

Qualifying as an Expert Witness

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Abstract: This article will discuss the basic principles of qualifying as a witness for expert testimony. A worksheet approach is used to assist the nurse life care planner in determining how he or she meets federal requirements of Rule 702. By mapping his or her qualifications in this manner, the life care planner is well prepared for meeting Daubert challenges and can assist the retaining attorney in presenting the qualifications to the court. Furthermore, by using this method, the expert gains confidence when providing testimony and can better support the recommendations included within the life care plan.

An expert witness is one who is allowed

to provide opinion testimony at trial which is based upon his or her specialized knowledge, experience, or training. The expert witness was created and the use is maintained by the legal system. The courts and their legal counsel have focused much energy in litigation on defining the parameters of expert testimony. Because the expert's ability to offer opinions can be a powerful influence in trials, the courts must ensure that the expert's testimony is an effective aid to the court rather than a burden or hindrance. In an attempt to ensure this, the courts have defined the role of expert witness and developed formal rules regarding evidence.

The expert witness performs two primary functions. The expert serves a scientific function by collecting, testing, and evaluating evidence and forming an opinion as to that evidence. The nurse life care planner as an expert typically collects data, assesses, and evaluates then produces a report which confirms, documents, demonstrates, authenticates, establishes,

substantiates, and concludes. He or she also serves in a forensic role by then communicating that conclusion or opinion (and its basis) to the court. The purpose is to provide information that makes something more evident than it was before. The statements made by an expert should be those on which a juror or judge can base a belief as to their accuracy.

Before testifying before a jury, an expert witness must be qualified by the court by meeting certain admissibility standards. Typically states use either Frye or Daubert definitions related to expert witness testimony. Some legal scholars argue that a state's choice to follow either Daubert or Frye ultimately makes little difference in how judges handle scientific evidence.

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(<http://www.ims-expertservices.com/blog/2011/two-more-states-adopt-daubert-bringing-total-to-32/>)

A 2005 study published in the Virginia Law Review, found “no evidence that Frye or Daubert makes a difference” (Cheng and Yoon).

Rule 702 of the Federal Rules of Evidence

(next page) and state laws serve to define the expert witness. In a very simplified description, Rule 702 states that the opinion of an expert must be reliable, relevant to the issues of the case, and will help the jury understand the evidence or to establish fact(s) of issue in the case. The basic requirements are divided into four parts: qualifications, reliability, helpfulness, and foundation (Hutchinson). The Daubert court determined this fourth helpfulness element required that the opinion have a “valid scientific connection to the pertinent injury” as a precondition of admissibility (Hutchison). Qualifying as an expert is not usually a problem so long as the expert is able to demonstrate how his or her knowledge, skill, experience, training, or education is relevant to the opinions offered in the case.

The retaining attorney is responsible for convincing the judge that the witness possesses specialized experience and training. The opposing attorney then has the right to cross-examine the expert witness in an attempt to disprove his or her qualifications.

Questioning is typically focused on the expert’s background, training, education, skills, experience,

States that Follow the Federal Daubert Standard

- | | |
|-----------------|-----------------|
| • Alaska | • Mississippi |
| • Arizona | • Montana |
| • Arkansas | • Nebraska |
| • Colorado | • New Hampshire |
| • Connecticut | • New Mexico |
| • Delaware | • Ohio |
| • Georgia | • Oklahoma |
| • Hawai’i | • Oregon |
| • Idaho | • Rhode Island |
| • Indiana | • South Dakota |
| • Iowa | • Tennessee |
| • Kentucky | • Texas |
| • Louisiana | • Vermont |
| • Maine | • West Virginia |
| • Massachusetts | • Wisconsin |
| • Michigan | • Wyoming |

and knowledge. [Figure 1] The expert must have specialized knowledge, ability beyond that of a layperson. The expert does not need to be the best in his field and has to meet only a minimum standard to satisfy the rule. Education and degrees are often highly regarded as evidence of expertise; however one does not have to be an alumnus of an Ivy League school. According to James J. Mangraviti, Jr., Esq. of SEAK, the vast majority of top notch expert witnesses have ordinary academic backgrounds and many expert witnesses without any college degree whatsoever commonly testify.

This means one does not have to be advanced in a life care planning career in order to be a successful

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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.

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.

(Sapir: <http://www.chm.uri.edu/forensics/courses/Appendix%20-%20forensic%20science%20&%20expert%20witness/Voir%20Dire.pdf>)

expert witness. Life care planners should never assume that they must have completed many years in

the field, written a certain number of plans, or accomplished particular milestones to serve as expert

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witnesses. Mangraviti reminds us that there is an important conjunction in the rule: the word *or*. The expert needs to have knowledge, skill, experience, training *or* education. The conjunction is *or*; not *and*. This means that in Rule 702, only one of the above five are needed, not all of them.

An expert witness can also be qualified based on experience and skills alone, e.g., in the Supreme Court case of *Kumho Tire*, perfume testers were given

as an example of experience-based ex-

perts. The expert witness must be able to explain how his experience is sufficient as a basis for his opinion and how the experience is applied to the facts of the case. (See *Hutchinson's Appendix B for the 2000*

amendments to Rule 702, plus advisory notes.) For example, many life care planners have previous experience in case management that could be qualifying under the standards.

As discussed, there is no absolute rule as to the degree of knowledge required to qualify a witness as an expert in a given field. Witnesses must be skilled in the subject matter. They may be found eligible through knowledge, training, education, skill, experience, or a combination of these factors. At a mini-

mum, the expert witness must know the underlying methodology engaged and relied upon as a basis for their opinions.

Qualifying as an expert witness is usually easy if you limit your testimony to areas in which you possess ample knowledge, skill, experience, training, or education. Background knowledge includes state of art technology, literature review, and experience

culminating in an opinion based upon a reason-

able degree of scientific certainty. Back-

ground information must be "of a type reasonably relied upon by experts in the particular field."

For example, an accident reconstructionist could not rely only on statements made by bystanders (Hutchison, citation 22). Foundational data must be accurate and accurately

reflect the undisputed circum-

stances of the case (Hutchison, cita-

tion 23). Even if the expert's technique is

valid, his opinion is not reliable if he misuses the methodology (Hutchinson, citation 28).

Methodology

Methodology is the practice, procedures, and/or rules used by those working in a discipline or engaging in an inquiry. It is not a package of various methods, but rather the designed process for carry-

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Figure 1: Sample questions used in qualifying the expert witness.

- *Occupation*
- *Place of employment*
- *Position currently held*
- *Describe briefly the subject matter of your specialty*
- *Specializations within that field*
- *What academic degrees are held and from where and when obtained*
- *Specialized degrees and training*
- *Licensing in field of practice and in which state(s)*
- *Length of time licensed*
- *Length of time practicing in this field*
- *Certifications obtained*
- *Length of time certified as a specialist*
- *Positions held since completion of formal education, and length of time in each position*
- *Duties and function of current position*
- *Length of time at current position*
- *Specific employment, duties, and experiences*
- *Whether conducted personal examination or testing of the patient*
- *Number of these tests or examinations conducted by you and when and where were they conducted*
- *Research you have conducted in your field*
- *Teaching, lecturing, presentations given by you in your field*
- *When and where your lecture or teach*
- *Publications authored and their titles*
- *Membership in professional societies/associations/organizations and any special positions held within them*
- *Requirements for membership and advancement within each of these organizations*
- *Awards, honors, and special acknowledgments received in your field*
- *Number of times you have given testimony in court as an expert witness*
- *Have you provided testimony in both state and federal court?*
- *Available for consulting to any party, state agencies, law enforcement agencies, plaintiff/defense attorneys?*

ing out research or the development of a life care plan and not some tool or instrument. Frameworks containing basic assumptions and ways of practicing commonly accepted by a life care planning association members, such as the AANLCP Standards of Practice (2012), satisfies most criteria for methodology.

Daubert defined the standard for evidentiary reliability. Generally the requirement is that the expert's methodology must be grounded in the methods and procedures of the field of expertise. Daubert suggested the guides for evaluating the opinions, but the elements applied vary with the type of discipline involved.

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The methodology should be reliable, consistent from case to case, transparent in a way it could be replicated and is understood, valid, relevant to the individual's situation, and through. It is not sufficient to simply cite reliable principles and methods then reach a conclusion without demonstrating how the opinion relied on the methodology. Ask yourself questions such as:

- What methods or procedures were used during the client evaluation?
- Is this method an accepted and commonly used method in life care planning?
- How reliable are results obtained using such a method?

Then qualify the methodology to the current case:

- How do the facts at hand apply to this particular test?
- How were the data collected and the test(s) conducted?
- How were the results verified?
- Who, if anyone, has further reviewed the findings/used these findings?

Knowing the methodology is especially important when it comes to meeting the next step: the presentation of the expert to the court.

Presenting the Witness to the Court

Generally in order to qualify an expert witness, introductory questions are posed from the retaining attorney regarding the expert's professional background. This serves two goals: to demonstrate to the judge that the expert possesses at least the minimum qualifications to give an opinion on a particular subject, and to persuade the jury or fact finder that the

expert's judgment is sound and the opinion(s) correct. It is the second goal that stresses methodology used.

Some opposing attorneys might offer to stipulate to the qualifications of an expert without the introductory questioning. This is done in an attempt to prevent the jury from hearing the expert's credentials. Attorneys can avoid this tactic by advising the court that the jury would have to hear the qualifications in order to adequately judge the witness' credibility. This can be especially important when this expert is better qualified than the opposition.

Because the retaining attorney may not fully understand a nurse life care planner's licensing, credentials, training, and education, it is important for the nurse life care planner to know the information which meets the criteria for qualifying as an expert and provide this in an organized fashion. Some life care planners have found it helpful to share the information in an outline format so that the attorney has a "script" that can be used in introductory questioning are posed to the expert on the stand in the qualifying process. This outline can also highlight experience or education that is of particular importance in the specific case for which the life care planner is attempting to qualify. The worksheet that at the end of this article might be the starting point for such an outline for retaining counsel.

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It is not necessary to reveal every single distinction of one's qualifications. The jurors are less likely to connect with an expert if they feel resentment by an immodest display of awards, degrees, and accolades. This can also result in decreased believability of the testimony by said witness. It is the attorney's job to ask the appropriate questions to elicit the credentials rather than the witnesses parading their accomplishments in front of the court.

Once the questioning of the witness has concluded, the court then makes a ruling on whether or not the witness will be accepted as an expert in their field. Once competency is satisfied, a witness' knowledge of the subject matter affects the testimony's weight and credibility. (Sapir

<http://www.chm.uri.edu/forensics/courses/Appendix%20-%20forensic%20science%20&%20expert%20witness/Voir%20Dire.pdf>)

By following a systematic approach, life care planners not only reveal how the standard was met, but also becomes more confident in their bases for qualification, which is often helpful on the witness stand.

By fully understanding the nuances of qualifying as an expert, the life care planner gains confidence, provides the retaining attorney a script for qualifying questions, and meets or exceeds the standards of the court.

The expert is presented to the court to provide information to the trier of fact. The role is an important one and is not to be taken lightly. By studying the Federal Rules of Evidence against the life

care planner's own background, and outlining their qualifications in the attached worksheet, the planner demonstrates credentials in a confident and systematic way to assist the retaining attorney in representing those qualifications to meet the requirements while bolstering self-confidence on the stand.

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Worksheet

Step 1-Education and formal training:

This includes formal education, training, academic qualifications, and credentials.

If an expert witness is highly accredited in his field, the retaining attorney should put greater emphasis on the expert's formal education, training, academic qualifications, and credentials. For example, it is more effective to elicit a medical expert's formal training while in school than simply having him state where he attended nursing school and completed his education.

The amount of information necessary to convey to the court regarding the witness's educational background depends entirely on the circumstances of the case. A combination of an impressive technical background in addition to an expert's humanity is a recipe for success. As an example, one expert was especially persuasive when he had a unique combination of four certifications that no one else in the world had.

List any formal education, training, academic qualifications, and credentials. Be sure to point out specific information regarding your education that may make you uniquely qualified.

Example: *Graduated from ABC School of Nursing with honors*

Completed BSN with XYZ College of Nursing

Kelynco 40+ hours of classroom education

FIG Services-40 hours of education

University of Florida-continuing education classes in Risk Management, Forensic Nursing

Worked in a burn unit. Started case management in 1990 and experienced burn patients with ongoing needs. Have a family member who was involved in a fire. Attend numerous educational conferences each year on the subject matter.

Step 2-Experience:

While experience alone may be enough to qualify an expert witness, experience coupled with education or actual training in the expert's field will demonstrate that he is not only well-versed in an area, but that he has direct experience, as well. For example, if a medical professor is called to testify as an expert to the appropriate standard of care in a malpractice case, and he has current experience in a clinical practice as well, his credibility will be enhanced. With practical experience beyond the academic credentials elicited, the expert will no longer be subjected to the question "Professor, when was the last time you actually handled a case?"

Now, list experience not included in the attainment of your academic degree or certifications. Think about how your experience is particularly meaningful in the case in which you plan to testify.

Example:

Nurse since 1994

Case manager since 2002

Life Care planner since 2007

Been in practice as a consultant since 2005

60+ cases in litigation

100s of cases managed as case manager

Special interest in amputation and complex orthopedic injury-patients/clients with amputee patients as young as 18 months old; and as complex as bilateral arm loss, and even quad amputees. Very few people have experience with children and quad amputees are even rarer. Have worked on trials in and out of the state and as far away as Australia.

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Step 3-Additional Considerations:

In addition to an expert's education, training and experience, there are many other qualifications that can speak to an expert's credibility. For instance, licenses and certificates, professional associations, awards, research and publications, teaching positions, and of course prior testimony, are all relevant. (citation 49) Many experts devote a large portion of their careers to the forensic side of their respective professions and therefore it is also effective to establish that the witness has testified on both the plaintiff and defense sides. This demonstrates that he is not dedicated to a particular side or a particular type of case.

List any licenses held:

List any certificates or certifications held and what was required to obtain them:

List any Professional Associations to which you belong and include any positions held within the organization(s):

List any awards received that are of a professional nature:

List and explain any pertinent research conducted or for which you may have participated:

List any of publications:

List any teaching positions you may have held. Also consider roles you may have had in presenting materials in a professional manner such as being an invited speaker to present on a subject.

Remember to include your history of prior testimony which also shows you are qualified as an expert:

Example:

Licenses

- Hold unencumbered RN license in the state of Wyoming

Certifications

- Certified in Case Manager in 2004
- Certified Nurse Life Care Planner by NLCP Cert Board
 - 65-70 hrs of classroom education-major dx
 - 50 hrs home study with development of LCP
 - Four hour exam
 - 60 hours CEUs every 5 years
- Certified Life Care Planner-ICHCC in 1999
 - 120 hours of specialty training in LCP with 16 hrs in methodology and standards of practice
 - Minimum of 3 years' experience in the field in the immediate 5 years preceding application for certification

- 80 hours of continuing education units over 5 years with 8 hours in ethics
- Case manager or Rehab background required

Conferences

- Attend no fewer than three major conferences per year such as
 - Annually AANLCP Conf
 - International LCP Conf
 - Association of Rehab Professionals Conf
 - Leisure and Learn Workshop
 - LCP Symposium
 - Trial Lawyers Association
 - State Specific Work Comp Commission Conf
 - Annually attend NAMP-SAP conference

Professional associations

- AANLCP
 - Editorial board member from 2005-present
 - Conference Committee for 2009-2011

- Marketing Chairperson 2009-2011
- NNBA
 - Lifetime Hall of Fame Recipient in 2011
- AALNC
 - Past President of State Chapter
- CMSA
 - Active member of County Chapter
- ARN since 2010

Publications

- Numerous publications as seen on CV (list pertinent ones to the case in question)

Teaching positions

- Adjunct faculty; contributing to University of Texas Forensic Science Course
- Numerous ABC educational events
- Teaching attorneys, nurses, community

Prior testimony

- Began testifying in 2000
- State and Federal court
- Never a Daubert Challenge

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Step 4: Identify with the jury:

By making the expert a three-dimensional person (e.g., asking a series of personal questions – married, children, hobbies, etc.) while avoiding braggadocious language, retaining counsel is able to make the expert come alive for the jury. Moreover, the jury's ability to understand that an expert engages in far more than just a daily business routine increases the chance that an expert will be viewed as someone the jury can relate to and trust. A large component in the development of the three-dimensional expert is by humanizing him for the jury. For example, if the expert is an oceanographer, he should tell several Jacques Cousteau-like stories about descending to the sea floor in a submarine. Being a "local boy" could also carry weight with a jury. A Mississippi jury will likely give the testimony of a local doctor from Ole Miss greater weight than the testimony of a doctor from Harvard.

List several things the retaining counsel can share with the jury that would increase the likelihood of being seen as a three dimensional person rather than a hired gun.

Example: *Married, mother of four, grandmother of seven. Previously owned a store in the same small town as the trial. Registered nurse. Self-employed for the past 15 years. Graduated from ABC School of Nursing in 1990. I have been writing nursing care plans since I began nursing school in the mid 1980s. I am certified as a case manager, a nurse life care planner, and am also an author, presenter, etc. and have a special interest in burn cases such as this*

Step 5-Outlining your qualifications for retaining counsel

Now that you have evaluated all the ways in which you qualify as an expert, think about the specific case in which you plan to testify. How do you specifically have expertise of value in this particular case? Use the steps above to create an outline that can be provided to retaining counsel during a preparatory meeting.

Example:

Education and formal training

- Graduated from ABC School of Nursing-with honors
- Completed BSN with XYZ College of Nursing
- Kelynco 40+ hours of classroom education
- FIG Services-40 hours of education
- University of Florida-continuing education classes in Risk Management, Forensic Nursing

Experience

- Nurse since 1994
- Case manager since 2002
- Life Care planner since 2007
- In practice as a consultant since 2005
- 60+ cases in litigation
- 100s of cases managed as case manager

Additional considerations

Licenses

- RN license in the state of Wyoming

Certifications held

- Certified in Case Manager in 2004
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 - 60 hours CEUs every 5 years
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- 120 hours of specialty training in LCP with 16 hrs in methodology and standards of practice

- Minimum of 3 years' experience in the field in the immediate 5 years preceding application for certification
- 80 hours of continuing education units over 5 years with 8 hours in ethics
- Case manager or Rehab background required

Certificates received

- Completed education in emergency burn management with Major Hospital; a 16 hour course
- Hold a certificate for first responder class and current CPR certificate

Professional organizations

- AANLCP
 - Editorial board member from 2005-present
 - Conference Committee for 2009-2011

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- Marketing Chairperson 2009-2011
- NNBA
- Lifetime Hall of Fame Recipient in 2011
- AALNC
- Past President of State Chapter
- CMSA
- Active member of County Chapter
- ARN since 2010

Awards

- Best student paper in nursing school, related to wound care management

Research

- Worked as research coordinator for two drug studies in a medical office

Publications

- Causes, Diagnosis, Symptoms and Treatment of chemical burns
- Children with thermal facial burns

Teaching positions

- Adjunct faculty; contributing to University of Texas Forensic Science Course
- Numerous ABC educational events
- Teaching attorneys, nurses, community

Prior testimony

- Began testifying in 2000
- State and Federal court
- Never a Daubert challenge
- Plaintiff and defense

Step 6- How can you connect to the jury?

Example: *First became acquainted with burn injuries when my family member suffered a severe burn in a motor vehicle accident. I was a teen at the time, but this is when I realized I wanted to become a nurse.*

Now connect the dots by providing a few lines in conversational form that indicates expertise without braggadocio.

Example: *I am lucky to have worked in many years in orthopedics and neurology which provided an excellent background when I began working in the burn unit. I began in case management in 1990 where I first worked with burn patients on their ongoing care needs. I have had the opportunity to manage the care for 27 burn patients in the past three years. Two of these cases became the subject of publications for our local association's journal. One week each summer, I volunteer with the local burn camp for kids. In the past I have provided safety education to employers related to burn hazards and emergency treatment. I learned about what Medicare's expectations are with regard to the cost of ongoing care by having written many cost projections for the insurance carriers for settlement negotiations and by writing and submitting several MSAs to CMS related to burn injuries.*

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