

VOIR DIRE. FROM THE FRENCH, MEANING 'TO SPEAK THE TRUTH.'

Qualifying the Expert Witness: A Practical Voir Dire

Gil I. Sapir, JD, MSc.*

Lawyers rarely do more than minimally review the qualifications of the expert and verify the facts on which the expert conclusions are based.' The voir dire examination is typically based upon perfunctory questioning about institutional affiliation and publications. The reason for this limited inquiry is simple: most lawyers and judges lack the adequate scientific background to argue or decide the admissibility of expert testimony.'



This article will briefly discuss the basic practical principles of qualifying a witness for expert testimony. An understandable, realistic theory and utilitarian method for expert witness voir dire is provided. The sample voir dire questions are constructed to obtain that objective^{2,3} — get the witness qualified.

BASIS AND FUNCTION OF EXPERT WITNESS

The expert witness' existence is created and perpetuated by the legal system. But for the Rules of Evidence, consulting and testimonial evidence would not exist. A simplified restatement of Federal Rules 701–706 (Figure 1) is that a qualified expert may give his opinion to help the court understand evidence, or to establish a fact in issue. States that have not adopted the Federal Rules of Evidence generally have similar rules or statutes governing expert witness qualifications and testimony.

The expert witness performs two primary functions: 1) the scientific function — collecting, testing, and evaluating evidence and forming an opinion as to that evidence; and 2) the forensic function — communicating that opinion and its basis to the judge and jury. A general rule of evidence is that witnesses may only testify to what they have personally observed or encountered through their five senses.

CATEGORIES OF EXPERT WITNESS

An expert may be used in basically two different capacities — consultation or for testimony. Consulting and testimonial witnesses are the basis for expert witnesses. They are derived from five general categories of expertise.

1. **Lay people:** common sense and life long experience.
2. **Technician/examiner:** limited and concentrated training, applies known techniques, works in a system and taught with the system [e.g., investigator and supervisors (observers and viewers)]. The technician is generally taught to use complex instruments (gas chromatographer, infrared spectrophotometer, mass spectrophotometer) or even “simple” breath alcohol testing equipment as “bench operators,” who have only a superficial understanding of what the instrument really does, and how the readout is generated. “Bench operators,” who qualify as expert witnesses, are not competent to explain the instrumentation used unless it is established that they received the training and education necessary to impart a thorough understanding of the underlying theories.⁴
3. **Practitioner:** material and information analysis and interpretation.
4. **Specialist:** devoted to one kind of study or work with individual characteristics.
5. **Scientist:** conducts original empirical research, then experiments to verify the validity of the theory; designs and creates instrumentation and applied techniques; is published in own field with peers; and advances his field of knowledge.

A consulting expert is a person who has been retained or specifically employed in anticipation of litigation or preparation of trial, but who will not be called at trial. The identity, theories, mental impressions, litigation plans, and opinions of a consultant are work product and protected by the attorney-client privilege.⁵

A testimonial expert is retained for purposes of testifying at trial. The confidentiality privilege is waived and all materials, notes, reports, and opinions must be produced through applicable discovery proceedings. If an expert relies on work product or hearsay as a basis for their opinion, that material must be disclosed and produced through discovery.

STANDARD OF REVIEW: “DAUBERT TRILOGY”

Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has expertise with the subject matter of the witness’ testimony. The standard of review and criteria for expert witness testimony has been codified by three cases, commonly known as the “Daubert Trilogy.” These cases consist of *Daubert v. Merrell Dow Pharmaceuticals Inc.*,⁶ *General Electric v. Joiner*,⁷ and *Kumho Tire Co., Ltd. v. Carmichael*.⁸

The *Daubert* standard of for evaluating scientific evidence is based on reliability and the *Daubert* test is relevance for “good science.” The reliability prong of scientific evidence is: 1) whether the scientific theory can be (and has been) tested; 2) whether the scientific theory has been subjected to peer review and publication; 3) the known or potential rate of error of the scientific technique; and 4) whether the theory has received “general acceptance” in the

SIMPLIFIED RESTATEMENT OF FEDERAL RULES 701–706

Rule	Explanation
701	<i>Lay Opinion:</i> If the witness is not an expert, opinion is admissible only when it is 1) rationally based on perceptions, and 2) helpful to the trier of fact.
702	<i>Testimony by Experts:</i> Expert opinions may be admissible if 1) the testimony assists the trier of fact, and 2) the witness is qualified as an expert.
703	<i>Bases of Opinion Testimony by Experts:</i> Expert opinion may be based on facts or data 1) actually seen or heard by the expert or 2) communicated to him at or before the hearing. Admissibility of the facts or data is not essential if typically relied on in this field.
704	<i>Opinion on Ultimate Issue:</i> An expert may express an opinion which 1) addresses an ultimate issue of fact, but opinions or inferences regarding the mental state of the accused are reserved for the trier of fact, and 2) when that mental state is an element of the crime charged or a defense to that crime.
705	<i>Disclosure of Facts or Data Underlying Expert Opinion:</i> An expert need not provide facts supporting the reason for his opinion unless 1) the court so requires, or 2) asked on cross examination.
706	<i>Court Appointed Experts:</i> The court 1) may issue an order to show cause as to why an expert should not be appointed, 2) may request nominations of an expert by parties, 3) may appoint an expert whether or not the parties agree to that expert, if the expert consents. The witness shall be informed of his duties 1) in writing, 2) a copy of which is filed with the court. The witness shall communicate his findings to the parties, and 1) may be deposed, 2) may be called to testify, 3) may be cross examined, and 3) shall be paid as the court directs. The jury’s knowledge of the court appointment is left to the discretion of the court. This rule does not limit parties from calling other experts.

Figure 1.

scientific community.⁹ In evaluating the second prong (relevance), trial courts must consider whether the particular reasoning or methodology offered can be properly applied to the facts in issue, as determined by “fit.” There must be a valid scientific connection and basis to the pertinent inquiry.¹⁰

*General Electric v. Joiner*⁷ upheld the trial court’s “gatekeeping” function, announced in *Daubert*, to determine the admissibility of expert witness testimony absent an abuse of judicial discretion.

*Kumho Tire Co., Ltd. v. Carmichael*⁸ held *Daubert* applies to all expert evidence and testimony regardless if it is “scientific” in nature. One of the underlying assumptions is that juries tend to believe almost anything the professed expert says, therefore, judges “should protect impressionable jurors from experts who lack objective credibility.”¹¹ Accordingly, a judicial “gatekeeping” function under *Daubert* is to limit abuses of FRE 702.

QUALIFICATIONS AND COMPETENCY REQUIREMENTS

The witness must be competent in the subject matter. They may be qualified through knowledge, skill, practical experience, training, education, or a combination of these factors. Minimally, the expert witness must know underlying methodology and procedures employed and relied upon as a basis for the opinion. The background knowledge includes state of art technology, literature review, and experience culminating in an opinion based upon a reasonable degree of scientific certainty. However, there is no absolute rule as to the degree of knowledge required to qualify a witness as an expert in a given field. Once competency is satisfied, a witness’ knowledge of the subject matter affects the weight and credibility of their testimony.

Reliance on the person’s resume or curriculum vitae for an appropriate voir dire is problematic. Resumes and curriculum vitae too frequently consist of superficial self-serving historical embellishments and highlights of professional achievements, accolades, and accomplishments. They are designed and intended to appear impressive through a well written linguistic and promotional presentation. Unfortunately, some expert witnesses prevaricate on their qualifications. Some experts blatantly misstate and exaggerate their qualifications, to the point of perjury — this is true of state and federal government, as well as defense witnesses. The vast majority of witnesses testify truthfully. However, the “mountebanks” are too numerous to suggest that it is a remote occurrence.

The moving party must establish the expert’s competency and knowledge in the profession and field (not experience, education, or specialized training) subject to judicial approval, through an examination of the expert’s credentials. The review process is conducted through a voir dire examination. Voir dire is from the French language meaning “to speak the truth.” The term is used in two contexts relating to trials: first, the prospective jury is voir dired by the attorneys to determine their qualifications, and second, after the proponent of an expert witness asks questions of the witness to bring out the person’s qualifications, the opposing attorney is allowed to voir dire the witness to bring out matters that might prevent his qualification as an expert. A witness is not deemed an expert until so qualified as such by the court.

The importance of a proffered expert’s testimony cannot be understated, which is a reason proper implementation of the voir dire process is paramount. Voir dire creates the standard for an expert witness’ testimony and credibility. It is the first and foremost part of any examination process. It is the judge and jury’s first impression of the witness. Neither the movant nor witness must take voir dire for granted or the proffered witness will not be properly qualified. Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has expertise with the subject matter of the witness’ testimony.

Neither party should stipulate to the witness’ credentials. An offer of stipulation to the expert’s credentials is because the expert is marginally qualified — not to save time. The voir dire can be made to sound impressive, but without substance to support qualifications and credentials. A proper qualifying voir dire should be able to survive a meticulous cross-examination of the proffered expert witness.

If there should be a stipulation regarding the expert’s credentials, the judge should be requested to recite the stipulation using the witness’ biographical statement. The movant should still have the curriculum vitae or resume placed into evidence to avoid any confusion or misunderstanding about the expert’s credentials and qualifications.

Nothing is exempt from scrutinization or comment regarding the expert witness. Expert witness discovery relating to scientific evidence and associated testimony is controlled in part by the Federal Rule of Civil Procedure 26 (a)(2)(A),(B),(C), *Daubert v. Merrell Dow Pharmaceuticals Inc.*,⁶ state statutes, and local court rules. The Supreme Court’s decision in *Daubert* sought to reconcile the differences and confusion in the Federal Rules of Evidence (FRE 702, 703) pertaining to the foundation of an expert’s proffered opinion for scientific validity based upon the “Frye Test.”¹²

According to Federal Rule 26(2-b), before an expert witness can offer testimony, that person must provide a written summary opinion discussing the testimonial subject matter, substance of facts and opinion, basis for opinion, reports, a list of all publications authored by the witness in the preceding ten years, a record of all previous testimony including depositions for the last four years, disclosure statement, report signed by the expert, and disclosing attorney. The disclosure statement generally includes the following information regarding the expert: qualifications; scope of engagement; information relied upon in formulating opinion; summary of opinion; qualifications and publications; compensation; and signature of both expert and disclosing attorney. Even though many states have adopted the Federal Rules of Civil Procedure, including Rule 26, parties should consult their own jurisdiction regarding rules of discovery and corresponding requirements.

Once disclosure of the expert witness is made, under FRCP 26(e)(1), a continuing duty exists to provide additional and corrective information. The movant must provide complete current information on the expert witness. If there is non-compliance, opposing counsel will undoubtedly ask what the witness is trying to hide.

Salaries, fees, and compensation affect the weight and credibility of an expert witness’ testimony — not qualifications or admissibility of the subject matter.

In *Daubert II* the court wrote, “That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist’s normal work place is the laboratory or field, not the courtroom or the lawyer’s office.”^{13,14} Therefore, compensation is a relevant area of cross examination after the person is permitted to testify.

Although prior judicial recognition of an expert’s qualifications is normally a significant factor in the court’s evaluation of finding the witness qualified as an expert, it is not the determining factor. Assumptions of this nature based upon presumptions are not reliable. Furthermore, deposition testimony is not the equivalent to judicial recognition of qualifications or previous court testimony. A deposition is a statement made orally by a person under oath before an examiner, commissioner, or officer of the court, but not in open court, and reduced to writing by the examiner or under his direction. Depositions are used as a discovery device and not generally subject to the same trial evidentiary standards.

The imprimatur of a governmental agency, laboratory, office, or title does not automatically make either the results or witness’ testimony inherently trustworthy, credible, and reliable. A shocking and explosive example of inadequacies, misrepresentations, flawed science, doctored laboratory reports, posed evidence, woeful investigative work, and false testimony was the epitomized by U.S. Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases, April, 1997*. The principle findings and recommendations of the Justice Department’s report addressed “significant instances of testimonial errors, substandard analytical work, and deficient practices” including policies by the Federal Bureau of Investigation Laboratory.¹⁵

“The (517 page Inspector General’s) report provided plentiful evidence of pro prosecution bias, false testimony and inadequate forensic work ... No defense lawyer in the country is going to take what the FBI lab says at face value anymore. For years they were trusted on the basis of glossy advertising.”¹⁶ Similar revelations were exposed in 2003 concerning the Houston Police Department Crime Laboratory¹⁷ and are probably applicable to other crime laboratories throughout the country. A witness is not an expert merely because the term is part of their title or job description for example, Special Agent (FBI), Drug Recognition Expert or Scientist. The name “special” or “expert” or “inspector” itself gives an instantaneous indicia and aura of authority and respect which implies a specific expertise beyond normal employment (law enforcement/ police) qualifications to the trier of fact.

Police officers who are trained to “identify drug impaired drivers” determined an authoritative, descriptive title was necessary. According to The DRE (Newsletter), police officers engaged in this law enforcement activity may call themselves drug recognition specialists, technicians, and evaluators.¹⁸ The International Association of Chiefs of Police (IACP) decided to use the term “technician.” However, on March 25, 1992, the Technical Advisory panel to the IACP Highway Safety Advisory Committee voted to change and use the self-proclaimed term “Drug Recognition Expert.”¹⁹ The term

“expert” is currently used in the latest training materials.²⁰ If DREs call themselves experts; it is problematic. Also, fraudulent claims of professional status and association with an organization that owns a federal registered trademark subjects the infringer to injunctive relief and damages.²¹

A debilitating invitation to blatant accusations and findings of motive, interest, and bias exists if the proffered witness is required to testify based upon their job description and employment duties. This is a common problem with government employees.²² Claims of intellectual dishonesty and inherent prejudice may be insurmountable. An expert witness cannot have an interest in the outcome of the trial. An expert may be qualified, but not competent to render a credible opinion.

“In trial, harm to litigants results from improper qualification of an incompetent expert or failure to qualify a competent expert ... The incompetent expert is a vehicle for unreliable proof, while the later denies the opportunity to present credible evidence.”²³ “In bolstering the credibility of an expert witness, attorneys will select, as circumstances allow, witnesses with significant trial experience. Absent such a source, attorneys select from the community rather than classified advertisements. Trial tactics rather than reliability become the impetus for the selection of experts. Such tactics may influence selection of the less reliable witness.”²⁴

Once competency is satisfied, a witness’ knowledge of the subject matter affects the weight and credibility of their testimony. Simply ask, is the proffered witness qualified? Is the witness competent? If the judicial determination is yes, only then may the witness provide opinion evidence.

In addition to credentials and competency, the subject matter of an expert witness’ testimony must be legally and factually relevant. There must also be a nexus between the scientific theory being proffered and the evidence at trial. Failure to meet these threshold criteria will preclude or bar the expert’s proffered testimony. Next, there must be a finding the proposed testimony will affect the validity of the evidence.

VOIR DIRE QUESTIONNAIRE

An effective, elementary, practical outline questionnaire for qualifying a person as an expert witness is provided in Figure 2.

CONCLUSION

Parties should not rely upon or use the person’s resume or curriculum vitae as the voir dire questionnaire for reasons presented in this article. This article’s simple, thorough voir dire questions can be very effective. The suggested subject order and format of core questions must be tailored to each case. However, discretion should be exercised to keep the voir dire simple. The voir dire is not perfected until the last question is asked. The examination can be developed in a clear and concise manner, using simple, short, single fact questions. The movant and witness must keep their objective in mind. Qualify the person as an expert witness.

Disclaimer

This article is intended to provide general information; it does not provide legal advice applicable to any specific matter and should

QUALIFYING QUESTIONS FOR THE EXPERT WITNESS

(SAMPLE EXPERT WITNESS VOIR DIRE)

1. Name.
2. Occupation.
3. Place of employment.
4. Present title.
5. Position currently held.
6. Describe briefly the subject matter of your specialty.
7. Specializations within that field.
8. What academic degrees are held and from where and when obtained.
9. Specialized degrees and training.
10. Licensing in field, and in which state(s).
11. Length of time licensed.
12. Length of time practicing in this field.
13. Board certified as a specialist in this field.
14. Length of time certified as a specialist.
15. Positions held since completion of formal education, and length of time in each position.
16. Duties and function of current position.
17. Length of time at current position.
18. Specific employment, duties, and experiences (optional).
19. Whether conducted personal examination or testing of (subject matter/ person/instrumentality).
20. Number of these tests or examinations conducted by you and when and where were they conducted.
21. Teaching or lecturing by you in your field.
22. When and where your lecture or teach.
23. Publications by you in this field and titles.
24. Membership in professional societies/associations/organizations, and special positions in them.
25. Requirements for membership and advancement within each of these organizations.
26. Honors, acknowledgments, and awards received by you in your field.
27. Number of times testimony has been given in court as an expert witness in this field.
28. Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.
29. Put curriculum vitae or resume into evidence.
30. Your Honor, pursuant to (applicable rule on expert witness), I am tendering (name) as a qualified expert witness in the field of _____.

Figure 2.

not be relied upon for that purpose. Interested parties should review the laws with their legal counsel to determine how they will be affected by the laws.

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Gil I. Sapir, Forensic Science Consultant and Attorney; B.Sc., Microbiology and Biology, Colorado State University (1976); J.D., IIT/Chicago-Kent College of Law (1980); M.Sc., Criminalistics, University of Illinois-Chicago (1987). He has lectured, testified, and written extensively on scientific evidence. Mr. Sapir maintains his office in Chicago, Illinois.