



# Qualifying an Expert Witness

*by: William Weinberger*

---

Unless an attorney pays careful attention (1) to the necessary steps to qualify an expert witness and his/her testimony for presentation to the jury and (2) to extracting the expert testimony in the most persuasive manner, the testimony of an expert can be rendered useless. Not only must an expert be qualified in the area in which he/she may be testifying; the methods and analysis used by the expert in coming to his/her conclusion must also pass a standard of acceptability and the opinion must be shown to be relevant to the matters at issue in the proceeding. Moreover, the entire manner in which the expert testifies could mean the difference between jurors either fixing their eyes on the expert in rapt attention or merely rolling their eyes.

In California state courts, a person may be qualified as an expert if he/she "has special knowledge, skill, experience training or education sufficient to qualify him/her as an expert on the subject to which his/her testimony relates." A proposed expert witness may testify concerning his/her own qualifications, and this is the manner in which an expert's qualifications are usually introduced.

Once an expert has been qualified, he/she will be permitted to offer his/her opinion, within his/her area of expertise, "related to a subject that is sufficiently beyond common experience that such opinion would assist" the jury (in jury trials) or the court (in non-jury trials). The expert's opinion may be based upon matters that he/she personally knows or has perceived, or upon facts related to him/her by someone else, provided those are the kind of facts and matters experts in his/her field reasonably rely upon in forming an opinion of the type the expert is going to offer. The expert may also rely upon his/her own special knowledge, skill, experience, training and education in rendering his/her opinion.

The foundation for qualifying an expert witness in federal court is similar to that in the California courts, but before expert testimony may be presented to the jury, the judge must make a preliminary determination of whether the testimony meets the requirements under the applicable evidence rule for expert testimony. Thus, the trial judge must assess (1) whether the expert testimony is based upon sufficient facts and data, (2) whether the expert testimony is the product of reliable principles



and methods, and (3) whether the expert witness has applied the principles and methods reliably to the facts of the case.

The determination of the first issue, whether the expert testimony is based upon sufficient facts and data, involves an evaluation by the trial judge of whether the facts made known to the expert are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. In determining the second issue, the judge must assess the principles and methodologies used by the expert against one or more of the following criteria: whether they are accepted in the field in which the expert works, have been tested by practitioners in that field, have been subjected to peer review, have an acceptable error rate or are conducted with proper standards and controls. The third factor is based upon a determination of how the witness has applied his/her principles and methods to the case.

Effective trial testimony by an expert requires careful preparation. Not only must the expert's conclusions and analysis be clear; his/her presentation must be persuasive to the jury. The most erudite and leading expert in a particular field could be a disaster at trial if the jury does not believe him/her.

Thus it is important to humanize the expert to the jury. The initial testimony by the expert usually is about his/her background and expertise. The testimony can also be used to help the jury relate to the expert; questions can elicit information about the expert that will show the jury that he/she is a person worthy of their trust. For example, while asking an expert about his/her educational and professional background, questions can also elicit information about why the expert went into a particular field and why he/she finds the field interesting or rewarding.

When presenting his/her opinions and the facts on which they were based, the expert needs to educate the jury. The attorney and the expert must strategize not just about what are the strongest opinions the expert can state, but also about what form of presentation of the opinion will be most persuasive to the jury.

The expert must also be prepared for cross-examination by the opposing counsel. Other opinions rendered by the expert must be gathered and reviewed, and, to the extent any appear not to support the conclusions of the expert in the case, the expert must be prepared about how he/she can honestly distinguish those opinions or explain why they do not contradict his/her opinions in this case. The expert and attorney must also prepare for any other matters in the expert's background that



might be used to attack his/her credibility. These may include professional disciplinary proceedings, license suspensions or revocations, or even any advertisements by the expert or his/her company that might be used to taint the expert's opinion.

Conducting a trial is, in essence, telling a compelling story with an ending that the jury can be persuaded to reach. Expert testimony is one chapter - a very important chapter - in that story, and must be made as moving and stirring as the rest of the chapters. Assuring that the expert's testimony will be admitted is just as important as making sure that his/her testimony is compelling. Careful attention to both these important aspects of the witnesses' testimony is critical.

*William Weinberger, a partner at Christa & Jackson, specializes in complex business, real estate and land use litigation. He has litigated and successfully resolved numerous eminent domain matters and other business cases involving valuation issues. Mr. Weinberger was recently appointed by Governor Gray Davis to the California Law Revision Commission. He may be reached at (310) 282-8040 phone, (310) 282-8421 facsimile, or [wweinberger@christalaw.com](mailto:wweinberger@christalaw.com).*