Getting It In: Expert Testimony (CLE)

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2010 Expert Witness Rule Amendments

By Gregory P. Joseph – April 28, 2011

Effective December 1, 2010, Federal Rule of Civil Procedure 26(a)(2) and (b)(4) are substantially amended. These amendments govern the disclosure of expert opinion, and they entail three principal practice changes.

Communications Between Counsel and Retained Experts
The 2010 amendments would close the door to almost all discovery of communications between counsel and retained experts. This reverses the result under the 1993 amendments to Rule 26(a)(2)(B), which were construed as allowing discovery of all communications between counsel and expert relating to the subject matter of the litigation, for two reasons. First, the 1993 version of Rule 26(a)(2)(B) mandated that the retained expert’s report contain all of “the data or other information considered by the witness in forming” his or her opinion. “Other information” was interpreted to include everything communicated by counsel to expert. See, e.g., Reg’l Airport Auth. v. LFG, LLC, 460 F.3d 697, 716 (6th Cir. 2006).

Second, the 1993 Advisory Committee Note observed that “[g]iven the obligation of disclosure, litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed.” Work product protection, to the extent it previously existed, vanished.

The 2010 amendments reverse this result. First, Rule 26(a)(2)(B)(ii) is amended to eliminate the phrase “data or other information.” It now reads, “the facts or data considered by the witness in forming them [the opinions].” The accompanying committee note explains that this amendment “is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.” Because this is an amendment to the report requirement, by definition, Rule 26(a)(2)(B)(ii) applies only to counsel’s communications with experts who must file a Rule 26(a)(2)(B) report.

Second, Rule 26(b)(4)(C) is amended to confer work product protection (which is set forth in Rule 26(b)(3)) on most communications between attorneys and retained experts.

Retained and Unretained Experts
Note that Rule 26(b)(4)(C)’s protection for communications between counsel and expert (like the amendment to Rule 26(a)(2)(B)(ii)) applies only to communications with experts from whom Rule 26(a)(2)(B) reports are required—that is, retained experts or party employees who regularly provide expert testimony on behalf of their employer. Amended Rule 26(b)(4)(C) does not
protect communications between lawyers and witnesses who provide expert testimony but are not required to furnish a report (non-reporting experts) because they were not “retained or specially employed to provide expert testimony” or their duties as party employees do not “regularly involve giving expert testimony.”

Exceptions
The only unprotected communications between attorneys and reporting experts are those relating to compensation, facts or data provided by counsel and considered by the expert, and assumptions provided by counsel and relied on by the expert.

Compensation. The committee note clarifies that “compensation” includes potential additional work for the expert, as well as compensation for work done by assistants, associates, and affiliated organizations. Presumably, all other financial incentives are freely discoverable, as “[t]he objective is to permit full inquiry into such potential sources of bias.”

“Considered” versus “Relied On.” There is a world of difference between facts or data “considered” (Rule 26(a)(2)(B)(i)) and assumptions “relied on” (Rule 26(a)(2)(B)(ii)), as those quoted words have been interpreted in the jurisprudence of Rule 26(a)(2). “Considered” is the word used in the 1993 version of Rule 26(a)(2)(B)(ii), and, together with the now-stricken “other information,” it was read as requiring disclosure of all communications between attorney and expert “related to the subject matter of the litigation.” See Karn v. Ingersoll Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (noting that the Advisory Committee in 1993 substituted “considered” for the more restrictive “relied upon” in an earlier draft of rule 26(a)(2)(B)).

Under the 2010 amendment, “considered” is confined to “facts or data” provided by counsel but does not apply to counsel-supplied “assumptions” (those must be “relied on”). Therefore, all facts or data communicated by counsel relating to the subject matter of the litigation must be identified. The committee note stresses that “the refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” Some of us argued years ago that “data or other information” could, and should, be read to the same effect because “[d]ata and ‘information’ connote subjects that are factual in nature, not ephemera like ‘mental impressions, conclusions, opinions or legal theories’ of the sort protected by Rule 26(b)(3).” Joseph, Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 104 (1996). While some decisions agreed with that approach, the overwhelming majority rule was to the contrary.

The committee note also emphasizes that “the intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients,” and the facts or data need only be identified—“further communications about the potential relevance of the facts or data are protected.”

In contrast, assumptions furnished by counsel are discoverable only if the expert actually relied on them in forming his or her opinion.
“Regardless of the Form of the Communications”
One of the textual problems with the former Rule 26(b)(3) is that it affords work product protection only to “documents and tangible things.” Work product takes many forms that are non-documentary and intangible, including discussions. For these, litigants must rely on common law protection, derived from *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). See *6 Moore’s Federal Practice* § 26.70[2][c] (3d ed. 2010). Rule 26(b)(4)(C) explicitly covers the waterfront, extending to all forms of communication.

“A Party’s Attorney”
Parties often have many attorneys, including in-house counsel, outside general counsel, and counsel in other cases dealing with the same or similar subject matters. The committee note to Rule 26(b)(4)(C) stresses that the work product protection it recognizes “should be applied in a realistic manner,” generally extending to these lawyers, each of whom is “the party’s attorney,” albeit not necessarily before the court, and observes that “[o]ther situations may also justify a pragmatic application of the ‘party’s attorney’ concept.”

The Discoverability of Draft Expert Reports
The previously discussed change to Rule 26(a)(2)(B)(ii) (“the facts or data considered by the witness”) is one of the two amendments proposed to protect draft expert reports, as reflected in the excerpt from the committee note quoted above. The second, direct approach is new Rule 26(b)(4)(B), which protects drafts of any report required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

Non-Reporting Experts
Under Rule 26(b)(4)(B), work product protection extends to written or otherwise “recorded” drafts of the new Rule 26(a)(2)(C) disclosures (discussed below), which summarize the testimony of experts who are not obliged to file a 26(a)(2)(B) report. Query whether audio recording one’s conversations with a non-reporting expert concerning his or her opinion suffices to place the conversations within the work product protection afforded by Rule 26(b)(4)(B), the issue being whether that conversation constitutes a “draft.”

Impact on Discovery and Cross- Examination
The proposed committee note discusses the breadth of work product protection afforded by Rules 26(b)(4)(B) and (C): (1) The protection extends to all forms of discovery, including depositions; (2) there is no other limit on exploring the foundation for expert opinion; and (3) one must show substantial need to obtain additional discovery.

Privilege Implications
Rules 26(b)(4)(B) and (C) address only work product protection, but they have potential attorney-client privilege repercussions. One effect of the 1993 amendments to Rule 26(a)(2)(B) was to make waiver an unavoidable cost of putting an expert forward to testify. Because communications between counsel and expert, and draft expert reports, were subject to disclosure and discovery, no plausible expectation of confidentiality could be asserted. Therefore, no viable claim of attorney-client privilege could be asserted with respect to those communications.
The amendments to Rules 26(b)(4)(B) and (C), however, reverse the expectation. It is true that, under Rules 26(b)(3)(A) and (B), an opposing party may obtain disclosure of work product on a showing of “substantial need” and an inability, “without undue hardship, [to] obtain their substantial equivalent by other means.” The committee note that accompanies the amendments contemplates that “[i]t will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert’s testimony.” Certain communications between attorney and expert may again be subject to a reasonable expectation of privacy and fall within the umbrella of attorney-client privilege.

**Disclosure Requirements for Non-Reporting Experts**

Prior to the 2010 amendments, there were no mandatory disclosure requirements for non-reporting experts. The report requirement of Rule 26(a)(2)(B) was confined to any witness “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” If anyone else was to provide expert testimony in a case—a treating physician, an employee whose duties did not regularly involve giving expert testimony, a third-party witness—no report was required. Instead, under Rule 26(a)(2)(A), the proponent of the testimony was simply required to “disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” The absence of any required disclosures for non-reporting experts lent itself to the prospect of trial by ambush and to district judges occasionally imposing disclosure requirements on an ad hoc basis. The 2010 Rule 26(a)(2)(C) mandates counsel-prepared disclosures for non-reporting experts. This requirement is similar in substance to the pre-1993 version of Rule 26(b)(4)(A), which permitted expert discovery primarily by means of interogatories.

**Keywords:** litigation, trial evidence, expert witnesses, Federal Rules of Civil Procedure

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**Endnotes**

18. See United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969) (“While the practicalities of a conspiracy trial may require that hearsay be admitted ‘subject to connection,’ the judge must determine, when all the evidence is in, whether . . . the prosecution has proved participation in the conspiracy. . .”).
22. United States v. Joe, 8 F.3d 1488, 1493 (10th Cir. 1993).
23. Brill v. Lante Corp., 119 F.3d 1266, 1271 (7th Cir. 1997).
Identifying and Retaining an Expert Witness

By James W. Creenan

One of the most critical pretrial litigation tasks involves the identification and retention of an expert witness. In many situations, the task may be easy due to the limited number of qualified experts, making identification an easy task. In other cases, there may be so many possible experts that the selection process will seem unmanageable.

Whether you require an expert for a simple slip-and-fall case or a complex multi-party construction dispute, the task of identifying and retaining an expert can yield substantial rewards at time of trial if you follow several simple steps. Although your case or your client may require special handling, the following pointers will get your expert selection off to the right start.

Preliminary Considerations

- **Start Early.** You otherwise may find that your opponent has already selected the best expert.
- **Before beginning your search, be certain that you know the rules.** Before contacting or even considering an expert, you must know and understand the applicable rules. Your starting point should be Federal Rule of Evidence 702, which governs the admissibility of expert testimony, and Federal Rule of Civil Procedure 26(a)(2)(B), which requires disclosure of the expert's identity and issuance of a written report.
- **Understand the law of experts in your jurisdiction.** In the federal courts, it is no longer enough to understand just Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) and Kumho Tire v. Carmichael, 526 U.S. 137 (1996), because the circuit and district courts have continually addressed and refined the standard for admission of expert testimony. In state courts, your approach may vary depending on whether Daubert or Frye is the controlling standard. There is no substitute for mastering recent developments in your jurisdiction.
- **Define the role your expert will play during discovery and trial.** Do you simply need a credible report or is there a certainty that deposition or trial testimony will be required? In states requiring a Certificate of Merit for professional liability claims, the certifying professional may not need to be your testifying witness. If the need for assistance is to provide technical assistance during discovery and trial, then your expert's role would be as a non-testifying consultant. It is critical to define the proposed expert's role prior to making an engagement.
- **Understand that every word you communicate might be discoverable.** You might be surprised to learn that your work product, if in the hands of a testifying expert, may be considered discoverable. Although Rule 26(b)(3) shields work product from discovery, most federal courts have required disclosure of work product shared with the expert in preparation of her opinion. By extension, you should assume that your communications - both oral and especially written - to the expert may be deemed discoverable. Therefore, your written communications must be neutral and should only communicate objective facts.

Finding Experts

- **Research the industry or profession.** Before selecting an expert, you must understand the accrediting association or organization that regulates the profession or industry. Each profession or industry has governing bodies that create standards, administer examinations and accreditations, and act as the best source of technical information.
- **Discuss the potential retention with your client.** Your client may be the best source of recommendation for an expert - particularly where a specialist's opinion could carry more probative weight. The client should also be involved in the selection process for pragmatic reasons, such as guideline compliance, reputation in the field, and business conflicts.
- **Check with the experts.** Your best source of referrals in a small industry might be your initial crop of expert candidates, who will be more knowledgeable of persons with specialized expertise in the field. Consider asking the question, "If you were getting sued in this matter, what person from your profession would you [the expert] want to testify on your behalf?" The answer just might provide your leading candidate.
- **Consider the expert's probative weight.** Once you have determined that the candidate is qualified to provide the required opinion, you should next determine how much weight that opinion will carry. Is your candidate the chairperson of the committee that published the applicable governing standards? Imagine your expert in a room with her peers discussing her opinions on your case. You should know her qualifications and reputation in the field, and the ideal expert will command the attention of other highly qualified professionals.
- **Do your own research on potential experts.** A quick Google search may help to narrow the universe of qualified experts to a manageable number. You may be able to red flag some candidates based on your search. Other online databases such as those maintained by trial lawyer associations will record the expert's testimonial and trial experience. Also reference the YLD Litigation Committee Newsletter for more online tips at: http://www.abanet.org/yld/litigation/Winter2005Newsletter.pdf
- **Consider utilizing an expert referral service.** Many fee-based services will do the leg work of identifying potential experts. The service will request basic information about the case and your expert needs and typically will provide resumes, also known as "curriculum vitae" or "CVs," of several qualified individuals.
- **Compare Your Options.** By this point, you should be ready to complete your search. Things you should have and know about your potential experts:
  - Current CV
  - Past cases
  - Current cases
  - Prior reports
  - Prior testimony
  - References
  - Fees/Rates
A side-by-side comparison will reveal each candidate's relative strengths and weaknesses.

- **Identify Ethical Conflicts and Business Conflicts.** You should disclose the involved parties and known or likely experts to each candidate. The potential expert should not be involved adversely in other proceedings as an expert, either directly with the parties or indirectly on substantially similar issues. The potential expert should not have any apparent bias due to past business dealings or current competitive circumstances. The expert should have adequate time to devote to the engagement.

- **Before making a final selection, take the time to meet with the potential expert.** You must assess the potential expert's ability to communicate complex concepts to a jury. An in-person meeting will allow you to see what the jury will see and weigh the expert's credibility and persuasiveness. A key part of your evaluation depends on your confidence in the expert's ability to tell your client's story to a jury. It is critical to avoid a candidate that looks great on paper but comes off as an arrogant jerk in a conversation.

### Retaining the Expert

- **Obtain client approval if necessary.** First and foremost, the client should agree with your selection and the client's points of view must be factored into the decision.

- **Communicate your decision to the expert.** After a final decision is made, you should confirm the engagement with a phone call to the expert and a simple confirmatory letter. The phone call should confirm what materials the expert is to review and the letter should provide the available materials, indicating that additional materials will be forwarded when received. Understand that the letter may be discoverable, so it is imperative to avoid any suggestion of the expert's expected opinion or conclusion.

- **Agree on a clearly defined scope of work and budget.** Before confirming retention, it is a good idea to discuss again the expert's anticipated fees based on the scope of the engagement. Will the expert require a comprehensive engineering study of the failed construction project? Or, will the expert be able to respond to your opponent's opinions by referring to the project documents and performing a mere record review? A reasonable hourly rate will not save your client from an over-zealous expert that spends every waking hour thinking about the case. The expert should agree to alert you if additional testing or other experts will be required to complete his opinion.

- **Lay the ground rules for a productive engagement.** An eager expert might be prone to provide a preliminary written report before receiving all pertinent information, while a seasoned expert knows that all information (documents, deposition testimony, and other reports) should be reviewed prior to arriving at any opinion and memorializing it in writing. Your expert should understand that you do not require any work, including preparation of a report, until you direct so.

- **Develop an agreed-upon schedule based on case deadlines.** The expert should be aware of the case's major deadlines and should agree on a schedule for delivering the opinion.

- **Close the Deal.** If your candidate cannot meet your expectations after going through this process, then you should find another expert. In all likelihood, by the time you reach this point, you have identified and retained a well-qualified expert that will add value to your client's case.

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Qualifying the Expert Witness: A Practical Voir Dire

By Gil I. Sapir, JD, MSC Article Posted: January 02, 2007

Lawyers rarely do more than minimally review the qualifications of the expert and verify the facts on which the expert conclusions are based.¹ 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.¹

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 objective²,³— 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.

SIMPLIFIED RESTATEMENT OF FEDERAL RULES 701–706

<table>
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<th>Rule Explanation</th>
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<td>701 Lay Opinion: 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.</td>
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<tr>
<td>702 Testimony by Experts: Expert opinions may be admissible if 1) the testimony assists the trier of fact, and 2) the witness is</td>
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qualified as an expert.

703 Bases of Opinion Testimony by Experts: 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 Opinion on Ultimate Issue: 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 Disclosure of Facts or Data Underlying Expert Opinion: 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 Court Appointed Experts: 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

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,”
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 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\textsuperscript{18} 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.”\textsuperscript{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 are 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., 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 noncompliance, 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 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 principal 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 Investigative Laboratory.

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.” Similar revelations were exposed in 2003 concerning the Houston Police Department Crime Laboratory 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/policy) 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. 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." The term "expert" is currently used in the latest training materials. 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.\textsuperscript{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.\textsuperscript{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 qualifications 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.\textsuperscript{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."\textsuperscript{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.

**QUALIFYING QUESTIONS FOR THE EXPERT WITNESS**
*(SAMPLE EXPERT WITNESS VOIR DIRE)*

1. Name.
2. Occupation.
3. Place of employment.
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**

**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 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.

References


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Working With Experts

By Bridget K. O’Connor

As with many other aspects of litigation, one of the best ways to approach working with an expert is to start by thinking about the end of the process and then tailor your work in the earlier stages of the case to suit that end result. So, if you expect that the expert you have retained will testify at trial, your approach to the preparation stages will be different than if you know that only a written report will be needed under the circumstances. Similarly, if you have retained the expert as a consulting, rather than a testifying expert, the nature of your interactions with him or her over the course of the case likely will be very different. Other factors to think about in assessing the expected end result of the expert’s engagement include:

- the subject matter that the expert is being asked to address (i.e., scientific vs. accounting vs. behavioral);
- the nature of the fact evidence that the expert will have available for his or her analysis;
- and whether this expert is the only expert you intend to call.

Each of these considerations will shape the way that you communicate with the expert over the course of the case, the types of information that you provide to the expert, and the types and manner of analysis that you ask the expert to undertake.

While your approach to working with an expert should be driven by the desired end result, the key to a successful engagement is that your efforts with respect to the expert not be an afterthought. The most rewarding — and issue free — expert engagements will be those in which the attorney has thought out — in advance and from the beginning — what the expert’s role will be, what rules apply to the engagement, what methods of communication are appropriate under the circumstances, and any other factors unique to either the expert or the case that might aid or hinder the expert’s work in the matter.

The following points set forth certain common aspects of working with experts that you should consider at the outset of the engagement. This set of points is by no means exhaustive and each case will bring its own unique circumstances for you to consider, but these points should aid in beginning to think about the types of issues that may come up over the course of the case.

**Role of Expert.** Decide the role of the expert (or experts) in your case from the start. If you have identified a testifying expert, is there also a consulting expert with whom you will work to develop points behind the scenes? Federal Rule of Civil Procedure 26(b)(4)(B) provides that the facts, opinions and bases therefore of consulting experts can only be obtained as provided in Rule 35, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Be sure to identify which experts will serve in which capacities upfront keep the lines and methods of communication with each appropriate to their function to avoid being required to disclose information to your opponents that you did not intend to share.

**Know the Rules That Will Apply to Your Case.** Before you even speak with the expert that has been (or will be) retained in your case, be sure that you understand the applicable rules and case law governing the admissibility of expert evidence and the disclosure of information relating to the expert (including, but not limited to Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26(a)(2)(B)), as well as the law as to the admissibility of expert testimony (again, including but not limited to Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993), and Kumho Tire v. Carmichael, 526 U.S. 137 (1996)). These rules and standards should serve as the touchstone for your efforts in working with the experts — either in developing the kind of information and analysis that will satisfy the applicable tests for admissibility or in avoiding the potential pitfalls befalling excluded expert testimony.

**Have a Communications Plan.** Depending on the role you have determined that your expert will play in the case, and the rules applicable to that type of role, you and other attorneys or paralegals interacting with the expert should be aware of and adhere to a plan for the methods and protocol for communicating with the expert. The more visible your expert will be in the case (i.e., whether they will testify, issue a report, etc.), the more conscious and deliberate you should be with the manner in which you communicate with the expert (this goes for e-mails, telephone calls and messages, notes from meetings, providing documents to the experts, drafts of analyses and reports, etc.). A vital aspect of implementing this plan is to discuss it with the expert. Do not take for granted that the expert shares your understanding as to the discoverability of their notes, analysis or other materials, even if the expert is what you would consider to be an “experienced” expert.
Set the Ground Rules for the Case. Evaluate and enter into, if appropriate, an agreement with your opposing counsel as to the method, timing and limits on expert disclosure in your particular matter. While the disclosure of certain types of information may be required under the rules applicable to your case, you will often have the opportunity to craft your own rules of engagement when it comes to experts. Frequently, both sides will agree that certain limits on disclosure, or being more specific as to the requirements as to the disclosures that will be required, is beneficial to their interests. These agreements are most valuable when entered into early, so that you and the expert will be able to communicate at the early stages of the case with a clear understanding of what will and will not be provided to the other side at the end of the case.

Arm Your Expert. Having by now thoroughly reviewed the requirements for admissibility of expert testimony, you now will seek to provide the expert with the information from the case that will assist the expert in understanding the issues and performing his or her desired analysis. At this stage (and continuing through the conclusion of the analysis), you assess the information available in the case and identify the set or subset of information that should go to the expert to consider.

It is just as important to arm the expert with the information that might be considered less-than-helpful as it is to provide your expert with the information that will make your case. By providing this information to the expert early and fully, you allow the expert maximum time to process and analyze both sets of information and reduce the sting of any bad documents or potentially confusing or contradictory testimony. In deciding where to draw the line as to what information to share with the expert, consider the questions that an opponent will ask the expert at a deposition: “In reaching your opinion that X, did you consider Y?” “Would the expert’s analysis be incomplete or subject to criticism if he or she was not provided with a particular piece or set of information?”

Cost and time also will factor into the analysis as to how much information to provide the expert, and in what way. While it may be faster and easier to dump data or documents on the expert in broad swaths for him or her to review in the course of the analysis, doing so may be counterproductive to the client’s interests. Not only does having the expert (and/or his or her staff) review the materials in raw, un-culled format (particularly where the attorney has likely already reviewed and processed the information in some way) create unnecessary duplication of costs, but doing so also may prevent the expert from reaching the most important information and force him or her to spend precious time on merely processing rather than on the analysis.

You should also track any items sent to the expert to ensure that the expert will be able to comply with the applicable disclosure requirements down the line.

Let the Experts Help You Help Your Client. In addition to facilitating the expert’s affirmative analysis, the expert — and his or her expertise — also can play an invaluable role in offensive discovery by assisting you to determine what discovery the attorney should be requesting from the opposing party. Because the expert discovery phase often is staged at or around the time that fact discovery is concluding, this is an area where thinking and planning ahead will pay dividends. The scope and budget of a given matter may dictate certain limits on your ability to engage the expert fully on fact discovery, but to the extent that an expert has been retained early on, he or she can be one of the best resources for identifying what to ask for and how to ask for it.

Be Your Expert’s Toughest Critic. Though professional courtesy is the rule, you will help neither the expert nor your client by serving as a passive facilitator. You are in the best position to pressure test the expert’s analysis and should not hesitate to do so.

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1 This article is intended to be used in tandem with 101 Practice Series Article “Identifying and Retaining an Expert Witness” by James W. Creenan and “Taking an Expert Deposition” Mark Chalos.