

## **Expert Witnesses and Video Depositions: Strategies for Effective Performance**

by

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The advancement of technology has impacted how attorneys and witnesses behave in a deposition. The use of video depositions has increased dramatically over the last ten years. Prior to video- and audio-recorded depositions, the primary concern was with the impact of the witness's word choice on paper. But in today's court room, the jury and judge may see more than merely the witness's written words—the witness's tone of voice, or stammering in the deposition, may enter into evidence. The same is true for facial expressions, hand gestures, style of hair, and clothing choice. A potential witness in a deposition must exercise self-control over more elements of communication than was the case just a few years ago. It is more critical than ever for witnesses to be fully prepared for the deposition process prior to entering the deposition room.

Proficiency in video depositions is even more essential for expert witnesses. Many experts testify in multiple trials a year. In drawing on my thirty years of litigation experience, here are techniques and strategies for experts to use in order to maximize his or her effectiveness as an expert witness in video depositions.

### **Preparing what to wear**

Experts should dress for the video deposition in essentially the same manner and formality that they plan to dress for the trial. If the expert plans on wearing a tie and sports coat during the trial, the expert should wear a tie and sports coat during the deposition. Jurors are attentive. They catch differences, even small ones, such as a minor difference in jewelry. Any thoughts about why the differences in attire occurred are thoughts detracted from the statements made by the expert. For effective performance in a video deposition, an expert should try to reduce these differences in attire as much as possible. This is not to say that

an expert should wear precisely the same articles of clothing at the deposition and trial. But only slight adjustments should be made. For example, if an expert that wore a sports coat and tie at the deposition, the same sports coat with a different tie at trial would minimize attention devoted to the expert's attire.

Of course, any person would have difficulty recalling what they wore several months prior at a deposition. One way to maintain consistent attire between the deposition and trial is to take a self-photograph on the day of the deposition, and save the photo along with the case notes. This practice is especially useful for experts who typically testify in several trials a year.

### **Strategies for practice on camera**

Most expert witnesses are comfortable speaking in front of juries. But not all experts are familiar with the experience of watching a videotape of themselves. With video depositions, parts of the expert's deposition may be played again during trial while the expert is on the witness stand. Watching one's self on video for the first time may be unnerving. To limit discomfort, expert witnesses should practice speaking on video and become familiar watching their performance. It may be helpful for the attorney to arrange a videotaped practice with the expert and to run through some questions on camera. The important task is the familiarization of oneself on camera to diminish the sense of uneasiness later in the courtroom. In addition to increasing the familiarity of observing oneself on camera, experts may wish to make some improvements to their physical appearance as a result of this process.

For all practical purposes, the expert should behave as if they were actually in the court room. Depositions are frequently carried out in small, informal conference rooms. People freely move about,

get cups of coffee, and come and go throughout the deposition. The videotape is for the jury, and the expert should behave exactly as they would want the jury to see them. During the videotaped deposition, experts should continually envision a jury behind the camera. This does not mean that the expert must look into the camera when answering questions, but the answers and mannerisms should be tailored as if the jury were present. Practice will help the expert behave during the deposition as they expect to in the court room.

### **Video performance warnings**

The camera amplifies, magnifies, and distorts. For example, if a deponent makes quiet, obnoxious sounds during the deposition, the sounds become loud and may become obnoxious when the video is played back. An expert's distracting mannerisms, no matter how small, will become apparent and distracting. Shuffling paper, flicking of a pen, and rubbing hands together are frequent nervous habits that distract juries. On camera, the excessive mannerisms will distract from the content of the expert's testimony because the camera exaggerates such mannerisms.

As the deposition wears on, fatigue sets in and it becomes more difficult to maintain positive body language and an authoritative tone of voice. Ask for rest breaks if needed. As the deposition stretches on, experts should frequently assess their own level of energy. One sign of growing fatigue is one's placement in their chair. As fatigue sets in, deponents have a tendency to slide their haunches forward in their seat and slump back. In this posture, elbows are no longer placed on the edge of the table and the arms usually drape over the body. This posture is less commanding and an expert's answers will appear less authoritative on camera. One way to avoid this is for witnesses to keep their tail as close to the back of the seat as comfortable during the entire videotaped session. Doing this keeps the body perched forward and appears more confident. If an expert becomes aware of growing fatigue, or notices his or her placement in the seat shifting forward to the edge, the expert should feel

no hesitation to request rest breaks.

During video depositions, an expert should avoid excessive pauses because the length of the pause is captured on the video for view by the audience. In traditional transcribed depositions, pauses do not have a significant impact on a jury since only the statements made during the deposition are recorded on paper. But in video depositions, the effect of a pause is greatly exaggerated. Juries infer from on-camera pauses that the expert is unsure of his or her answers or that the expert is making up the responses while answering the questions. While an expert should give all of the thought necessary to answer the questions, the expert should make efforts to move more quickly through the thought process during a video deposition than they might in a traditionally transcribed deposition.

An expert should always avoid arrogance or argumentativeness in any deposition. But this is even more important for video depositions where small expressions or slight changes in tone of voice may indicate these type of negative responses. What may come across as a simple short or curt answer on paper may transform into being more aggravated when accompanied by a sneer or dismissive hand gesture on video. These negative displays of callousness or haughtiness are unappealing to a jury and may have a destructive impact upon the case.

### **Conclusion**

For experts who seek to expand their practice as expert witnesses for trials, it is essential that they prepare themselves to perform well during depositions. This is also true for veteran experts that have been testifying in trials for many years. Improved performance in depositions will lead to a higher number of referrals and a reputation as an effective expert witness amongst trial lawyers. With the increasingly number of video-taped depositions, expert witnesses should prepare and adjust their performances accordingly.

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He regularly speaks on numerous topics such as depositions, cross and direct examinations, jury selection, witness preparation, opening state-

ments, closing arguments, case strategy, alternative dispute resolution, and business development, to name a few.

Dave is a founding partner of the business litigation firm Markowitz, Herbold, Glade & Mehlhaf, P.C. He shepherded the firm from its beginnings as an ambitious two-attorney litigation shop to its present status as one of the premier business litigation firms in the region.

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