

Chapter 12

Deposition Guidelines for an Expert Witness

2nd Ed.

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Special Instructions to You, the Independent Expert:

It is very important to understand what these guidelines are. These are general guidelines. These are not guidelines created specifically for you or your deposition in any particular case.

After reading these Guidelines, you should create your own individual set of guidelines on how you wish to handle your depositions in cases where you are an expert witness and then you should discard these guidelines. That way, if you are later asked, you can truthfully say that you saw a general set of deposition guidelines on what to expect but then developed your own particular way of handling your expert witness deposition yourself. You should never put yourself in a position of having to say that you are just “following instructions” in handling your expert witness deposition. Not for anyone.

Always remember that in every case the expert’s first job is to find the truth of the matter. The expert’s second job is to explain it, when the time comes. That time is coming up soon. The adequacy and thoroughness of your expert report forms the foundation for everything you will do in a case. The way you handle yourself in your deposition will establish your credibility and reputation as an expert witness.

Also, these guidelines are for the normal non-video deposition. A video deposition requires additional considerations that are very different from what you will read below. If you are planning for a video deposition, you should carefully discuss with your consumer’s attorney the important differences between a non-video deposition and a video deposition. They are not handled the same and, as a witness, your preparation is very different and you must not treat them the same.

General Instructions

What Is a Deposition?

A deposition is where the attorney who represents the “other side” will have a chance to ask you questions about your opinions, all of the facts that you understand occurred in the case, and your expert report, among other things. It is often the first chance that they have to see and hear you explain what you think and why you think it.

You may think that it is going to be relatively easy. Because it is so important, you need to be on your guard that you do not let the other attorney try to twist the truth around or put words in your mouth.

A “court reporter” will be there to take down everything that is said using a steno-type machine. Later, this is typed up into a transcript of the deposition. You may have the right to read it and obtain a copy of it (a copy will probably cost about \$100 for each hour that the deposition lasted). In court, this transcript can be used against you.

A court reporter is not someone from the court. That is just the name of the job that they perform.

Is it Important?

You better believe it. If it wasn't, the other attorney would not be doing it. To take your deposition will probably cost the other side between \$2,000 and \$4,000. They spend that money for only two reasons:(1) they want to know what you will say in court, and (2) they want to figure out how to get the jury not to believe you.

Your deposition is probably the most important thing that you will ever do in this case, except for the actual trial itself. Because of that, it is extremely important that you understand what is happening and how you should handle yourself. This brochure is designed to give you some guidelines.

What Can I Do to Prepare?

The main idea is to *be prepared*. You will have no idea what specific questions will be asked so it is important to have an overall view of your part in the case. You do not need to know anything about the case other than what you were specifically involved in doing, as an expert witness.

You should meet with the consumer's attorney, or at least talk with him/her by telephone, a few days before the deposition, so you can (1) review everything, and (2) find out what documents or exhibits the consumer's attorney wants you to bring with you to the deposition, and (3) find out what the "questioning style" is of the other side's attorney so you know what to expect. You should also look over any documents, papers, or files that you have which are involved in the case, and bring them with you when you have your conference with the consumer's attorney before the deposition.

On the day of the deposition, only bring to the deposition exactly what you are told to bring or what you feel you absolutely need to bring. Anything you bring with you, the other attorney may get to look at. So make sure you do not bring anything you do not wish them to see.

A deposition is really nothing to be afraid of. You only have to tell the truth. Just remember to be careful, be correct, and be calm through the whole process.

Know Your Industry's Standards

You are an expert in your industry so you are expected to know the standards that are applicable to what happens in that industry. For instance, if you found an engine was using oil, know what the acceptable industry standards are for oil consumption for that size engine and also the industry standards for how to determine if an engine is actually using excessive oil. Know what industry standards are applicable in the case at hand and know the rest of the industry standards too. Be ready to state what they are and what industry organization establishes and/or recognizes them. Be able to explain why each standard is the standard of practice in your industry. If any industry publications were checked by you

in coming up with any of your expert opinions, be ready to say what they were, too.

Be Aware of Any Important Legal Issues You Need to Know

Talk with the consumer's attorney about what legal issues you need to be generally aware of and get comfortable with the legal terminology that might come up in your deposition. However, always try to avoid actual use of legal terms in your deposition.

For instance, you need to have a good working understanding of what "substantial impairment" really means along with other terms that are important to the case. During the deposition, if the other attorney uses a term that you are the least bit uncertain of, then simply tell them that you do not understand exactly what they mean by that particular word and ask them to tell you what they mean - *before* you give your answer. Do not guess. If they ask you what you think a term means, just tell them to give you their own definition so you can be sure you understand what it is that they want to know. If you disagree with their definition, then you can explain why their definition is not accurate.

Don't give explanations of the meanings of common, everyday terms. After all, you are an expert and you are there to give expert opinions.

Maintain a Calm Composure

Keep calm and cool. The other side's attorney is paid to discredit you if there is an opportunity. If they question you aggressively, they will likely anger you at one point or another. Don't worry; it's not personal. It is intended to get you flustered and make a mistake. Just be the professional that you are and don't let it get to you. Give the attorney an answer that you know for a fact is true and move on.

Will I Be There Alone?

No. The consumer who hired you may be there, and certainly the consumer's attorney will be. Other people in the case may also be there. However, the questions that will be asked in your deposition will be a little different from those that would be asked at trial. At trial, objections frequently occur which can stop questions from even being asked or answered. Generally, that does not happen at the deposition. Most questions asked in a deposition must be answered by you, but not all.

Listen carefully to the question and then pause before answering so that (1) you can decide upon and think over the correct answer before saying it out loud, and (2) the consumer's attorney, or other attorneys present, can object if it is appropriate to do so. Do not answer any question that the consumer's attorney tells you not to answer. If you want to talk with the consumer's attorney privately at any time during the deposition, just ask to take a break. You can give any reason you want, or no reason at all.

You can also bring your own attorney, if you like, but that rarely occurs because of

the expense and the fact that your role is just to say what you know or believe and why you know or believe it. It is very unlikely that you will need an attorney.

Bring Your Resume With You

Always bring a copy of your current resume (what some experts call a “CV”). Most defense attorneys always go over your education, training and experience so being able to just hand them a copy of your current resume can make the questions much shorter and save you time. Also, be sure you keep your resume up to date with any new seminars or courses or job duties, etc.

Quite often federal courts require experts to maintain a list of cases that they have worked on. Ask the consumer’s attorney if you will need to bring one. As a routine matter, you should be keeping one that lists the case name, the court, whether you gave a deposition or court testimony and the date of your involvement in the case.

You Were Not Hired to Impress People

You were hired to *persuade* people. It may be possible to do both, but if you must choose between looking impressive and being likeable, it is better to be liked. You should think of yourself as a teacher and not as the ultimate decider of the truth. Your job is to determine what you think the truth is and then to teach others to understand it to be just that: the truth. Impressing them is nice, but getting them to believe you is better and that requires knowing your subject matter better than anyone else. And perhaps a little bit of friendly persuasion.

Don't Get Friendly

Many defense attorneys try to seem very casual and easy going. This is often just a trick to get you to let down your guard and make a mistake.

Keep everything as formal as you can so that you stay careful all through the deposition. For instance, do not let the attorney call you by your first name. The other attorney is not your friend. Remember that their job is to figure out how to make you look incompetent and/or stupid so that their side can win the case.

If the other side’s attorney says “Help me understand ...” this a warning! The attorney almost always understands it very well. What they really are trying to do is to relax you and then to trick you, so when you hear this phrase you should be especially careful about the question that is coming next.

Pay Close Attention to Every Question

You cannot help by answering a question that you do not really understand. If you

are not clear on what is being asked, then make the attorney be clearly state the question.

Think Carefully Before You Answer

The golden rule: *think* about your answer, before you say your answer out loud. You can think things over very thoroughly, but once you say it out loud, you cannot take back what later on may turn out to be a “bad answer.”

What Do I Do When a Question Is Asked?

First, pause. The first thing you should do, after each question, is pause for several seconds and think carefully about the question and how to answer it. This gives the consumer’s attorney time to object to the question, if necessary. If they do object, listen to what is being said about the reasons for the objection. It may be a clue about what the attorney’s question is really trying to trick you into saying.

You have all the time in the world to answer the question - it is not a race to see how fast you can get it over with. If you are asked why you took so long to answer, you can always truthfully say that you were thinking it over because you know they want accurate answers and you wanted to be certain your answer was correct.

Quite often the defense attorney will ask a question which uses legal or technical words which mean one thing to most people and something entirely different in a legal sense. Be very careful that you are not tricked into answering such a question. There is also another reason to pause before you answer a question.

Before you start to give any answer to any question, you should repeat the question to yourself, and be certain you *understand* the question. If you don’t understand what the attorney is asking, make him repeat it in other terms or reword the question. You have a right to understand what you are being asked.

After you are sure you understand the question, then think through your answer, and then say the answer out loud. Then, *stop*. Do not say anything more than what is necessary to answer the question. The only exception to this rule is when the question is unfair, does not state a true set of facts or opinions, or tries to mislead you. If it does then tell the questioner what you think is unfair or misleading about the question, and straighten it out before you give any kind of answer.

You should go through this process for each and every question that is asked. Remember, you are not trying to hide anything; you are only trying to be careful that your answer is truthful and correct.

Keep it Short and Specific

Generally, you should be short and specific with your answers. Say no more than is

necessary to answer a question. Long explanations may give the attorney a chance to use some of your testimony against you later. The more you say, the easier it becomes for you to make a mistake. You don't have to stop at "yes" or "no" but use as short an explanation as possible. It saves you time and can really save you from getting into trouble.

If you believe you made a mistake in your answer, try to correct it right away, before the attorney moves on to another question. If the attorney is already on another question, just interrupt and correct your prior answer anyway. Just say something like "I would like to refine my last answer" or "I would like to clarify my answer to a question a few minutes ago." You have the chance then to correct what you think was a mistake. Don't worry, this will not make you look bad. Instead, it makes you look truthful and honest.

Should I Tell Them Everything I Know?

Generally, no. Your job is to answer the questions that are asked of you. It is often best to try to answer questions with a simply yes or no whenever possible.

Generally, you do not want to volunteer extra information that is not called for by a question. The reason is simple: the other attorney knows precisely what they want to ask. They may get upset if you volunteer things they are not interested in or which have nothing at all to do with the question being asked. They should know what they want to find out about. Simply answer the question short and to the point and we may all be done that much quicker.

Also, avoid saying what other people told you or have said to you. Unless you are asked specifically what you heard someone else say, only talk about things that are within your own knowledge.

Last, do not exaggerate. As an expert, no one is as familiar with your area of expertise as well as you. The simple truth is enough to do the job.

I Don't Understand the Question, but I Think I Know the Answer...

Then, keep it to yourself. If you do not understand the question, you should say so. You do not guess about anything, not about a question and certainly not in your answer. As soon as you hear the question, if you are not certain that you understand it, then just say so. Attorneys are very highly educated and should know how to ask questions in such a way that you know precisely what is being asked. Make the other attorney speak plain and simple.

If you do not know something, just be honest and say so. Nothing is worse than to make a statement in a deposition that you were really not sure about and then later be forced to explain your answer in front of a jury at trial.

Do not guess about what the other attorney means in a question. Never answer a question that you do not understand, just because you think you know the answer. When

you do that you are sticking your neck out. Remember; turtles stick their necks out to, and that is why we have turtle soup.

Will There Be Trick Questions?

Probably. Some attorneys take pride in their ability to confuse and trick witnesses. Be careful.

Watch out for questions that use the words “probably” or “possible”, “may” or “likely”, “never” or “always”.

Do not argue with the other attorney, simply point out that you have your own opinions and that is what you are telling him. Whether or not his characterization is fair is up to someone else to decide. The attorneys are not allowed to argue with you and you should not engage in discussions or arguments with them. Remember, you are an expert and you are an independent expert.

Watch Out for Speculative Questions

You will likely be asked speculative questions ... be careful. This is the opposing sides' opportunity to catch you in a moment of stupidity. Questions like “Are you saying this is always true?” or “What is the probability that X will happen if Y occurs?” These are attempts to catch you in erroneous thinking that can be used later in the trial against you to make you look incompetent. After all, the other side has experts too. They could refute your deposition by saying that they think what you said was not likely to occur at all.

When you get these types of questions, you should always ask the other attorney to be more specific about what he is asking. Make him define the question in technical terms and specifics that apply to your experience. Don't answer open ended questions or multi-part questions either. If you get a question like that, just ask the attorney to break the question down for you. Remember, if you make the attorney ask short and simple questions, your answers can be shorter and simpler too.

Will They Interrupt Me When I Am Answering?

Maybe, but do not allow them to cut you off. You can just say that you want to finish your answer before discussing anything else. No one has the right to cut you off. If your answer is cut off, it can result in a partial answer that actually is not correct but still looks in the transcript's printed version as though the answer were complete. That is why you must not let anyone interrupt you or cut your answer short by interrupting you.

You have the right to give a complete and correct answer to every question. Your answer must be truthful and correct. How complete you wish your answer to be is up to you, but do not let an incomplete answer leave a false impression or a statement.

Only Answer the Question That Is Asked

Most of the time, after you answer a question you should not want to volunteer additional information. That is true even if the opposing attorney is sitting silently and seems to be waiting for you to say more. That is a trap and be careful you do not fall into it. If they want more information, they will ask more questions. Do not let silence make you feel uncomfortable. They do that because they want you to talk more, so they can try to use your words against you later.

You May Be Asked Hypothetical Questions Which Are Unfair

The other attorney may ask you to assume facts, telling you what they are, and then ask you to explain how your opinion would change if those facts were true.

First of all, do not assume those facts are true. Do not hesitate to tell the other attorney that those facts are not true here. They may be trying to confuse you or they may be trying to make you doubt your own beliefs. Stick to your guns. Do not let them lead you astray.

Is It Ok to Say “I Don’t Know”?

You may be asked a surprising question or given a surprising statement at a deposition. Try not to become flustered. Whether or not new information would have a substantial effect on your own opinion or whether it would only be a minimal effect on your own opinion, will often depend on exactly what the new information is and what you decide after you carefully analyze the new information. Also, the “new information” may not even be true at all; it could just be a test of your knowledge. Be careful.

Do not give an answer unless you are absolutely positive you are correct in what you are saying. If you are uncertain, or not willing to take a risk on a surprise question or new information, then you may be better off saying “I do not know without thinking about that some more” or “the analysis is complex and I will have to perform a new set of calculations or do some more research on that before I can answer that question”. Take your time and avoid a costly mistake.

Try to Make Your Testimony Understandable

Avoid technical jargon where you can. If you are testifying about some mechanical failure, you would not ordinarily want to refer to mechanical details without making a clear record of any differences between one part and another that might have to do with the problem you are trying to explain. You can even use the wrong term in explaining something, so that people will understand it, so long as you point out that you are doing that.

However, you can expect the opposing attorney to try to use anything against you

that they can. For that reason, be very clear about what you are saying and how you are explaining things. Try to make your testimony as easy to understand as possible for the average person on the street. Remember, you are an expert, but no one listening to you may have any idea of what you are saying, if it is not clear and understandable.

Do Not Follow an Attorney's Lead If He Has Taken You Astray

Sometimes an attorney may repeatedly refer to something with a term that is not quite accurate, hoping that you will follow his lead. His short term goal is to trick you into believing that they are unsophisticated about the mechanical issues. The long term goal is to be able to argue to the jury later that you do not know the difference between one part and another. Make a record, early in the questioning, about the opposing attorneys incorrect use of terms and clear up any misunderstanding.

Watch out for Legal Questions

If the other attorney asks a question that sounds like "legalese", it might be an effort to trick you into making a damaging statement.

You are not going to testify about what the law says or means because you are not an expert on the law. That is the job of the Judge. Avoid legal issues, legal standards, and legal terms.

Be Careful about Accepting the Other Attorney's Facts

During your deposition the other attorney is likely to ask if you agree with certain key facts. You should discuss which facts you are "positive" about with the consumer's attorney, and what "facts" the other side's attorney is likely to ask you about before your deposition occurs so that you are not surprised. Make sure you understand what facts are disputed by the other side, so you do not accidentally admit something that you don't want to do.

Avoid the Ultimate Question

The "ultimate" question in a warranty case is whether or not the manufacturer lived up to its warranty. That is not a question for you to answer. You are the mechanical expert in the case, but you are not the person in the case who decides whether or not the warranty has been breached. That is the jury's job. Your only job is to testify about your expert opinions which relate only to your area of expertise in the case.

If you are asked what the "purpose" of a warranty is, then you should not answer the question. Different manufacturers may have different reasons and purposes for their warranty language or coverage. Unless you have actual personal knowledge of the reasons and purposes that a particular manufacturer had behind *their* particular warranty and its language and terms, you would only be guessing.

The purpose of a warranty is not a question for an expert witness. What you think the purpose may be, is likely to be different from what another person may think it is. For that reason, you should simply say that it is not your area of expertise and something like “that is up to the jury to decide here; I am not an expert on that question.”

Whether the warranty was breached, whether the consumer’s product is legally speaking a “lemon”, and similar questions are simply not what you are supposed to give an expert opinion about. Strictly limit yourself to your area of expertise. Any other questions should be answered by simply saying that “someone else will have to decide that”, or something like that.

Will I Get a Chance to Read it and Correct it Later?

Both yes and no. You always have a right to read the transcript of the deposition in order to be certain that it is accurate. When you get a copy of the deposition to read you will also receive a “correction sheet” on which you can make notes of any changes to the deposition. However, changes to the substance of your answers are, technically speaking, not supposed to be allowed.

Still, it sometimes occurs to you later, when you read the deposition, that the question actually is asking something slightly different than what you thought at the time you listened to it. You should go ahead and make the correction on the correction sheet that you will receive. The correction sheet is suppose to be used for minor changes like spelling or specific words that were not clearly understood by the court report at the time they were spoken. However, it is not unusual to see other changes written on the correction sheet.

Be careful of your changes on the correction sheet, however, because you may be asked about those on the witness stand in front of a jury. The reality is that the answers that you give in the deposition are pretty much what you are “stuck” with, so you always want to be certain that you answer thoughtfully, carefully, and correctly. It is not likely that any consumer will win their case because of what you say in your expert witness deposition, but they could lose it.

Specific Questions

What Do You Consider Yourself to Be an Expert On?

“Being a good spouse.” “The Bible.” “Nothing really.” It’s hard to believe but those are just some of the answers we’ve heard. Never forget your job. Never forget the purpose for which you were hired. Never forget what you are an expert on and never forget to say it. Be serious about your answer. Do not add anything else and do not appear flippant.

Would it Be Fair to Say ...

Watch out! Many attorneys will ask you a series of questions and then try to

summarize your answers into their own words. Then they ask you if the way they have described it “would be a fair statement.” Shakespeare said “nothing a lawyer says is fair, they are trained that way.”

Do not fall for this trick. Your best answer is to just say “I do not know what you think is fair, but how I have described it is the way I think it is”, or something like that. Be careful.

Tell Me All of Your Opinions

Watch out for this question. Unless you only have one or two opinions, what this question is really doing is inviting you to overlook some of your opinions. Do not fall for it. If you have the usual quantity of opinions on variety of aspects, then you need to tell the attorney that you “have a number of opinions on a variety of aspects of this situation, which one do you want to know about?” In other words, make the attorney ask you for a specific opinion. They already realize what the issues are, what the problems are, and what the basic things are that you have an opinion about.

This question is really designed to trap you into limiting yourself to only a few opinions instead of all of the expert opinions you may have. If you prepared a written report before the deposition, most of the time the opposing attorney has a copy of that report and is already completely aware of your opinions. If you have been advised that your expert report has been turned over to the defense attorney, then when he asks you the question “tell me all of your opinions”, an easy way to answer is to ask him if he has seen your report and what opinions in it does he wants to talk about.

What Is Your Opinion Based On?

Every expert opinion is always based on the expert’s “education, training, and experience”. That is the standard answer. Of course, your opinion is likely to also be the result of your expert inspection, documents that have been reviewed, perhaps an interview with the consumer, independent testing or review of tests conducted by others, engineering principles, industry standards, consulting research resources, etc. Include everything when you give your answer.

Are Those All of Your Opinions?

Think long and hard before you answer this question. This question usually comes after you have given several of your opinions and is designed to cut off any more opinions that you might develop later.

Frequently, you will have to conduct another inspection before the trial occurs. You may also receive more documents from the manufacturer, another Defendant, or another witness in the case. You may also receive photographs that the Defendant has taken and have not yet shared with the consumer’s attorney. Perhaps you have not yet seen the

defense expert witness report. All of these things can cause new opinions to develop.

Because new evidence may be uncovered, if you are asked this question “are those all of your opinions”, if you have covered everything simply say “so far” and explain that any new information that is provided to you may cause you to develop more opinions. In other words, give yourself an “out”.

Are There Any Other Tests You May Need to Do?

This question is designed to see if you are going to do any more work in the case before testifying in court. Often times, you simply really cannot say whether you will or will not have to do more work. For that reason, it is much safety to say “it depends on whether any new information is provided or I am asked to do any additional work”. That is almost always the most accurate answer you can give to this kind of question.

Are There Any Other Documents You May Need to See?

If documents have not been provided to you, how could you possibly know whether or not you need to see them? Obviously, this question is not fair to you. Just about the only honest way to answer this question is something like “it depends on what the documents are, what did you have in mind?” If you believe additional documents are needed, then simply say what they are.

If you are not certain additional documents exist, but you suspect it, then try to more broadly state that you would like to see all documents related to the issues in the case. Obviously, manufacturers of defective products often times do not like to turn over damaging documents until the last minute or try to avoid it completely. Because of that, you want to make certain that your answer to this question is clear and that it gives you “room” to look at other documents as they arise.

Have You Discussed this Case with Anyone?

Of course you have and the other attorney knows it. It always happens and it is normal, customary, and not at all unusual. The only question, really, is who it was.

Obviously, you have probably discussed it with the consumer who owns the disputed product. You may have discussed it with co-workers and the consumer’s attorney. It is completely fair for you to do that (it is expected) so just answer the question.

However, you can expect that the next question is going to be “tell me everything that was said”. That may be difficult for you to remember because of the time or length of the conversation, or detail involved. If you do not remember everything (and you probably won’t), then just say that.

You will very likely be asked what the consumer said to you. Just repeat what the

consumer actually said to you as best as you can recall, but do not repeat anything that the consumer has related to you that came from a third party, unless you were there when that conversation took place. Third party information is often not useful and often not allowable. Talk about only what you were present to hear. Generally, you are better off giving a broad general response and avoiding the details, where appropriate.