



Managing Mental Health Experts

John R. Chamberlain, M.D.

Clinical Professor of Psychiatry

Associate Director, Program in Psychiatry and the Law

Parnassus Site Director, Residency Training Program

Associate Medical Director, Adult Outpatient Teaching Clinics

Department of Psychiatry and Behavioral Sciences

University of California San Francisco



Definitions

Expert Witness: “a person with specialized skill sets whose opinion may help a jury make sense of the factual evidence of a case.”

<https://www.expertinstitute.com/resources/insights/what-is-an-expert-witness/>

“Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier.”

“There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.”

Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

https://www.law.cornell.edu/rules/fre/rule_702

Definitions

Expert Witness: “a person who is a specialist in a subject, often technical, who may present his/her expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case.”

“It is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/her expertise, training and special knowledge.”

“If the expertise is challenged, the attorney for the party calling the ‘expert’ must make a showing of the necessary background through questions in court, and the trial judge has discretion to qualify the witness or rule he/she is not an expert, or is an expert on limited subjects.”

<https://dictionary.law.com/Default.aspx?selected=700>

Definitions

Reliability vs validity

	Reliability	Validity
What does it tell you?	The extent to which the results can be reproduced when the research is repeated under the same conditions.	The extent to which the results really measure what they are supposed to measure.
How is it assessed?	By checking the consistency of results across time, across different observers, and across parts of the test itself.	By checking how well the results correspond to established theories and other measures of the same concept.
How do they relate?	A reliable measurement is not always valid: the results might be reproducible, but they're not necessarily correct.	A valid measurement is generally reliable: if a test produces accurate results, they should be reproducible.

Legal Standards/Requirements/Qualities

Rule 702: Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Legal Standards/Requirements/Qualities

The factors expounded by the Daubert Court are:

- 1) Has, or can, the expert witness' technique(s) or theory(ies) be tested?
In other words, is it possible to challenge the expert witness' theory in an objective manner? Or, rather is the theory a subjective approach that is not able to be assessed for reliability?
- 2) Has the expert witness' theory or technique been subjected to publication and peer review?
- 3) What is the known or the potential error rate of the theory or technique when applied?
- 4) The existence (as well as the maintenance) of appropriate controls and standards; and
- 5) Has the theory or the technique been generally accepted within the scientific community.

Legal Standards/Requirements/Qualities

Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999) held the Daubert factors might be applicable to the assessment non-scientific expert witness testimony's reliability reliant on "the particular circumstances of the particular case at issue."

Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) the Daubert factors do not apply easily to expert witness testimony from a sociologist.

Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997) a lack of publication or peer review is not dispositive when the expert witness' opinion has the support of "widely accepted scientific knowledge."

Legal Standards/Requirements/Qualities

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995) are the expert witnesses were “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”

General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) holding that a trial court (in certain instances) “may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”

Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) held that testimony could be excluded when the expert witness failed to consider alternative, obvious reasons for the plaintiff's condition.

https://www.law.cornell.edu/rules/fre/rule_702

Legal Standards/Requirements/Qualities

Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) holding that the possibility there existed some causes which were not eliminated presented a question of the weight of the expert's testimony, as long as the most obvious causes have been considered and reasonably ruled out by the expert).

Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997) if the expert witness "is being as careful as he would be in his regular professional work outside his paid litigation consulting."

https://www.law.cornell.edu/rules/fre/rule_702

Legal Standards/Requirements/Qualities

Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1175 (1999) holding that "Daubert's general acceptance factor does not 'help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.'"

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) holding "some expert disciplines 'have the courtroom as a principal theatre of operations' and as to these disciplines 'the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.'"

Comparisons of Mental Health Providers

Psychiatry is the specialty within medicine which focuses on the diagnosing, treating and preventing mental, behavioral, and emotional disorders.

A psychiatrist is a physician (an M.D. or D.O.) who specializes in the diagnosis, treatment, and prevention of mental health (including substance use) disorders.

Psychiatrists complete:
Four years of medical school
Four years of residency
Possibly additional specialty training (i.e. fellowships)

Psychiatrists are qualified (based on their training) to evaluate both the mental and the physical facets of psychological problems.

Comparisons of Mental Health Providers

Psychologists assist a variety of individuals and are equipped to treat many types of issues.

Some people might speak with a psychologist due to longstanding depression, anger, or anxiety.

Alternatively, they may want assistance with a chronic condition which interferes with their life or physical health.

Other people might be experiencing short-term difficulties they want support in navigating (e.g. grief or feeling overwhelmed by their job).

Psychologists can administer assessments and tests including ones which are able to appraise intellectual skills, cognitive weaknesses and strengths, personality characteristics, neuropsychological function, and vocational preference and aptitude.

Comparisons of Mental Health Providers

Marriage and Family Therapists (a.k.a. LMFTs or MFTs) are mental health providers who are trained in psychotherapy as well as family systems.

MFT's are licensed to treat and diagnose both emotional and mental disorders in the context of couples, marriage, and family systems.

MFTs attend to the role of people in relationship networks (e.g. marriage, family, and other relationships).

MFTs have graduate level training (e.g. master's degree, doctoral degree) in the field of marriage and family therapy as well as a minimum of two years' clinical experience.

https://www.aamft.org/About_AAMFT/About_Marriage_and_Family_Therapists.aspx

Comparisons of Mental Health Providers

Licensed Clinical Social Workers (a.k.a. LCSW) are mental health providers who provide evaluation, intervention, counseling, and case management services to individuals experiencing social, family, mental, health, and/or medical issues.

In addition to considering an individual's emotional and psychological conditions, LCSWs examine environmental and social factors which affect the person's life.

As such, LCSWs are equipped to provide clients with community resources which can positively impact their clients' lives.

LCSWs may work in social service agencies, mental health facilities, school systems, hospitals, or private practice.

Who Should Evaluate and Testify Exercise



<https://www.pinterest.com/pin/431712314277682580/>

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.

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

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.

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

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).

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

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.

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

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.

Voir Dire Exercise

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

NEED FOR EXPERT OPINION

“This case involves a child [with a brain injury/severe burns/bite marks; victim of sexual abuse/Munchausen by Proxy, exposed to methamphetamine production/other].”

“What it is about [a brain injury/a burn injury/bite marks/sexual abuse/Munchausen by Proxy/exposure to methamphetamine production/other] that requires an expert to explain?”

“What is it about this case that a lay person with no background in this field might not understand?”

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

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

NEED FOR EXPERT OPINION

“What are the key principles that a person without education or experience in this field would need to grasp in order to understand this case?”

“Can you explain the [research/theoretical basis/concept/scientific principles] involved in this field of study to a non-expert?”

“Do you believe your testimony will aid the judge or jury in understanding the facts in this case? How?”

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

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

BASIS FOR OPINION

"Have you examined or interviewed [the child/parent/other person]?"

"Have you administered any medical or psychological tests to the [child/ parent/other person]?"

"Have you reviewed [medical records/documents/photographs of scene/injury/ x-rays/ court reports/police reports/child's written or recorded statement/other evidence]?"

"Have you [made a diagnosis/made a conclusion/formed an opinion regarding cause of injury/diagnosis/child's needs or other issue]?" "

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

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

BASIS FOR OPINION

“Did you rely on any other source of information in forming your opinion other than the [examination/interview/records/photographs/ etc.] that we have discussed?”

“If so, what other sources did you rely on?”

“If the facts were [supply hypothetical], could you render an opinion regarding [cause of injury/whether the injury was intentional/whether the injury is consistent with the parent’s report of the incident/other?]”

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

EXPERTISE IN "HARD" SCIENCES

Testing

"What theory/technique did you base your opinion on?"

"How did you test this theory/technique? What were the results?"

"How many times have you used this theory/technique?"

"Have you always used the same method when you used this theory/technique?"

"Have you ever had different results- or results inconsistent with the theory/technique you based today's opinion on?"

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

EXPERTISE IN "HARD" SCIENCES

Extent of Subjective Interpretation

"Does any part of the theory/technique require subjective interpretation?"

"If yes, describe what facet of the testing is subjective."

"If yes, do you believe another professional might interpret the same data differently?"

"Is there any method you use to assess the subjective component of this theory/technique?"

"Did you use that method in arriving at your opinion in this case?"

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

EXPERTISE IN “HARD” SCIENCES

Peer Review

“Has there been peer review of your theory/technique?”

“Has the theory/technique you rely on today been published? If so, where & when?”

“Have any articles or other publications criticized or cast doubt on your theory/technique? If so, when and what was the basis for the criticism?”

“Does that criticism change your opinion in this case? Why not?”

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

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

EXPERTISE IN "HARD" SCIENCES

Error Rate

"Does your theory/technique have a known or potential error rate? If yes, what is the error rate?"

"How did you calculate the error rate?"

"Have you considered alternate theories or explanations?"

"Why did you reject any alternate theories or explanations?"

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

EXPERTISE IN "HARD" SCIENCES

Acceptance in Scientific Community

"Is this technique/theory generally accepted in the scientific community of [engineers/physicians /coroners/other]?"

"What evidence is there that this is a generally accepted technique/theory?"

- "- Formal statements of professional organizations
- Professional literature, training, publications
- Use by government/trade/community organizations"

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

Use Outside Courtroom

“Is this technique/theory used for a purpose outside the courtroom and litigation?”

“-Diagnosis, treatment, social work assessment, criminal investigation”

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

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

EXPERTISE IN "SOFT SCIENCES"

"What is your field of expertise/specialty?"

"Within the [mental health/social work/social sciences/other discipline] field, is this a recognized professional area of expertise?"

"Are there published articles recognizing this field of expertise/specialty?"

"Has this field of expertise/specialty been recognized by any licensing or accreditation body or any governmental agency?"

"Are there professional journals or conferences that focus on this field of expertise /specialty?"

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

EXPERTISE IN "SOFT SCIENCES"

Is there controversy within the profession about the efficacy or reliability of this field of expertise/specialty?"

"If so, can you articulate why these [opinions/statements/criticism] should not undermine the value of your opinion?"

"Repeat questions related to QUALIFICATIONS, above, as needed to establish the specific expertise and experience. Based on your education and experience, are you able to give an opinion as to _____?"

"Within your [field of expertise/specialty] is it common for a practitioner to give an opinion as to [the cause of an injury/whether termination is in the child's best interest/a caretaker and child are bonded/a certain placement is in the child's best interest]?"

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

EXPERTISE IN "SOFT SCIENCES"

"What facts or evidence did you rely on?"

"Did you rely on [observation/examination/review of records/ photographs/written or recorded statements/reports/ tests/other]?"

"Is this the type of evidence relied on in the ordinary course by professionals in your field?"

"Is there any other evidence or information relied on in the ordinary course by professionals in your field as part of making such a determination that you did not use? Why not?"

https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_13_Tools/Evidence/Questions_Expert_Witness.pdf

Exercise: Strategies to Manage Mental Health Experts

Questions?