness's ability to explain complicated technical principles to the jury.
 - Your expert should be taught to answer questions truthfully and completely but to not volunteer damaging information.
- Use your expert to help opposing counsel's case.
 - Opposing counsel may attempt to get the expert to make concessions or appear inflexible.
 - Your expert should make concessions readily and gracefully.
 - Learn about the opponent's case to evaluate the settlement value of the case.
- Intimidate your expert.
 - Intimidation could include threatening to report the expert witness for professional discipline.
 - Your expert should be prepared for this and should appear unflappable.
- Learn what your expert did.

- Your expert needs to be prepared to explain what he did and why as well as what he did not do and why he did not do it.
- Set the stage for a later motion to disqualify your expert or throw out the expert's opinion.
 - Your expert needs to be prepared to recognize questions furthering this goal. This includes understanding what opposing counsel is trying to do and being prepared with specific, credible facts to justify the expert's qualifications and conclusions.

Provide Advice on How to Best Perform at Deposition

As retaining counsel, you must help your experts do the best they can when they are deposed. Well-prepared experts will improve your settlement posture and, if the case is not settled, lay the groundwork for trial. The following are recommendations to help your expert witnesses improve their performance at depositions:

- Tell the truth.
 - Avoid half-truths.
 - Be intellectually honest.
- Prepare diligently. High-level performance at a deposition is more perspiration than inspiration.
- Consider not having the deposition in your office because of the following disadvantages:
 - Interruptions
 - Unwanted disclosure of information
 - Staff time/expense
 - Availability of on-site records
 - Distractions
 - Expert may be less likely to prepare
- If the deposition is being videotaped, dress accordingly.
- Arguing with counsel will make you appear to be an advocate.
- Make requested drawings with extreme care.
 - Consider noting on the record and/or writing on the paper that the drawing is made freehand not to scale, and not with precision.
- Do not exaggerate, speculate, guess, or estimate.
 - If you don't know, just say that you don't know.
 - Be careful to avoid answers that start with, "I don't know, but...."
- Listen to the entire question before answering. This will ensure that you answer the proper question.
- Insist on finishing your answers—don't let counsel cut you off.
- Actively listen to the question.
 - Maintain a high level of concentration.
 - Focus on the specific question asked.
- Pause before answering to give yourself a chance to think and to give retaining counsel a chance to object.
- Read and sign the transcript.
- Do not respond to pregnant pauses. Wait for a question.
- Avoid gesturing because the stenographer cannot record gestures.
- Do not show weakness.

- A deposition is often a battle of wills that your expert needs to be prepared to win.
- Listen carefully to counsel's objections because these may contain valuable information.
- Don't get involved in bickering between counsel.
- Remember that "off the record" remarks can and will be used against you.
- Know the facts cold.
 - Prepare.
 - If you need to look something up, look it up.
 - Make sure your file is well organized so that you can quickly locate sought-after information.
- Be rested and alert when your deposition starts.
- Use a protocol for answering questions:
 - Do I understand the question?
 - Do not guess.
 - Do not help counsel rephrase the question.
 - Do not answer the question you think counsel might be asking.
 - Do not answer overly broad questions.
 - Do not answer questions inconsistent with the facts.
 - Do I know the answer?
 - Do I remember the answer?
 - How do I phrase my answer in a way that is both truthful and artful?
- Exude confidence.
- Remain calm, cool, collected, confident, and under control. Do not lose your temper.
- Act naturally and be yourself (unless you're a jerk).
- Avoid jokes, sarcasm, and inappropriate remarks.
- Act dignified and polite.
- Do not be argumentative. If you are, you will appear to be an advocate and lose credibility.
- Avoid absolute words such as "always" and "never."
- Do not elaborate or volunteer damaging information. Don't get caught up in being overly helpful or in trying to show how smart you are.
- Be careful when using "hedge words" such as "I guess," "I believe," "it seems," etc.
 - State your opinion with reasonable certainty.
- Make concessions gracefully.
- If you don't know the answer, say so.
- If you can't recall the answer, say so.
- Answer only questions that you understand.
- Leave yourself some wiggle room on additional work and additional opinions.
- Do not ramble.
 - Answer the question asked and then stop talking.
- Avoid slang.
- Do not help counsel to rephrase unintelligible questions.
- Do not answer with a simple "yes" or "no" if it would be misleading.
- Correct misstatements as soon as possible.
- Force counsel to explain ambiguous questions.
- Occasionally break counsel's momentum by:

- Asking for a clarification of an ambiguity.
- Answering a question with a question.
- Asking that the question be rephrased.
- Asking that the question be repeated.
- Requesting a break.
- Taking a sip of water and then asking that the question be repeated.
- Referring to a document.
- Encourage counsel to lose his cool by:
 - Telling the truth.
 - Staying cool.
 - Being prepared.
 - Concentrating.
 - Pushing counsel's buttons.
 - Breaking counsel's momentum occasionally.
 - Pointing out counsel's mistakes and mischaracterizations.
- Use the clock to your advantage.
- Do not testify beyond your true area of expertise.

Prepare Your Expert Witness to Excel on Video

Videotaped depositions of experts are being used with increased frequency. During impeachment, clips from a videotaped deposition can make a dramatic impression on the jury or fact finder. Preparing your expert for a videotaped deposition means you will have to concern yourself with the additional issues of your expert's:

- General appearance
- Distracting or unpleasant mannerisms
- Pace of answering questions
- Tone
- Facial expressions
- Body language
- Posture
- Anger
- Arrogance
- Confidence
- Likability on videotape

Your expert may be concerned about mechanics of the videotaping and whether these will be manipulated to his disadvantage. Explain that the Rules of Civil Procedure prohibit the misrepresentation of appearance or demeanor using recording techniques. Attorneys, however, may attempt to distort the expert's appearance by:

- Pacing to force the expert's eyes to move back and forth,
- Using lighting to wash out the witness,
- Using extreme close-ups to emphasize facial expressions, and
- Getting the expert angry.

Explain to your expert that portions of his videotaped deposition may be shown during cross-examination to impeach him. The authors find that showing the expert video clips of both effective and ineffective experts testifying at deposition help drive this point home in a dramatic and effective fashion. Critiquing a video deposition from one of your expert's past cases can be particularly helpful.

The authors recommend you share with your expert some general strategies for increasing his effectiveness during videotaped deposition. As retaining counsel, you should make sure during your preparation session that your expert can demonstrate compliance with the following techniques:

- Avoid annoying, distracting, or unfavorable mannerisms.
- Dress conservatively. Avoid white, black, and red.
- Avoid unhelpful nonverbal behavior, such as:
 - Appearing impatient
 - Clearing your throat excessively
 - Drumming on the table
 - Eye blinking
 - Fidgeting with pens and pencils
 - Gritting your teeth
 - Head nodding or shaking
 - Looking at your watch
 - Looks of disgust
 - Playing with your hair
 - Rocking back and forth in your chair
 - Rolling your eyes
 - Shifting your eyes
 - Slouching
 - Smirking
 - Touching your face
 - Wringing your hands
- Avoid eating, chewing gum, or chewing on pens or pencils.
- Speak clearly and distinctly.
- Look directly at the camera.
- Turn off cell phones, pagers, and beepers.
- Handle exhibits so that the camera can see them easily (respect your audience).
- Avoid making unnecessary noise such as ruffling papers.
- Avoid being goaded into flashes of anger.
- Use makeup. This should be tried out before the date of deposition to see how it looks on video.
- Do not appear evasive, nervous, suspicious, or anxious.

Make Sure Your Expert Witness Recognizes What Counsel Is Likely to Ask

To excel during deposition, your expert witness must be able to answer counsel's questions directly and truthfully without making mistakes or falling victim to counsel's tactics, traps, or trick questions. The best way to do this is to prepare your expert for questions that opposing counsel is likely to ask. A forewarned expert deponent is a forearmed expert deponent.

How to Prepare Your Expert Witness for Deposition
By James J. Mangraviti, Jr. Esq. and Steven Babitsky, Esq.

The expert witness who is aware of the common lines of questioning and tactics employed by counsel is in the strongest position to succeed at deposition. This expert can think about the likely line of attack and consider how she will truthfully and artfully answer the difficult questions she is likely to be asked. During preparation, you should flag for your expert witness the areas of inquiry that you most expect opposing counsel to delve into (i.e., perceived weaknesses). The specific vexing questions likely to be asked will depend on the type of case, the expert, the facts, and the issues in dispute. Having said that, the likely areas of inquiry for an expert witness deponent include the following:

- Qualifications questions
 - These are relevant to the expert's credibility.
 - Remind your expert that nobody has a perfect resume.
 - Advise your expert that defensiveness and evasiveness are counterproductive.
 - Attack weak spots in your expert's qualifications and see how she reacts.
 - The expert may be asked about the following:
 - Educational background
 - Grades
 - Degrees
 - Dates of attendance and degrees
 - Gaps in education and/or professional experience
 - Additional training
 - Continuing education courses
 - Relevant practical experience
 - Membership in professional organizations
 - Certifications
 - If these certifications were earned, bought, or if the expert was grandfathered-in
- CV questions
 - Have your expert update her CV and bring it to deposition.
 - Make sure your expert is thoroughly familiar with her present and past CVs.
 - Identify potential CV problem areas and discuss these, including:
 - Gaps
 - Mistakes
 - Inconsistencies with Internet CV
 - Sloppiness
 - Date prepared
 - Omissions
 - Multiple CVs
- Web page questions
 - Areas of inquiry include:
 - Inconsistent with CVs
 - Using over-the-top marketing language
 - Providing detailed content/checklists
 - Your expert may be able to point out that someone else (e.g., a marketing person or assistant) was responsible for her website.
 - Inconsistencies on a web page could be the result of the web page simply being out of date.

- Your expert should study her web page and be familiar with it.
- Your expert should be advised to Google herself so that she knows what's out there and publicly available.
- Opinions
 - What the expert will and will not be testifying to.
 - Experienced experts usually leave themselves some wiggle room when they answer these types of questions.
 - Your expert may want to point out that if she is asked unexpected questions, she may offer unplanned opinions.
 - She might qualify an answer with, "Sitting here today," "I have no plans as of today to offer additional opinions," etc.
 - Your expert may want to point out that if she is provided with new or additional information she may form additional opinions.
 - Degree of flexibility in opinions.
 - A totally inflexible expert may lose credibility because *nothing* would make her change her opinion.
 - Admissions—Areas of agreement that help opposing counsel's case.
 - "Usually, but not in this case" may be an appropriate answer to some questions looking for admissions.
 - Rationale for opinions.
 - The most believable opinions are well reasoned.
 - Experienced experts are prepared to cite their rationales in bullet-point format at deposition.
 - If the reasons are contained in a report or declaration, you may want to encourage your expert to refer to these documents.
 - Where no report or declaration exists, you may want to ask your expert to create a document containing her numbered opinions and the numbered reasons for each.
 - When was the opinion formed?
 - Was there a rush to judgment?
 - Did the expert have enough information at the time to form an opinion?
 - Did the expert rely on other experts' opinions?
 - Were those opinions reliable?
 - Were they reasonably relied upon?
 - Have your expert be prepared to state in bullet-point format the reasons why it was acceptable for her to rely on other experts.
 - Contrasting the expert's opinions with those of other experts.
 - Have your expert be prepared to state in bullet-point format the reasons why, specifically, she disagrees with other experts.
- Interrogatory answers
 - Your expert should sign off on interrogatory answers dealing with her and her opinion before they are signed.
 - Your expert should be provided a copy of, study, and be familiar with interrogatory answers prior to her deposition.
- Factual basis of opinion

- Your expert's opinion is only as good as the facts upon which it is based.
 - She is well advised to master the facts as part of her preparation.
 - Caution your expert to not be evasive.
 - If your expert is given new or different information, she should consider it.
 - New information may or may not result in a changed opinion.
 - Your expert should not feel obligated to come up with new, spur-of-the-moment opinions based on hypotheticals. Prudent experts often need to carefully consider and study new facts and put them in context prior to forming new opinions.
 - Were the expert's equipment and testing reliable?
 - How thorough was the expert's investigation?
 - What didn't the expert do and why?
 - Did the expert review all relevant documents?
 - Did she visit the scene?
 - When exactly did the expert do her work?
 - Have your expert be prepared to explain why she is confident in her opinion even though there was a time lag between the occurrence and her investigation.
 - Your expert should be encouraged to study and know key facts cold.
 - Facts that have not been committed to memory should be looked up. The expert should know exactly where everything is in her file, including key facts if she hasn't memorized them.
 - The expert's file will need to be well organized to facilitate finding key facts.
 - Key facts are often found in the expert's report, which she should know cold.
 - Your expert should be able to recite in bullet-point fashion the facts that support her opinions.
 - If the expert didn't do something, she should be prepared to explain why it wasn't done and (if applicable) why doing it would not have made a difference.
- Methodology
 - Methodology questions may be extremely important because they may be relevant to both the weight and admissibility of your expert's testimony.
 - Questions in the area of methodology could lead to the exclusion of your expert and the case being dismissed, so your expert needs to be prepared for this line of questioning.
 - Your expert should be prepared to articulate:
 - How she tested her theory or technique.
 - Where, specifically, the theory or technique was subjected to peer review and publication.
 - The known or potential error rate of her technique and how this was determined.
 - The standards and controls used.
 - Why she considers the theory or technique to be generally accepted in her field (including citing examples of who else is using it).
 - What she did that evidences that she was careful.
 - Why any extrapolation was justifiable and reliable.
 - All the alternative explanations she was able to exclude with the reasons why she excluded each.
 - The research that is independent of litigation that the opinions were based on.

Potential bias of the expert

- Always testifying for one side.
 - Prepare your expert to point out the instances where she provided her client an unfavorable opinion.
 - Prepare your expert to explain the legitimate reason why she is mostly retained by one side or the other.
- Always has same opinion regardless of facts? This is not believable.
- No flexibility in opinion?
 - Your expert should consider any new facts even though these may or may not change her opinion.
 - Your expert should not allow herself to be pressured into giving new opinions off the top of her head without having time to carefully consider new information and put this information into context.
- Personal/social relationship with a party to the case or with retaining counsel.
- Professional witness?
 - Teach your expert that this is likely to be a wash as the other expert may also do quite a bit of legal work.
 - Your expert should not be evasive or defensive about the amount of legal work she does.
- Fees?
 - Your expert should not be evasive on fee questions.
 - Your expert should be prepared to answer questions, such as the following, with accurate information:
 - What percentage of your time is devoted to forensic work?
 - What percentage of your personal income is derived from forensic matters?
 - How many matters are you currently working on?
 - How many cases have you worked on? For which firms?
 - How much total money did you make working on legal matters last/this year?
 - How much have you billed to date in this case?
 - How much are you being paid for your time here today?
 - How much more per hour do you make doing forensic work than your hourly rate on your full-time job?
 - You do this forensic work for the money, correct?
 - How will you collect your outstanding bill if the plaintiff loses this case?
 - Who is responsible for payment of your fees? Attorney Jones or his client?
 - Why do you discount your rate for insurance companies?
 - How much *pro bono* forensic work do you do?
 - Will you produce your 1099s for your forensic income for the past three years?
- Bills
 - Detailed bills can be used against your expert.
 - Consider encouraging your expert to submit bare-bones bills.
- Impeachment with inconsistent statements
 - Prior sworn testimony
 - Reports from prior cases
 - Mistakes in prior testimony

- The expert's publications and other writings
- Your expert should be prepared to explain legitimate reasons for apparent inconsistencies:
 - Changed circumstances
 - New science
- If applicable, your expert should be prepared to explain why the past statement was not inconsistent:
 - Taken out of context

Prepare Your Expert for Counsel's Tactics

To excel at deposition, your expert witness will need a full understanding of the tactics opposing counsel may use and the effective methods of dealing with these tactics. Time permitting, each of the below tactics should be practiced with your expert using questions that apply to the expert and case at hand.

- Beginning a deposition with a pointed, challenging question in an attempt to rattle your expert.
 - Make sure your expert is mentally prepared to address key issues or direct challenges at the outset.
- Requesting that your expert waive reading and signing of the deposition transcript.
 - Recommend against this.
- Making the deposition uncomfortable for your expert.
 - Ask your expert to let you know if he is uncomfortable so that you can address the situation.
- Conducting a lengthy deposition in an attempt to wear your expert down.
 - Explain how you will protect your expert from being worn down by enforcing time limits and insisting on a 10-minute break every 50 minutes.
 - Warn your expert to prepare for a battle of attrition and to be well rested.
- Questioning on notes taken by your expert at deposition.
 - Suggest that your expert not take notes at the deposition.
 - Suggest that your expert bring neither a pen nor note paper to the deposition or anything else (besides expert materials) unless included in the subpoena or unless you ask him to bring it. Experts should assume counsel will be able to see anything they bring to deposition.
- Jumping to different topics.
 - Train your expert to concentrate on each question at hand and not try to out-think counsel.
- Asking about the expert's notes.
 - Remind your expert to answer honestly and transparently.
 - Suggest that answering questions about why the expert underlined something should be relatively easy—the expert thought it might be important.
- Asking if anything has been removed from the expert's file.
 - Remind your expert that the cover up is often worse than the crime and to answer honestly and transparently.
 - Warn your expert not to sanitize his file and not to testify dishonestly.
- Intimidating your expert with an unfriendly demeanor.

- Suggest that your expert try not to show fear and remain cool, calm, and collected.
- Asking about conversations you had with your expert during the break.
 - Explain why you won't be discussing the case with your expert during breaks.
- Trying to get an answer that contradicts your expert's report or the interrogatories.
 - Stress that your expert do his homework and know his report and the interrogatories cold.
- Trying to lock down your expert on how critical a factual assumption is.
 - Suggest that the most truthful response to such a question might contain a hedge.
 - Your expert should be willing to consider new information/facts.
 - This new information might or might not change your expert's opinions.
 - Your expert may need time to consider new information prior to expressing an opinion. (Explain to your expert that experts are not required or expected to create on-the-spot expert opinions to a reasonable degree of certainty.)
- Questioning about newly presented documents.
 - Teach your expert to insist on time to adequately review the new document before answering any questions.
 - Attempting to get your expert to unwittingly attest to the authenticity of a document.
 - Remind your expert to listen carefully to the questions and to carefully phrase his responses. For example, your expert could state, "It purports to be...."
- Asking about key names and dates.
 - Stress that your expert must do his homework and know this information cold.
- Trying to get your expert to lose his cool.
 - Explain to your expert that the best way to make this tactic boomerang is to stay calm and nonplussed.
- Asking unintelligible questions in an effort to get your expert to volunteer information.
 - Remind your expert that he should only answer questions he understands.
- Remaining silent after your expert finishes answering a question to try to elicit more information.
 - Make sure your expert knows to remain silent after finishing a reply.
 - Your expert should only speak in response to questions.
- Getting your expert in a rhythm.
 - Make sure your expert carefully listens before he answers questions.
 - If the truthful answer to a long series of questions is "I don't know," so be it.
- Asking convoluted questions.
 - Make sure your expert knows not to answer any questions unless he understands them. If your expert doesn't understand the question, he should say so.
 - Make sure your expert listens to objections you may have regarding the improper form of a convoluted, unintelligible question.
- Asking "catchall" questions to limit future testimony.
 - The most truthful answer will often leave some wiggle room. For instance, stating, "Not that I can recall at this time" instead of "No."
- Using your expert's own office against him.
 - Explain why you will do what you can to make sure the deposition is not in your expert's office.
- Bringing the opposing party to the deposition.

- Mentally preparing your expert for this contingency.
- Counsel asking if the expert has anything else to add.
 - Your expert can state, “If you would like to ask any further questions, I would be happy to answer them.”
- Using abusive conduct.
 - Teach your expert that it is best to stay calm and just answer the questions posed.
 - Explain what will happen if opposing counsel crosses a line. Warn counsel on record and, if necessary, terminate the deposition and file for a protective order.
- Counsel playing the “wide-eyed student” in an effort to get your expert talking.
 - Remind your expert to answer the questions asked fully and truthfully but not to volunteer beyond the scope of the question asked.
- Using hypothetical questions designed to turn your expert against your case.
 - Make sure that the expert knows that it is OK to not come up with instant opinions on the fly unless he feels comfortable doing so. Many issues would require study and reflection to put the new hypothetical facts into context properly.
 - Your expert may also need additional information before he could begin to form a new opinion.
- Trying to get your expert thrown off the case.
 - This is the most serious tactic as it can result in your expert being excluded and your case being lost.
 - Your expert needs to be prepared to explain why (preferably in bullet-point fashion) he is qualified and why his methodology is reliable.
- Questioning “magic word” legal standards.
 - Make sure your expert understands the definition of all legal terms likely to come up and can explain these terms to you in his own words.
- Scheduling a deposition over multiple days to get your expert to contradict himself.
 - Explain why you will protect your expert from this and how you will do it.
- Getting your expert to criticize co-defendants.
 - If your expert doesn’t have an opinion or hasn’t looked into an issue, he should say so. Remind your expert that he is not required to form opinions on the spot.
- Mischaracterizing your expert’s testimony or opinion.
 - Your expert should actively listen and should not agree to counsel’s characterization unless it is 100% accurate.
 - Ask your expert to picture the question as though it were written on an index card.
 - Ask your expert to repeat back to you the precise question that he was asked.
- Getting your expert to agree that a text is “authoritative.”
 - He may hedge a response and state that, although he may use the book and agrees with some or many things in the book, he does not necessarily agree with all of it.
 - Most professionals would never substitute a book for their professional judgment.
 - Most books are out of date the day they are published.
 - Many books have multiple authors.
- Asking if the expert turned in a colleague he was critical of for professional discipline.
 - Carefully word criticism about colleagues.

Prepare Your Expert for Trick and Difficult Questions

A proven preparation technique is to pepper your expert witness with practice trick and difficult questions. Emphasize to your expert that the key to answering trick and difficult questions at deposition is *not* to memorize answers to questions. Because there is an almost endless supply of questions, this would be impossible. The key is for your expert witness to hone techniques for answering these questions. These questions will help you work on both substantive issues in the case and the way the expert goes about answering the questions. Prior to using these questions, remind your expert witness of the general rules for answering questions at deposition:

First: Focus all attention on the question. Picture the question as if it were written on a board.

Second: If you don't understand the question, say so. Counsel may get belligerent and ask, "What about the question don't you understand?" Prepare your witness on how to answer that (e.g., "All of it.").

Third: If you don't know the answer, say so.

Fourth: If you can't remember the answer, say so.

Fifth: If you need to refer to a document or reference, do so. Depositions are not closed-book examinations.

Sixth: Answer the questions truthfully, completely, and artfully. This often involves leaving yourself some wiggle room. This *always* involves listening carefully to the question and telling the whole truth.

About the Authors/Presenters

Steven Babitsky, Esq. and James J. Mangraviti, Jr., Esq. have trained thousands of expert witnesses through seminars, conferences, corporate training, and training for professional societies. Steve and Jim are also frequently called to train and prepare individual expert witnesses for upcoming testimony – either by the expert personally, the expert's employer, or the expert's retaining law firm. They have helped expert witnesses and their attorneys prepare for deposition in a broad range of cases, including antitrust, patent, medical malpractice, wrongful death, computer forensics, and many others. They currently serve as Principals of SEAK, Inc. (www.testifyingtraining.com) - the expert witness training company. Steve and Jim are the authors of numerous books on expert witnesses including *How to Prepare Your Expert Witness for Deposition* (SEAK 2012). In 2000 they founded SEAK's National Directory of Expert Witnesses (www.seakexperts.com), which contains over 1,300 expert witnesses.

SEAK

DEPOSITION PREPARATION OUTLINE

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James J. Mangraviti, Jr., Esq. and Steven Babitsky, Esq.

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IN DISCOVERY DEPOSITION COUNSEL'S GOALS ARE TO

- A. Learn opinions.
- B. Explore qualifications.
- C. Lock down the expert.
- D. Evaluate credibility.
- E. Probe for bias.
- F. Learn factual assumptions.
- G. Gather as much information as possible.
- H. Use the expert to bolster counsel's case.
- I. Intimidate the expert.
- J. Learn as much as possible about the case.
- K. Evaluate settlement value of case.

SUBPOENAS

- A. Have you received a subpoena duces tecum?
- B. Have you complied with the subpoena?
- C. Have you left superfluous material at home (including superfluous electronically stored information)?
- D. Have you brought billing records and correspondence if requested?
- E. Has anyone removed anything from the file?

HOUSEKEEPING DETAILS

- A. Manner of dress.
- B. Where and when to report.
- C. Parking availability.
- D. Estimated time of deposition.
- E. Who will be present for deposition?
- F. Will it be video recorded?

CURRICULUM VITAE

- A. Is it accurate and complete?
- B. Any exaggerations or mistakes?
- C. Ever removed or changed anything? Why?
- D. Do you have any other versions of your CV?

QUALIFICATIONS

- A. What are you and are you not an expert in?
- B. What schools have you attended?
- C. What were your major areas of study?
- D. What degrees did you obtain?
- E. What are the dates for your attendance and degrees?
- F. What additional training courses have you attended?
- G. What continuing education courses have you attended in the past ten years?
- H. Have you been the subject of any disciplinary actions?
- I. Have your licenses ever been suspended, denied or revoked?
- J. What were your grades?
- K. What did you do between any gaps in your education or experience?
- L. Has your expert testimony ever been limited or excluded?
- M. What is your practical real world experience in this field?

WORK YOU HAVE DONE IN THIS CASE

- A. Records and documents reviewed: Which ones and when?
- B. Examination: What was done and when was it done?
- C. Testing: What was done, when was it done, and what were the results?
- D. Is all of this work reflected on your bills and invoices?
- E. What additional work do you anticipate doing prior to the trial?
- F. Did you take any notes? Have these been preserved and produced?
- G. What else would you have liked to have done but did not? Why wasn't this done?
- H. Who/what else did you rely on for help?
- I. What were you asked to do? What was the scope of your assignment?

OPINIONS

- A. All the opinions you will be testifying to.
- B. The facts and assumptions upon which the opinions are based.
- C. The methodology employed in deriving the opinion.
- D. When the opinion was first formed.
- E. The documents you used in forming the opinion.
- F. The degrees of certainty and flexibility in the opinion.
- G. How the proposed opinion compares to answers previously given during discovery.
- H. The opinions you will not be testifying to.
- I. Agreement or disagreement with other experts in case. Reasons why?
- J. How would opinion change assuming new assumptions?
- K. Who and what did you rely on to form opinions?
- L. Are opinions full and final?
- M. What is your margin of error?

METHODOLOGY

- A. Did you follow a protocol?
- B. Generally accepted? Who else is doing it this way?
- C. Peer reviewed? Where, specifically?
- D. Rule out other possibilities? How?
- E. Potential error rate?
- F. Has technique been tested?
- G. Standards and controls?
- H. Unjustified extrapolation?
- I. Research and protocol independent of litigation?
- J. Why choose this methodology?

REPORT

- A. Accurate?
- B. Complete?
- C. Anyone help you write?
- D. Improper influence of counsel or others?
- E. Understand all terms used in report?
- F. Prior versions/drafts?

INCONSISTENT PRIOR STATEMENTS

- A. Interrogatories.
- B. Prior written statements, publications and reports.
- C. Prior testimony, where, when, for whom?

COMPENSATION

- A. How much paid to date/outstanding?
- B. Hourly rate?
- C. Percentage of income from legal work?
- D. Plaintiff v. Defense percentages?

BIAS

- A. Always testify for one side?
- B. Personal or financial relationship with party or counsel?
- C. Professional witness?
- D. Ax to grind?

INVOLVEMENT IN CASE

- A. When were you first contacted concerning this case?
- B. By whom were you contacted?
- C. How were you contacted: Phone, letter, e-mail, other?
- D. When did you accept the case?
- E. How did counsel find you?

READING AND SIGNING

- A. Do not agree to waive reading and signing.

PUBLICATIONS

- A. State all of the articles, chapters, books, reviews, abstracts, and other writings that you have had published on this topic.
- B. When and where were these published?
- C. Specify if any of your writings have not been accepted for publication.

KEY DATES TO KNOW

- A. When you were first contacted by counsel.
- B. When you were retained as an expert.
- C. When you received the records.
- D. From whom they were received.
- E. When you formed your opinion(s) in the case.
- F. The date of the event in question.
- G. The date(s) key tests were performed.

TO EXCEL AT DEPOSITION

- A. Tell the truth.
- B. Do not argue with counsel.
- C. Do not exaggerate, speculate or guess.
- D. Actively listen to the entire question before responding.
- E. Listen carefully to objections that are made.
- F. Do not respond to pregnant pauses or statements. Wait for a question.
- G. Do not get involved in bickering between counsel.
- H. Choose your words very carefully.
- I. Leave yourself some wiggle room where appropriate.
- J. Don't give off the cuff opinions.
- K. Don't give opinions outside of your area of expertise.
- L. Correct misstatements as soon as possible.
- M. Do not be afraid to say that you do not know, do not recall, or do not understand the question.
- N. Keep cool, don't freeze.
- O. Exude confidence and make a good impression on camera.
- P. Be yourself, unless you're a jerk.
- Q. Know the facts and file cold, or know where to look them up when needed.
- R. Be prepared to articulate your thoughts.

YOUR PREPARATION

- A. Locate all records and tests you have reviewed.
- B. Organize your file for easy reference.
- C. Review your report, file, opinion, CV and case weaknesses/strengths.
- D. Discuss case with client attorney and undergo a mock examination.
- E. Try to get opposing counsel's style, techniques and theory of the case.
- F. Think about the difficult questions and issues.
- G. Know the timeline in the case.
- H. Have a past deposition transcript professionally reviewed and critiqued.
- I. Get professional help/one-on-one expert witness training to prepare.



About the authors: James J. Mangraviti, Jr., Esq. and Steven Babitsky, Esq., are frequently called upon by experts, their employers, and retaining counsel to train and prepare individual expert witnesses for upcoming testimony. They are former litigators who currently serve as Principals of the expert witness training company SEAK, Inc. Mr. Mangraviti and Mr. Babitsky are the co-authors of numerous texts on expert witnessing, including: *How to Prepare Your Expert Witness for Deposition*; *How to Become a Dangerous Expert Witness: Advanced Techniques and Strategies*; *The A-Z Guide to Expert Witnessing*; and *Writing and Defending Your Expert Report: The Step-by-Step Guide with Models* and are the co-founders of SEAK's Expert Witness Directory (www.seakexperts.com). For more information please visit www.testifyingtraining.com or call 508-457-1111.