How to Testify: Guidelines for Mental Health Expert Witnesses
Matthew L. Ferrara, Ph.D.

Expert testimony is the act of sitting in the witness chair and dropping off facts during a deposition or trial. Since the witness’ job is to drop off facts, the easiest way to do that is to be factual. In other words, the witness should have testimony based upon facts and when asked for an opinion, the witness should provide factual responses.

The easiest position to hold while testifying is a clear cut, factual position. The most difficult position as a witness is a wishy-washy one that lacks facts. The facts that the witness testifies about provide him or her with a solid foundation that can weather attacks by opposing attorneys.

As important as it is to understand what testimony is; it is equally important to understand what testimony is not.

- **Testimony is not the expert witness’ opportunity to win the case.** An expert witness cannot win a case because the expert does not have a side in the case. The expert is on the side of his or her profession and the science that supports the testimony. Only the attorneys and the parties can win or lose a lawsuit. Only the trier of fact can render a verdict.

- **Testimony is not the expert witness’ opportunity to outsmart opposing counsel.** As trial consultant Ken Broda Bahm (2011) stated, “The faulty notion that the role of a witness is to play some sort of verbal chess game with the opposing attorney is a belief I encounter regularly. Many witnesses think that the more difficult they make it for the cross-examiner, the more they help you or themselves. They think that to be good witnesses, they must be able to dodge or outwit the opposition. Unfortunately, I have encountered some attorneys who also have this misperception. I have heard attorneys give directions like, "Don't take it from him. If he gets sarcastic with you, just give it right back to him." Wrong. Argument and sarcasm between witness and attorney may make interesting theater or entertaining TV, but they’re a terrible tactic (p. 25).”

- **The expert’s testimony is not the centerpiece of the trial.** Even though the expert witness’ time on the witness stand might be the only part of the trial he or she is privy to, it is likely a small part of the trial and it is often not the centerpiece. All trials begin with preliminary hearings that might occur months before trial. The trial itself begins with jury selection and opening statements. Even if the expert witness is the first witness, many things have happened prior to the expert’s testimony and many more things will happen after the expert steps off the witness stand. The expert witness needs to keep this perspective and remember that the job of the expert witness is simply to drop off facts during testimony.

A good understanding of what testimony is and is not will help the expert stay focused while testifying. Still, the act of testifying is often difficult. The things that make testimony difficult include the witness’ emotions, questions by the retaining attorney, and cross examination by the opposing attorney.

In this paper, we will discuss how the expert witness can use the definition of testimony as a guide for testifying. The goal of this paper is not to teach the expert how to be a perfect witness. There are no perfect witnesses. Rather, the goal of this paper is to provide testimony guidelines
from three different areas that directly affect the quality of testimony: legal foundation for expert testimony, the empiricism of expert testimony, and rules for testifying.

**Legal Foundation of Expert Testimony**

The legal foundation for expert testimony can be found in each state’s statutes regarding rules of evidence. Presently, 42 of the 50 states have adopted into state statute the Federal Rules of Evidence. All rules of evidence are a set of rules that control the manner in which evidence can be introduced during the course of a trial. The US Supreme Court drafted the Federal Rules of Evidence and, in 1975, the US Congress put the rules into statute.

Once the courts begin using the rules of evidence, questions and controversy about the rules arise. Conflicts over the rules of evidence are resolved by state and federal courts in the form of case law. Case law is law that that provides new interpretations of existing laws. Case law is particularly helpful when the law passed by the legislature is ambiguous. Case law can interpret and clarify an existing law. Once case law has been established, it sets a precedent for the way the courts must follow a specific law.

The Rules of Evidence provide the legal basis for an expert to testify in a legal proceeding. Rule 702 of the Rules of Evidence provides the most critical guideline for expert testimony, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As simple as Rule 702 may appear, it is actually a very complex rule that merits a thorough analysis, as evidenced by the various state and federal case law rulings regarding Rule 702. Keep in mind that case law clarifies a rule of evidence and the case law itself becomes law. So, for a proper understanding of Rule 702, one must understand the case law rulings related to Rule 702.

The most famous Rule 702 case law ruling is the case of Daubert v. Merrell Dow Chemical (1993). The criteria set forth in Daubert has become the gold standard for judges determining if an expert can testify in a specific case. It is important for experts to know the Daubert criteria because if the expert fails to meet Daubert criteria, some or all of the expert’s testimony could be excluded from a trial. Here are the four criteria comprising the Daubert standard:

1. Has the theory or technique been tested or is it subject to being tested?
2. Has the theory or technique been subjected to peer review and publication?
3. What is the known or potential rate of error in applying the particular scientific theory or technique?
4. To what extent has the theory or technique received general acceptance in the relevant scientific community?

For every opinion offered, the expert should be able to answer the four Daubert questions. For example, if an expert is offering an opinion that a criminal offender is low risk for reoffense, based upon a risk assessment instrument, the expert should be able to answer each of the Daubert questions regarding the risk instrument that was used. The prepared expert will not only write out responses to each of the Daubert criteria, the prepared expert memorizes the responses. Eventually, the responses to each of the Daubert criteria are firmly set in the expert’s memory, which means
he or she does not have to write response for the Daubert criteria for familiar testimony. Below are answers an expert create in response to the Daubert criteria, if the expert was offering testimony about the Level of Service Inventory – Revised (LSI-R).

1. **Has the theory or technique been tested or is it subject to being tested?**
   The Level of Service Inventory (Andrews & Bonta, 1995) was devised in the late 1970s and was revised and published in 1995 as the Level of Service Inventory - Revised (LSI-R). The LSI-R had been the subject of intensive study since that time and hundreds of peer reviewed research studies have been published using it. The LSI-R manual contains a listing of approximately 50 peer reviewed works featuring the LSI-R.

2. **Has the theory or technique been subjected to peer review and publication?**
   The LSI-R Manual (Andrews & Bonta, 1995) contains a listing of approximately 50 peer reviewed works featuring the LSI-R.

3. **What is the known or potential rate of error in applying the particular scientific theory or technique?**
   - Simourd (2004) reports that with respect to psychometric properties, the LSI-R has shown to have good internal consistency (coefficient alpha = .72), inter-rater reliability (r = .94) and temporal stability (r = .80).
   - Andrews and Bonta (1995) state in the LSI-R Manual, “The false negative rate for the Level of Service Inventory - Revised is usually found to be approximately two to three percent.” This means that when an individual is placed in low security based on an LSI-R score, there will rarely be any major problems with that individual. Andrews (1982) also found that even when an individual with a low LSI-R score transgresses, it was usually a minor incident (Level of Service Inventory - Revised Manual; pg. 47)."
   - Loza and Green (2003) found the LSI-R had an AUC of 0.78 for general recidivism and an AUC of 0.67 for violent recidivism.

4. **To what extent has the theory or technique received general acceptance in the relevant scientific community?**
   - Simourd (2004) reports that the LSI-R Revised has been successfully employed as a classification/management tool among an array of offender groups including probationers, male inmates, female offenders, Native American inmates, juvenile offenders and sex offenders.
   - The LSI-R is used in the Canadian Criminal Justice System and in many states in the U.S. It is also used across many nations in Europe.

Most of the time, if an expert’s testimony meets the Daubert standard, the court will be inclined to allow the expert to testify. Still, there is a great deal of other case law that has been developed concerning expert testimony. This case law was likely the result of the unique quality of expert testimony in the eyes of the jury. As noted in Flores v. Johnson (2000) the court’s gatekeeping function regarding expert testimony has special significance, given how impactful expert testimony can be, “As some courts have indicated, the problem here (as with all expert testimony) is not the introduction of one man's opinion... but the fact that the opinion is introduced..."
by one whose title and education (not to mention designation as an “expert”) gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact.”

Like the Daubert ruling, there are other rulings that could be used to challenge an expert’s testimony. Some of the more common case law challenges to expert testimony are presented below:

- **Gatekeeping Based upon Rule 702**: Case law specifies that Rule 702 is composed of two independent prongs, which trial judges assesses by a three-part inquiry:
  
  a. **Rule 702 is Composed of Two Independent Prongs**: There are two prongs to Rule 702. The first prong of Rule 702 describes what type of opinions an expert can offer. The second prong of Rule 702 describes who qualifies as an expert. Case law views these two prongs as independent, such that an expert could qualify under one prong but not the other prong. In US v. Frazier (2004) the court explained the independent nature of the two prongs of Rule 702: “Of course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express. As we observed in Quiet Technology, “while an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability... If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong. [O]ur case law plainly establishes that one may be considered an expert but still offer unreliable testimony.”
  
  b. **Courts Use a Three-Part Test**: Even though there are two prongs in Rule 702, in order for a court to decide if the expert’s testimony is admissible, the court must conduct a three-part test (US v. Frazier, 2004): “Thus, it comes as no surprise that in determining the admissibility of expert testimony under Rule 702, we engage in a rigorous three-part inquiry. Trial courts must consider whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.”

- **Accuracy Requirement of Rule 702**: An expert cannot testify, unless that testimony improves the accuracy of the trier of fact, with regard to understanding evidence or determining the facts of a case. “Under Rule 702, the proponent of scientific evidence must show, by clear and convincing proof, that the evidence he is proffering is sufficiently relevant and reliable to assist the jury in accurately (emphasis added) understanding other evidence or in determining a fact in issue (Weatherred v. Texas, 2000).”

- **Rule 702 does not permit Grandfathering**: The courts have ruled that neither an expert, nor the expert’s testimony, can be grandfathered.
  
  a. **No Grandfathering Experts**: Each time an expert offers testimony, the expert must demonstrate his or her testimony meets the legal standards for testimony in that case. In Hernandez v State (2003), the court ruled there is no grandfathering, or exempting experts from meeting qualifications, “The fact that a trial court has allowed some type of scientific testimony by a particular witness before (perhaps without objection) does
not mean that the witness' testimony is, ipso facto, scientifically reliable in this case...It may well be scientifically reliable, but the trial court's statement that he has allowed this testimony before does not make it so.”

b. No Grandfathering Testimony: Coble v. Texas (2010) states that trial courts do not have to reinvent the legal wheel every time an expert offers testimony but if there is reason to believe that testimony admitted in the past may not be reliable, the Court must guard against allowing unscientific testimony, “Science is constantly evolving and, therefore, the Rule 702-703 ‘gatekeeping’ standards of the trial court must keep up with the most current understanding of any scientific endeavor.”

- Rule 702 requires a Scientific Basis: Expert opinions based upon the expert’s word, idiosyncratic methods, and mere “knowledge, skill, experience, training, or education” are inadmissible.
  a. Ipse Dixit Opinions are Inadmissible. Bountiful case law exists requiring that expert opinion be based upon science, not the mere ipse dixit of the expert:
    - “Under the regime of Daubert a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist (Rosen v. Ciba-Geigy Corp, 1996).”
    - “But it is the basis of the witness’ opinion, and not the witness’ qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness (Burrow v. Arce, 1999).”
    - “An expert's simple ipse dixit is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts (Earl v. Ratliff, 1999).”
    - “Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert (Flores v. Johnson, 2000).”
  b. Idiosyncratic Methods are Not Admissible: In Coble v. Texas (2010) the Texas Court of Criminal Appeals stated that there is no place in the courtroom for “idiosyncratic” methodologies. In this case, a psychiatrist testified in the punishment phase of a capital trial using his own “idiosyncratic” method of risk assessment. The Texas Court of Criminal Appeals determined that idiosyncratic methods do not meet the criteria for expert testimony and the expert’s testimony was deemed to be “unreliable.”
  c. Daubert Standard Applies to All Aspects of Expert Testimony: Even if an expert does not rely upon a specific methodology, the manner in which the expert uses his or her knowledge, skill, experience, training, or education is subject to the Daubert standard, “In determining whether an expert's testimony is reliable, the Daubert factors are applicable in cases where an expert eschews reliance on any rigorous methodology and instead purports to base his opinion merely on ‘experience’ or ‘training’ (United States v. Frazier, 2004)”

- Misleading Expert Testimony is perhaps the Most Dangerous Type of Testimony: The court should have a heightened concern regarding mental health expert testimony because of the challenges jury face when applying such testimony to case facts:
  a. “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against
probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses. Weinstein, 138 F.R.D., at 632 Daubert v. Merrell Dow Chemical, 1993)."

b. “Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse (United States v. Frazier, 2004).”

The foregoing list of case law challenges to expert testimony is by no means exhaustive but it is demonstrative of the amount of attention appellate courts have given expert testimony. It is the duty of each expert to be aware of the local and federal case law pertaining to the type of testimony they plan to offer in a specific case.

Empirically Study of Credible Testimony

As Morris (2013) notes, “the legal requirements for expert qualifications [are] truly unrelated to how persuasive an expert will be (pg. 1).” In a review of the research regarding expert testimony, Neal (2010) concluded credible testimony is persuasive testimony and specifically, less credible witnesses are less persuasive.

Two important findings have emerged from research regarding the credibility of expert testimony. First, the research has identified specific verbal and nonverbal communication skills that are associated with credible testimony. Second, the research has shown that testimony skills associated with credible testimony can be taught.

Witness Credibility. Brodsky, Griffin, and Cramer (2010) studied witness credibility by having subjects rate witnesses using paired adjectives on a 10-point Likert Scale, e.g., Friendly – Unfriendly; Respectful – Disrespectful; and Kind – Unkind. Using a confirmatory factor analysis, these researchers identified four components of credible testimony:

- **Confidence**: Confidence is strongly correlated with poise, efficiency, and effortlessness. Shyness is the opposite of confidence. Confidence is by far the most important component of credible testimony. In the factor analysis, confidence accounted for 49.76% of the variance of credible testimony. Trustworthiness, likeability, and knowledge were significant but accounted for 9.20%, 6.56%, and 5.10% of the variance of credible testimony, respectively.

- **Likeability**: Likeability is strongly associated with kindness, friendliness, and charm. Likeability is the opposite of phoniness and conceit.

- **Trustworthiness**: Trustworthiness is strongly associated with being dependable, reliable, consistent, and honest. Trustworthiness is the opposite of unpredictable, dishonest and erratic.

- **Knowledge**: The knowledgeable expert is one who has specific information about the topic of testimony. It has less to do with such things as general intelligence or appearing well-educated.

As one might suspect, jurors who evaluate expert testimony do not carry around a checklist with the four factors listed above. Instead, jurors indirectly evaluate these four factors by focusing on two categories of witness behavior (Cramer, DeCoster, Neal, & Brodsky, 2013):

- **Poise**: Poise refers to how well a witness manages negative emotions, such as nervousness, while testifying. As poise increases, the perception of the witness confidence increases. The research has identified the behaviors jurors use to judge the confidence of a witness:
The skills used during direct examination are also used during cross examination. There are, however, skills that seem to be uniquely associated with cross examination that are critical to the credibility of the witness’ testimony.

- **Communication Style:** Jurors evaluate witness knowledge, likeability, and trustworthiness in terms of the witness’ verbal and nonverbal communication. The research has identified behaviors jurors use to judge witness knowledge, likeability, and trustworthiness:

<table>
<thead>
<tr>
<th>NONVERBAL COMMUNICATION STYLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Has good posture throughout the testimony</td>
</tr>
<tr>
<td>2. Sits upright</td>
</tr>
<tr>
<td>3. On occasion, leans slightly forward when answering some questions</td>
</tr>
<tr>
<td>4. Makes eye contact with the jury during direct exam</td>
</tr>
<tr>
<td>5. Makes eye contact with the opposing attorney during cross examination</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VERBAL COMMUNICATION STYLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Provides more than “yes/no” answers but not long answers</td>
</tr>
<tr>
<td>7. Responses show organization of thoughts</td>
</tr>
<tr>
<td>8. Comfortably admits when uncertain of an answer</td>
</tr>
</tbody>
</table>
A quick review of the criteria that jurors use to evaluate poise and communication skills reveals that all of the behaviors that constitute credible testimony are behaviors most people use in their day-to-day life. The skill comes in using these behaviors while the expert sits on the witness stand, being questioned by an attorney, as the court reporter types every word, with twelve jurors staring at the expert as he or she speaks. Fortunately, there is training that increases an expert’s ability to testify in a credible manner.

**Acquisition of Testimony Skills.** The research regarding credible expert testimony has discovered that witnesses who practice direct and cross examination get better at it and they feel more comfortable while testifying. Cramer et al. (2013) found that witness preparation produces improvement in managing nervousness, increasing testifying skills, and coping with cross examination; all of which improve credibility.

In an effort to demonstrate the effectiveness of witness training, Boccaccini, Gordon, and Brodsky (2003) asked 55 undergraduate psychology students to play the role of a defendant in a criminal trial, for various crimes, e.g., vandalism, reckless driving, and trespassing. Some of the students received witness preparation training, which included review of a video of them testifying the first time. Witnesses were told effective witnesses communicate in a clear and coherent manner, and are attentive, respectful, and composed while testifying. The most frequent behaviors addressed during witness preparation training included posture, hand fidgeting, clear communication, and saying “I don’t know” rather than guessing. The results showed that witnesses who received training felt more confident about testifying, especially with regard to cross examination. The authors concluded that witness preparation increases witness credibility.

As a practical matter, the four components of witness credibility can be used to not only rate witnesses but to train witnesses (Cramer, Stroud, & Ferrara, 2011). By rating an expert on these four factors, the expert’s weak points can be identified and remediated, before live testimony. The expert can also use these four factors for self-evaluation. Evaluating recent testimony in light of these four factors would allow an expert to make adjustments in testimony skills and improve the quality of testimony.

**Guidelines for Testifying**

Good expert testimony is a complex process that begins long before the expert steps into the courtroom and requires a great deal of collaboration with the retaining attorney. In fact, good expert testimony begins with the first contact between the expert and the retaining attorney. If the expert accepts the request for testimony, the expert will spend a great deal of time preparing to testify. It is not uncommon for an expert to spend three to four times longer preparing to testify compared to the amount of time the expert spends on the witness stand. Finally, when the expert is testifying, the expert needs to utilize the research on credible testimony to guide the manner in which the expert testifies.

**Screening Requests for Testimony.** An experienced expert knows not to accept every request for testimony. To determine if there is a good fit between the request for testimony and the expert’s area of expertise, the expert must do a good job of screening all requests.

Most of the time, the first contact between the retaining attorney and expert happens in a telephone call. The lack of face to face contact may give the first contact an informal appearance. Nothing could be further from the truth. The first contact, whether in person or over the phone, is one of the most critical events in complex process of testifying.
As is the case with so many things, a good beginning is half the task. So, an expert should carefully screen requests for testimony. The following are factors that could be used to begin screening a request for testimony.

- **Acceptance Criteria:** As the attorney talks about the case, the expert must determine: (a) if the requested testimony is an area in which the expert has competence; and (b) whether there exists scientific research that would support the testimony.

  When questioning if the requested testimony overlaps with an area of his or her competence, the expert should keep in mind Rule 702, which states that the expert should have specialized “knowledge, skill, experience, training, or education” in the area. If the expert has little overlap with the area of testimony, the expert should decline the request to testify. It is less embarrassing and costly to an expert’s career to decline testimony in private conversation with the attorney, as opposed to being found not competent to testify by a judge, after a very public Daubert hearing.

  The expert is doing the attorney a favor by declining to take a case outside his or her area of competence. The expert could be of additional help to the attorney, if the expert can refer the attorney to other professionals who might possess the competence to testify.

  Even if an expert has the knowledge, skill, experience, training, or education to testify, Rule 702 requires the expert to use scientific research as the basis for the testimony. If the expert is familiar with the area of testimony being discussed, the expert might be able to tell the attorney during the initial contact if the requested testimony overlaps with the scientific research. More often than not, the expert will want to decline to commit to testify during the first contact. The expert should let the attorney know that prior to committing to testify, the expert will perform a review of the scientific literature to ensure there is an empirical basis for the requested testimony.

  When determining if there is a scientific basis for testimony, a mistake that mental health experts make is confusing clinical literature with scientific research. Take for example the issue of signs or symptoms of sexual abuse. There is a great deal of clinical lore regarding the signs and symptoms of sexual abuse. If a mental health expert offered testimony based upon clinical lore and literature, the testimony would not have a scientific basis. In fact, the current scientific literature regarding the signs of symptoms of sexual abuse has found that all indicators of sexual abuse occur more often in children who were never sexually abused compared to children who were sexually abused (Kuehnle & Connell, 2009). Obviously, experts should decline requests to testify about signs and symptoms of sexual abuse.

  Another common request of mental health professionals is to testify about the role of grooming in a child sexual abuse case. Once again, there is a great deal of clinical literature on grooming but the current scientific literature on grooming clearly states that experts should not testify about this subject (Bennett & O’Donohue, 2015): “Currently there is no consensus regarding how to define grooming. In addition, there is no valid method to assess whether grooming has occurred or is occurring. The field possesses an insufficient amount of knowledge about key issues such as the interrater reliability of these judgments or the error rates of these judgments including the frequency of false negatives or false positives. Thus currently it appears that grooming is not a construct that ought to be used in forensic settings as it does not meet some of the criteria in the Daubert standard. The Daubert standard indicates that in court an expert witness may only testify 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”
(Rule 702: Testimony by expert witness). Right now it does not appear to be the case that
there are “reliable principles and methods” to define and detect grooming (p. 974).”

An expert’s criteria for accepting a request for testimony should be Rule 702. The
expert should ensure that both parts of Rule 702 (i.e., competence and scientific basis) can
be satisfied before accepting a request to testify.

• **Provide Parameters for Testimony:** In the first contact with the attorney, the expert should
provide parameters for testifying. At a minimum, the expert should provide the attorney
with a description of the type of testimony that is provided, e.g., “I view my job as an expert
witness as dropping off facts in the courtroom.” Additionally, the expert should explain the
limits of testimony, e.g., “I will only testify about the things that I have a scientific basis
for.”

• **Draw a Distinction between Evidence and Argument:** Expert testimony is evidence. Expert
testimony is not argument. Argument is what attorneys do when they tell the jury how to
use evidence. Frequently, attorneys blur the lines between evidence and argument and ask
the expert to testify in a manner that amounts to the expert making an argument for the
attorney. The expert should never use testimony to argue a portion of the case. When the
expert detects the attorney is requesting argument instead of evidence, the expert should
decline to offer that part of the testimony.

Even with a cursory review of the foregoing screening criteria, it should be apparent that
much of the screening process is an effort to determine how many times the expert will tell the
attorney, “No.”

• “No, I don’t have the experience to testify in this case.”
• “No, there is no research that can serve as the basis for my testimony.”
• “No, I won’t testify about that but I will testify about these other things.”
• “No, I won’t testify about that because it sounds like argument. I will testify about things
that will allow you to make that argument.”

No one likes to say “no.” No one likes to be told “no.” However, the expert who tells the
attorney “no” before the expert testifies is doing the attorney a tremendous favor. Testifying as an
expert is difficult enough. Failure to put proper limits on the testimony will likely cause the
testimony to go poorly. Then it will be the attorney who is saying “no” when asked about the
expert by other attorneys, “No, I wouldn’t hire him again. He did such a poor job testifying. I was
cought completely off guard by what he did and did not say.”

**Preparing to Testify.** Preparing to testify is a two-step process. First, the expert must
review the scientific literature to determine if there is an empirical basis for the testimony. Second,
the expert should write his or her direct exam.

When conducting a literature review, the expert begins by conducting a search of the
empirical literature to determine if there is an overlap between the scientific literature and the case.
Even if the expert is familiar with the literature, the expert should conduct a new search each time
he or she accepts a new case. There are good reasons for this. First, there might be new research
that has been published since the last time the expert testified about a specific topic. The expert
would want to make sure to include the newest research. Second, each time the expert searches,
there is a possibility that the expert might discover old research that was missed during prior literature searches. This increases the expert’s competency in the area.

When conducting the review of the literature, the mental health expert must be careful not to confuse clinical and empirical literature. Clinical literature is any publication that expresses a clinician’s opinion but the opinion has not been subjected to a formal empirical test. Empirical literature is any publication that is based upon the scientific methodology. Mental health experts must base their opinions on empirical, not clinical, literature.

Upon completing the literature review, the expert can write his or her direct exam. The idea of the expert writing his or her own direct exam might sound odd, until that idea receives closer scrutiny. Upon reflection, it should be clear that the expert is the one who conducted the literature review, so the expert is the one that knows the information that should come out on direct exam.

Some care must be taken when writing questions. Direct examination questions cannot be leading questions, i.e., a question cannot contain the answer. For example, a leading question might be, “Could you tell the jury about the defendant being low risk for reoffense?” Instead of using this leading question, the expert would create a nonleading question, such as this one: “What level of risk for reoffense does the defendant have?”

When writing the direct exam, the expert should divide the direct exam into a beginning, middle, and end. The beginning of the direct exam includes questions designed to address the two prongs of Rule 702: (a) education, training, and experience, and (b) methodology. The middle part of the direct exam is dedicated to discussion of the expert’s opinions. Given what is known about human memory and attention, it is best if the expert limits this section to one general opinion and three specific opinions. Even if there is more the expert could testify about, it might be difficult for non-experts to retain too much information. The final section is a wrap-up, which is designed to offer a quick summary and pass the witness.

Below is an example of direct exam questions an expert might write, if the expert were testifying in the punishment phase of a criminal trial. The sample questions assume the expert used two risk assessment instruments. Out of caution, a dummy name (“Mr. Mxx”) is used to refer to the defendant.

**Qualification Questions**
1. Please state your name.
2. How are you employed?
3. As a licensed psychologist, what kind of work do you do?
4. As a Licensed Sex Offender Treatment Provider, what kind of work do you do?
5. Describe your educational background.
6. What experience do you have that is relevant to this case?

**Relevant Experience**
7. What did I ask you to do in this case?
8. Have you done that kind of work before?
9. Have you ever been designated as an expert and testified in court about your analysis and findings when you have done this type of work?
10. Have you testified for the State as well as for defense attorneys?
Methodology
11. What methodology did you use to conduct your risk assessment of Mr. Mxx?
12. After reviewing all of that evidence, do you have an opinion about Mr. Mxx’s risk?

General Opinion
13. What is your opinion?
14. What do you base that opinion on?

First Opinion
15. Could you identify the first risk assessment that you used and tell us what you found?
16. Is Mr. Mxx an exclusive pedophile?
17. What is an exclusive pedophile?
18. Is there a big difference between an exclusive and non-exclusive pedophile?
19. What is the difference?
20. Is Mr. Mxx a sexual predator?
21. Could you tell us what a sexual predator is?

Second Opinion
22. Could you identify the second risk assessment instrument that you used and tell us what you found?

Third Opinion
23. What is prognosis?
24. Did you assess Mr. Mxx’s prognosis?
25. What is Mr. Mxx’s prognosis?
26. You testified that you assessed Mr. Mxx’s prognosis. How did you do that?
27. What did you find?
28. Did you do any formal tests of Mr. Mxx’s motivation for treatment?
29. What test did you conduct?
30. What did the Personality Assessment Inventory tell you about Mr. Mxx’s readiness for treatment?

Wrap-Up
31. Based upon the two risk assessments instruments that you used, do you have an overall opinion about Mr. Mxx?
32. Pass the witness.

In addition to writing the questions for direct exam, the expert should also write responses to the questions. Responses should follow the Three Sentence Rule, which is discussed below. Perhaps the most important benefit of the expert writing his or her own direct exam is that the expert clearly communicates to the attorney the things the expert will and will not say on the
witness stand. If the attorney sees the direct exam and does not like what the expert will testify about, the attorney can always switch to a different expert. If that happens, the expert should rest assured that he or she was a poor match for the case or the attorney’s case strategy and it is better for both the attorney and the expert that they do not work together on this case.

Experts who have been writing their own direct exam for a long time may find they do not always have to write a direct exam for each and every case, especially if the expert and the attorney have worked together in the past, on similar cases. After two decades of expert testimony, the author rarely has to write his own direct exam. Instead, the author can merely tell the retaining attorney the methodology he used and the opinions he will testify about.

**Testifying.** Given the demands of writing the direct exam, the expert might mistakenly focus too much attention on the direct exam. It is important for the expert to keep in mind that the direct exam is invariably followed by cross exam. Usually, cross exam is followed by redirect examination, which is followed by re-cross examination.

The testifying guidelines offered in this section apply to both direct and cross exam. Before discussing testifying guidelines, it is important to understand the finite nature of the questions that will posed to the expert. Lewis (2005) points out that there are really only three types of questions that an attorney can ask:

1. **Yes or No Questions**, which can be answered by simply saying yes, or no. For example, “Are you a licensed psychologist?”
2. **Fact Questions**, which require information such as names, dates, times, or places. For example, “Where did you go to graduate school?”
3. **Explanation Question**, which require the witness to offer an explanation. For example, “Why did you choose that risk assessment instrument?”

One commonplace challenge experts face is the question of when to talk directly to the jury. It really depends on whether the expert is on direct exam or cross exam. On direct exam, the retaining attorney should gesture and ask the expert to talk to the jury. After being directed to address the jury, the expert should spend most of the time on direct exam talking directly to the jury. On cross exam, it is more natural to look at the opposing attorney and only occasionally look at the jury. Whether on direct exam or cross exam, when the expert wants to emphasize a point, the expert should look directly at the jury. In reality, these rules are just rules for a good conversation: look at who you are talking to and look at someone you want to make a point with.

Regardless of whether the expert is on direct or cross exam, there are specific testimony guidelines that can help an expert testify in a credible manner. All of these specific guidelines fall under the umbrella of a general guideline: “Listen, think, & respond” (Mills-Spaeth, 2010). With that in mind, the following testimony guidelines are offered:

- **Rule of Three:** There are two rules of three. One rule pertains to short answers and one rule pertains to long answers. The expert should always try to use short answers but sometimes that is just not possible. When responding to questions that require an explanation, the expert can use the Three Chunk Rule.
  - **Three Sentence Rule:** If the question posed does not call for a long response, and most questions do not call for a long response, the expert should answer the question in one word or one sentence. Above all, the expert should limit responses to three sentences or less. Experts who give long responses are inviting a long, often painful, cross examination.
• **Three Chunk Rule:** Some questions just call for an explanation. For example, if the attorney asks a question like the following, the witness cannot use the Three Sentence Rule, “Tell me about your work experience from the time you left high school until now.” When a question demands a long response, the expert should organize the response into three “chunks” of information. A chunk is a package of information. Quite often, the expert can chunk, or package a longer response into: beginning, middle and end.

• **Implication Rule:** Sometimes the expert will hear a question and the implication of that question. Or, the expert might be concerned by the “implication” of a response. The expert should not respond to the implications of a question, or be concerned about the implication of a response. The expert must answer all questions, without responding to the implication. If the implication of a question or response is important, the retaining attorney will clear it up on redirect examination.

• **Surrender Rule:** If the attorney asks a question that is harmful to the side who retained the expert, the expert should surrender the information. Experts must keep in mind that they do not have a side in a lawsuit. The expert is on the side of their science and this means that some answers will give the opposing party some desirable testimony. The expert should answer those questions honestly. As always, the retaining attorney has the opportunity to clarify the expert’s testimony on re-direct exam.

• **Accuracy Rule:** The expert must carefully listen to the question and only answer the question asked by the attorney. The expert must take care to avoid mentally changing the question. The jury will notice if the expert is not answering the question that was posed.

• **Honesty Rule:** Research has shown that jurors prefer it when a witness does not know an answer and simply responds, “I don’t know.” No expert knows everything about a specific field of science. It is important for the expert to admit it when he or she does not know the answer to a question.

• **Emotional Rule:** In a trial that takes several days or more, jurors can lose focus. Their minds can wander. One thing that will cause jurors to focus with laser-like attention is emotion. To the extent possible, the expert should not show emotion. After all, the expert’s job is to drop off facts in the courtroom and that can be done in a matter-of-fact manner.

• **Courteous Rule:** Ad hominin attacks are common, especially when the witness is an expert. In fact, some attorneys are so ill-prepared that the cross examination is almost entirely ad hominin. Even when being personally insulted, the expert should remain courteous. If the expert is not courteous, it merely prolongs the cross examination.

• **Jargon Rule:** Experts have knowledge that the layperson does not have, which is why experts meet the Rule 702 criteria to testify. Unfortunately, the knowledge that makes a professional an expert may also make the professional a poor witness. Expert testimony is enhanced by the complete elimination of jargon. If jargon must be used, the expert should define the term. If the jargon refers to a complex concept, the expert should use analogy or metaphor to help explain the concept.

• **Nonverbal Rules:** As Broda-Bahm (2011) points out, “You cannot communicate nothing. It is impossible, nonverbally at least, to communicate no meaning whatsoever.” The expert should rely upon the witness credibility research and use nonverbal behaviors that communicate competence, including: remaining calm, using a stable tone when speaking, using good posture, making eye contact with jury, resisting fidgeting, and being authentic.
Pacing Rule: Testifying is a complex task that requires much from the expert. In fact, the expert can feel overwhelmed with the magnitude of things to keep in mind while preparing to testify and during testimony. The witness stand is hardly a place that promotes calm, collected, and complete testimony. More often it is a place of anxiety, fear, and confrontation (New, Schwartz, & Giewat, 2006). Research has shown that relaxation training can reduce anxiety and improve the expert’s ability to offer credible testimony (Cramer et al, 2011).

Feeling calm and relaxed on the witness stand is an acquired skill. The research is quite clear: if a witness practices deep breathing exercises daily prior to testifying, the expert will be much more calm on the witness stand. Deep breathing is simple to do and it does not require special equipment. Here is all that is required:

“Find a comfortable, quiet place to sit. Close your eyes. Breathe in slowly through your nose, as you slowly count to five. Hold your breath for a moment and then exhale through your mouth, while counting from down from five to one. Repeat this for five minutes.”

The practice only needs to take place daily, for about five minutes a day, though ten minutes is optimal. The research shows that the more an individual practices deep breathing relaxation, the easier it is to feel relaxed on the witness stand.

All of the rules in the foregoing list are designed to help the expert drop off facts in the courtroom. Arguing, fussing, and debating with opposing counsel does not help the expert drop off facts, so the rules direct the expert to avoid these activities. Along with the reminder not to argue, the rules point out that it is the retaining attorney’s duty to use the expert’s redirect testimony to rehabilitate unwanted testimony.

The quality of redirect is solely dependent upon the retaining attorney. The retaining attorney must listen carefully to the cross exam and note any areas of concern. The retaining attorney must then formulate and ask questions to clarify areas of concern. If the retaining attorney does not do a good job of this, then the expert’s testimony will not be as clear as it could be and this is the complete responsibility of the retaining attorney.

The expert can make cross examination easier by having appropriate expectations. The most critical expectation that the expert should maintain while on cross exam is that it is not the expert’s job to prove that the cross examiner is wrong (Lewis, 2005). In other words, it is not the job of the expert to convince the opposing attorney that the expert’s testimony is correct or accurate. The expert should keep in mind that the opposing attorney’s job is to show disbelief and even if the opposing attorney shows disbelief, it does not mean the jury feels disbelief.

It is the job of the opposing attorney to find a way to make the expert’s testimony helpful to his or her side. To do this, most opposing attorneys use predictable types of questions, including the following:

- **Repeated Questions:** If the opposing attorney does not like the answer the expert just gave, the attorney will change the question and then re-ask it. In fact, the attorney might make very slight changes and then ask the same question up to three or four times. Since it is the same question, the expert should give the same response, over and over.
- **Substituting Part for Whole:** Sometimes the opposing attorney will ask about one aspect of a very large issue or concept, for the purpose of seeking the agreement of the expert. For example, the opposing attorney might select one question from the MMPI-2, a 567-item
test, and ask the expert if that question can be used to determine if someone is mentally ill. The correct answer is no. The attorney will use the expert’s answer as a basis for generalizing the entire MMPI-2 as incapable of determining mental illness.

- **Quicken the Pace**: Most experienced attorneys know how to use pacing to their advantage. An opposing attorney doing cross exam may speed up questioning, so that the expert begins answering quickly. The quicker the expert answers, the less time the expert has to think. Speedy questioning is designed to get the expert to make mistakes because the expert is answering too quickly.

- **Seeking Agreement**: Some attorneys use a technique of becoming very argumentative and then they calm down (even if just a little bit) and appear to offer the expert something easy to agree with. If the agreement is not something that is 100% agreeable, the expert should not agree with opposing counseling.

**Studying**. If an expert witness really wants to hone his or her testifying skills, then the expert should be a student of expert testimony. This means the expert should read about testifying and practice testifying.

There are good publications and journal articles regarding expert testimony. The aspiring expert witness should read at least one book and four research articles per year. This would amount to 6 hours of continuing education. Alternatively, the expert could attend expert witness workshops every year. A good source of information for learning expert testimony skills is review of actual expert testimony transcripts, both the expert’s own transcripts and the transcripts of other experts.

The expert should also take the time to practice testifying. This can be done with the retaining attorney. As mentioned above, the expert is expected to write his or her direct exam. Practicing the direct exam with the retaining attorney is a good way to hone testifying skills.

**Conclusion**

Expert testimony is a complex process that unfolds over time. The time spent on the witness stand is only a small part of the time it takes to offer credible testimony. Credible expert testimony relies upon teamwork and preparation. There are many benchmarks along the way that an expert can use to decide whether or not to testify. Prior to and during testimony, the expert must ensure that the testimony meets legal as well as scientific standards. Above all, the expert should keep in mind that testifying is merely the act of dropping of facts during deposition or in a courtroom.
References


**Legal References**

Burrow v. Arce 997 SW 2nd 229, 235 (Texas 1999)


Earle v. Ratliff 997 SW 2nd 882, 890 (Texas 1999)

Flores v. Johnson 210 F 3rd 456, 465-466 (5th Circuit Court 2000)


Kelly v. Texas No. 969-90 Court of Criminal Appeals of Texas, En Banc. (1992)

Manson v. Braithwaite 432 U.S. 98, 97 S.Ct. 2243 53 L.Ed.2d 140 (1977)

Nenno v. Texas No. 72313. 970 S.W.2d 549, 560-561 (1998)

Rosen v. Ciba-Geigy Corp 78 F. 3rd 316 (7th Cir. 1996)

Texas Rules of Evidence (April 2015)

United States v. Frazier 387 F3rd 1244, 1261 (11 Circuit Court, 2004)

Weatherred v. State of Texas 15 SW 3rd 540, 542 (Texas Court of Criminal Appeals, 2000)