

On Humanizing the Expert Witness: A Proposed Narrative Approach to Expert Witness Qualification

Michael Lamport Commons, PhD, Thomas Gordon Gutheil, MD, and
James T. Hilliard, JD

J Am Acad Psychiatry Law 38:302–4, 2010

Before expert witnesses may testify in court, it is necessary that they be qualified to render an expert opinion. The qualification process has three steps: first, the expert's training, education, experience, and other indices of qualification are elicited on direct examination by the retaining attorney. Second, a proffer is made to the court of the witness as an expert; the proffer may be challenged or argued in *voir dire* or other mechanism by the opposing side. Finally, the court either accepts or rejects the proffer, and the witness, if now qualified as an expert, is entitled to give expert opinions to a reasonable medical certainty, if testifying in a medical context. Problems of bias or conflict of interest must be sorted out.

Traditionally, the first step in the process involves a lengthy series of questions—20, 40, or even 60 questions, depending on the expert and the case—along the following lines, with additional queries to fill in the details:

What is your full name?

Where do you practice?

Are you licensed?

Are you board-certified?

What are your education, training, experience, and specialization?

Dr. Commons is Assistant Clinical Professor of Psychiatry and Dr. Gutheil is Professor of Psychiatry and Co-founder, Program in Psychiatry and the Law, Massachusetts Mental Health Center, Harvard Medical School, Boston, MA. Mr. Hilliard is a partner in the law firm of Connor and Hilliard, Walpole, MA. Address correspondence to: Thomas G. Gutheil, MD, 6 Wellman Street, Brookline, MA 02446. E-mail: gutheilg@cs.com.

Disclosures of financial or other potential conflicts of interest: None.

What positions of responsibility have you held?

Have you published in the literature?

Have you received any honors?

And so on.

Such a listing mechanically places before the fact finder that information necessary for the latter to rule on whether the expert is qualified by knowledge, skill, experience, and training or education¹ to offer an expert opinion; indeed, these data points must be covered to establish qualification. Although this mechanical listing is not an evidentiary requirement, it is used by lawyers to ensure that all the requisite information is placed before the judge in a checklist fashion.

However, the checklist, the completion of which may consume up to two hours in court, has one unfortunate side effect. Although necessary, it is mind-numbing to the jury and may induce sleep or daydreaming. Since it is very hard for a jury to remember and appreciate such a series of facts without an organizing structure, the resulting lack of coherence may be off-putting, thus possibly coloring the jury's view of the expert in a negative way.

Is there a better way to impart the necessary information? While establishment of the facts must precede and thus justify expert opinion testimony, the form and timing of that establishment may be more flexible than tradition holds. We propose a hypothetical approach to this process, a different approach that draws on the power of narrative. The expert witness may come alive more successfully for the jury as a real person, and keep the jurors awake longer, if

the expert's qualifications are presented in whole or in part through the telling of a coherent and understandable story. Of course, this approach could equally serve in a deposition, but without the immediate "audience" effect. In support of this theory, a classic study by Bower and Clark² showed that a story presentation (i.e., a narrative) led to the listening subjects' remembering six times as many words from a list as the control group who did not hear the narrative, although both groups spent the same amount of time in learning the words.

The story may be a narration of how the psychiatrist came to be an expert witness serving at this place and time, those factors that led to the witness's interest in the field, the emotional connection of the witness with the work, the satisfaction derived from the practice, and similar topics.

Sample Narratives

To illustrate this point, consider this sample opening, occurring just after the expert has provided his full name and location of practice:

Attorney: Doctor, how did it come to pass that you are offering to be an expert witness in this courtroom?

Expert: There was a time in college when I considered going to law school, but I decided my heart was in medicine, so I went to medical school and then into psychiatry. But I remained interested in the law and followed cases in the news. After I went into private practice, a close friend of mine, also a psychiatrist, was sued for malpractice, and he used to talk to me about the case and his experience. His story fascinated me, and so I started to read some books on forensic psychiatry and take some courses offered by my medical society. Before I knew it, I was hooked. I started consulting on cases, and more and more of them came my way, and here I am.

Attorney: And what was it that was so fascinating to you, doctor?

Expert: The fact that you had two ways of looking at people, law and psychiatry, that were so different, yet that had to be brought together to help the jury understand the questions we are going to be considering here.

Attorney: Thank you, doctor. And while you were still only in medicine, what kinds of cases were you seeing?

Expert: Well, a fair number of them were very similar to the one we are here to discuss today.

Attorney: Besides that experience, had you had some training in the subject?

From this platform, the usual credentialing bases can be covered. Consider also this example, also occurring after the usual preliminaries:

Attorney: Doctor, what first got you involved in the field of forensic psychiatry?

Expert: Mainly, it was the frustration I felt when a patient on my own inpatient unit committed suicide. A new law had just been passed that, in effect, made it very hard to treat those patients who really needed it, even if their illness was the main obstacle to their accepting treatment. This patient went essentially untreated for a long time, despite our best efforts. I was very upset when he killed himself. It seemed to me that the law, in trying to help people, was inadvertently harming them. After I got over being frustrated and upset, I became interested in this dilemma and started studying and researching the field. I began to consult with my colleagues on their medicolegal problems and advanced to consulting on cases. And this is one of those.

Attorney: And what has kept you in this field?

Expert: I would say it is the challenge of being like a translator between two languages that are foreign to each other.

Attorney: And what translation is needed in the present case?

Expert: Trying to fit the care that this patient actually received into the standard of care, which is the yardstick we are supposed to use.

Attorney: What experience have you had with the standard of care?

And so on.

Why begin this way? There are several reasons. One of the most common complaints of patients is that their doctors do not spend enough time talking with them. In mental health, it is even worse. The doctor may not talk with the patient much at all and almost never about himself. Both these shortcomings

are addressed by the personal narrative, where the jurors hear directly from a doctor, in an unusually self-disclosing way. More important, they hear about the witness's life before he testifies.

Far more important, the witness is humanized, revealed as a real person with a unique history, rather than as a one-dimensional figure, listing an array of egocentric accomplishments, almost all of which have no resonance with the average juror. What does "board certification" really mean to lay juries? What does a "teaching appointment" actually convey?

Finally, this approach offers the most useful way of dealing with bias: that is, to place it directly on the table first. The second (credentialing) example, for instance, suggests that the witness has a sensitivity to suicide, which may constitute a bias in a suicide malpractice case. At later points, the witness can be examined as to how that bias was managed or controlled during the expert consultation.

Legal Support for The Narrative Approach

Judges have wide discretion concerning what testimony is relevant and may be admitted. Rule 611 of the Federal Rules of Evidence states that:

The court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to make the interrogation and presentation effective for the [1] ascertainment of the truth [2] and to avoid needless consumption of time. . . .³

The Advisory Committee to the Federal Court on the Rules of Evidence commented on the intent of Section [a] by stating in their committee notes appended to Rule 611 that:

Spelling out rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible.⁴

The Committee further notes that Item [1] will:

. . . cover such concerns as whether testimony shall be in the form of a *free narrative or response to specific questions* [citing 6 Wigmore Sec 1867] . . . and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances [emphasis added].⁴

The Question of Relevance

Are there any drawbacks to this approach? One always has trepidation when challenging tradition,

but, as long as the qualifications are on record and judicially accepted before an expert opinion is provided, it is not required that that step occur at a particular point in the examination. One may also readily anticipate that this approach, because it is unexpected and nontraditional, will draw objections, perhaps on general principle, although none of it is technically objectionable, except possibly its relevance. The point could be made to the court in response that it would be helpful to the jury to know something about the person who will be teaching them. One might also argue that these novel approaches merely adopt a historical or chronological approach to revealing the expert's qualifications.

As mentioned earlier, trial judges are generally accorded substantial leeway in deciding whether evidence is relevant.⁵ Accordingly, there is no required standard form of testimony for qualifying an expert witness, as long as the court determines that the subject of the testimony is relevant and therefore admissible. A narrative response would only succeed if, as in the examples herein, the narrative leads smoothly into the factual qualifying details of the expert's background, but such a response would certainly go a long way toward humanizing the expert.

Conclusion

While resistance to altering a tradition may well arise, a strong case can be made for presenting the expert's qualification in a narrative form, rather than the more common laundry-list approach. The narrative model may be expected to hold the attention of the jury, to present the expert to the jury as a multi-dimensional person, and to improve the image of the witness in the jury's eyes. This model is proposed with those goals in mind.

Acknowledgments

The authors thank members of the Program for critical comments and Ms. Ellen Lewy for assistance with the manuscript.

References

1. Fed. R. Evid. 702 (2002)
2. Bower GH, Clark MC: Narrative stories as mediators for serial learning. *Psychonomic Sci* 14:181-2, 1969
3. Fed. R. Evid. 611(a) (2002)
4. Fed. R. Evid. 611(a)(1) Advisory Committee's note
5. *Commonwealth v. Tobin*, 467 N.E.2d 826, 833 (Mass. 1984)