

Qualifying as an Expert Witness In Tribal, State, & Federal Courts

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What Is An Eye Witness?

- An “eye witness” (a.k.a. “lay” or “percipient” witness”) is someone who observed something & is called to testify about it later.
- An eye witness can only testify about what she personally has **seen, heard, or experienced**. (“5 Senses”)

Examples of a DV Advocate’s Eye Witness Testimony

Based on events that occurred in her presence or her personal observations, an advocate testifies in court about:

- photos she took of the victim’s injuries, or
- the quality of the victim’s parenting skills that the advocate observed while the victim & kids were in shelter.

CAUTION: Testifying as an eye witness when you’ve been the victim’s advocate may waive the victim-advocate privilege!

Examples of an Officer's Eye Witness Testimony

Based on events that occurred in his presence or his personal observations, an officer testifies in court:

- where the parties were & what they were doing upon arrival at the scene,
- evidence collected by or in presence of officer

Any injuries to the victim observed by officer

Any non-hearsay statements (excited utterances, etc.) made in officer's presence.

"Expert Witness"

➤ Broad definition in federal and many tribal courts:

- someone with **greater knowledge than the average layperson** about a topic
- who is deemed qualified as an expert by a judge
- and can then provide expert witness testimony.

Rules

- Tribal, state, & federal courts each have their own rules of evidence.
- Many tribes (& some states) have adopted the Federal Rules of Evidence (FRE).
- Some jurisdictions are more lenient than others in allowing the introduction of expert witness testimony as evidence.
- Each jurisdiction's governing rules of evidence & judges (based on case law) determine whether someone may testify as an expert witness.

Who is an Expert Witness?

- Under Federal Rules of Evidence an expert witness is a person with **specialized** 1.) **knowledge**, 2.) **skill**, 3.) **experience**, 4.) **training**, or 5.) **education** on a particular matter (e.g. DV or SA) **greater than that of the “layman.”**
- Experts are called to testify in legal cases to help the judge or jury (“trier of fact”) better understand the issues involved or determine a fact in issue.

Example: You might qualify as an expert witness on domestic violence if you:

- Work at a domestic violence shelter or as a dv advocate
- Provide legal advocacy for dv victims
- Work in a program funded by the DOJ
- Are an experienced DV law enforcement officer
- Participate in a community d.v. task force &/or other coalitions
- Assisted in drafting the d.v. code, court forms, law enforcement protocols, etc.

Example: DV Qualify cont'd

- Train or present on d.v. in local schools, community colleges, universities, chambers of commerce, communities, etc.
- Attend trainings, conferences & workshops on d.v.
- Write articles on d.v. for newsletters, local newspapers, and other publications
- Appear on t.v. or radio presenting information on d.v.
- Also have education and degrees related to dv (e.g., A.A. in criminal justice, M.S.W., etc.)

Experts In Indian Country

- often live in the same Native community as the victims
- may speak the same Native language
- participate in the same culture and ceremonies
- work extensively in programs that serve Native people & Native communities

Qualifications cont'd

- Do not need to have all of the above skills and knowledge to qualify as an expert witness, just some!
- The more demonstrated training, work experience, education, etc. that you have, the easier it will be for you to qualify as an expert witness.

Expert Witness Testimony

- The purpose of expert witness testimony is to help educate a judge or jury (“trier of fact”) about important issues in both criminal & civil cases.
- An expert witness’ testimony is generally admissible if it will assist the trier of fact (judge or jury) to better understand the evidence or to determine a fact in issue.

Why should you testify as an expert witness?

- Your expert witness testimony could help provide safety for victims & accountability for perpetrators
- You can help educate the judge &/or jury about:
 - “DV 101”
 - predominant aggressors
 - effects of dv on children
 - lethality risk factors
 - Delayed reporting
 - Victim recanting

How Can Expert Witness Testimony Help Victims?

- Can ensure that the correct party is convicted of the crime:
 - Example: Self-Defense
 - Example: Bolster or rebut other defenses
- Can help victims in collateral legal matters (especially child custody):
 - Example: divorce/child custody
 - Example: ICWA/failure to protect cases
 - Example: unemployment benefits for victim who missed a lot of work after being raped

Examples of Common Expert Witness Testimony in D.V. Cases

- explaining d.v. in a divorce or custody case
- explaining why a Native mother who is being battered by her partner might not leave where CPS is trying to remove children
- explaining lethality risk factors in a protection order hearing
- explaining predominant aggressor evidence in a criminal case where the victim has been wrongfully charged
- explaining effects of witnessing d.v. on kids & why it is often in the child(ren)'s best interests to remain in the custody & care of the non-abusive parent

Examples in Sexual Assault Cases

- Explaining delayed reporting
- Why it's not unusual for no injuries to be present on victim
- Explain why a victim may recant
- Explain lack of DNA evidence (used condom, no timely exam, etc.)

Examples of a Qualified Expert Witness In Other Areas

- Gang member testifying as an expert on drug trafficking based on his testimony that he had six years of experience setting up drug distribution centers in different cities. U.S. v. Harris, 28 F.3d 1487, 1496-97 (8th Cir. 1994)
- Witness' experience as a mechanic qualified him as expert on machine repairs. U.S. v. Hernandez- Palacios, 838 F. 2d 1345 (5th Cir. 1988)

You're Already 1/2-way There To Becoming an Expert Witness!

- As an advocate or law enforcement officer who has worked with Native victims, you already possess specialized skills, education, experience, & training.
- You also possess specialized knowledge of your communities (language, customs, traditions, etc.).
- In many courts you can qualify as an expert witness!

A Word of Caution Before Proceeding – Once Again!

- If you were the victim's advocate & are called as an expert witness, your testimony may waive the victim-advocate privilege.

FRE 705b Disclosure of Facts Or Data Underlying Expert Opinion

The expert must testify about the underlying facts they used to form their opinion if:

1. the Court requires them to, or
2. the expert is asked to disclose the facts on cross-examination

Remember: you may have to disclose what you relied on to form your opinion – so confidentiality may be waived!

2 standards for admission

1st = FRE: follows “Kumho Tire”

- Judge As “Gatekeeper” of non-scientific expert witness testimony will determine
- witness’ **specialized experience, knowledge, skill, training, and/or education**
- Whether the testimony is relevant and reliable.
- Whether the testimony helps the trier of fact to determine a fact in issue.

Judge As “Gatekeeper” under the 2nd Test: “Frye Test”

- States & Tribes that do not follow the FRE, may follow “the Frye test” based on a series of cases stemming from *Frye v. United States*, 293 F. Supp. 1013 (D.C. Cir. 1923).
- The Frye test is whether the proposed expert testimony is “sufficiently established to have gained general acceptance in the particular field to which it belongs.”
- The expert herself can testify as to the evidence’s “general acceptance” in the field.

Frye Test: D.V. Theory Is Widely-Accepted

- All proposed d.v. expert witnesses should be prepared to show the judge that basic d.v. theory (e.g. power & control, predominant aggressor) is widely accepted by:
 - national d.v. advocacy organizations,
 - social scientists & academicians,
 - law enforcement officers & prosecutors,
 - other courts & legal professionals,
 - state and tribal bar associations, &
 - the federal government including legislation such as the Violence Against Women Act.

Examples of Widely-Recognized & Respected D.V. Authorities

- **Office on Violence Against Women (OVW)** in the Department of Justice (DOJ) - numerous publications, training conferences, articles, and manuals
- **US Bureau of Justice Statistics** - various studies provide the most widely-quoted d.v. statistics available
- **Domestic Abuse Intervention Project (MN Program Development, Inc.- Duluth)** - designed the Power & Control Wheel
- **PCADV**
- **ABA**
- **NDAA, IAFN, etc.**

Native DV Authorities

- Sacred Circle- National Resource Center to End Violence Against Native Women (a project of Cangleska, Inc.)
- Mending the Sacred Hoop TA Project
- Southwest Center For Law And Policy
- Tribal Law And Policy Institute (Sarah Deer)
- BWJP, other OVW tribal TA providers, etc.

Widely-Recognized & Respected D.V. Authorities Include These Individuals (dominant culture)

- **Barbara J. Hart** - longtime legal advocate at the forefront of the d.v. movement, developed many widely-accepted theories including that of "lethality risk factors" (find her collected publications at: www.mincava.umn.edu/documents/hart/hart.html)
- **Jacquelyn "Jackie" Campbell** - preeminent leader in the field of d.v. risk assessment research

Other Published Authorities

- **Lundy Bancroft** - widely regarded as the preeminent expert on the effects of d.v. on children & on one's ability to parent; numerous publications including several books (see: www.lundybancroft.com)
- **Evan Stark** - proponent of theory of coercive control which is steadily gaining more widespread acceptance as it becomes better known
- **Nancy Lemon** - wrote, amongst other things, widely-used & cited casebook *Domestic Violence Law*; testified as expert witness in Supreme Court d.v. case
- In Native communities and/or Native dv: **Sarah Deer**, **Christine Zuni Cruz**, etc.

Peer-Reviewed Journals

- Other professionals in the author's field review articles in peer review journals prior to publication to ensure the research & conclusions are in keeping with general standards in the field.
- The ABA's *Domestic Violence Quarterly* is an example of a peer-reviewed journal on DV.
- Another good example is Gloria Valencia Weber & Christine Zuni's peer-reviewed journal article *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, published by the St. John's Law Review.
- Newspaper, magazine, & newsletter articles are not considered to be peer-reviewed.
- Bring to court copies & lists of citations to any & all peer-reviewed journals you used & relied on in forming your expert opinion.

Learned Treatises

- A learned treatise is a reference manual, book, or publication commonly relied upon in the expert's field.
- DV examples include:
 - Nancy Lemon's book [Domestic Violence Law](#)
 - Clare Dalton & Elizabeth Schneider's book [Battered Women & the Law](#)
 - TLPI's [Sharing our Stories of Survival: Native Women Surviving Violence](#) and [Tribal Legal Code Resource: Domestic Violence Laws](#)
- Bring to court copies & lists of citations to any & all learned treatises you used & relied on in forming your expert opinion.

To Testify As An Expert Witness

your testimony must be:

- (1) based upon "sufficient facts or data",
- (2) "the product of reliable principles and methods", **AND**
- (3) you must "apply the principles & methods reliably to the facts of the case."**

This means that you are:

- using good, solid, widely accepted theory & statistics in developing your expert opinion
- basing your opinion on information and facts provided to you
 - by the attorney(s), or
 - by the victim **(but watch out for confidentiality issues!)**

Example: Explaining Basic Power and Control DV Theory

- Domestic violence is about power and control - This is an important but difficult concept for many lay people to grasp
- You'll spend much of your testimony helping the judge or jury understand this concept

Power and Control Wheel

- You may want to bring an enlarged, mounted chart-sized copy of the power and control wheel for use during your testimony
- This can be a valuable visual tool
 - Helps keep the attention of the judge or jury
 - Helps judge or jury to understand abstract concepts
 - Helps keep your testimony flowing
- Be prepared to talk about where the power and control wheel comes from and how it is regarded in the domestic violence field

Myth #2

She should just leave him.

Truth

- Survivors face many **barriers** to leaving their abusive partners, including:
 - Economic
 - Geographic isolation
 - Lack of transportation
 - Lack of shelters
 - Lack of Tribal codes to protect women
 - Lack of criminal jurisdiction over non-Indian abusers
 - Shortage of legal services
 - Shortage of law enforcement officers
 - Danger (especially high at time of separation)
 - Community/religious pressure
 - Fear of losing her children

Myth #3

She is endangering her children by staying with her batterer.

Truth

- Survivors of domestic violence take steps everyday to protect their children.
- Batterers often threaten to kill their partners or children if their partner ever leaves. A survivor may be making the safest choice for her and her children when she stays with her batterer.
- A survivor may stay with her batterer in order for her children to maintain shelter, food, health insurance, and the other necessities of life.
- Survivors may stay with their abusers because they have no access to shelter or resources and believe that it is safer for their children in their home with the abuser than on the streets
- Separation violence: most lethal time

Myth #4

She provoked him into hitting her. She's always harping on him and making him jealous. He couldn't control himself.

Truth

- No adult can provoke another person into committing an act of violence by "harping", "nagging", or "making someone jealous."
- The batterer chooses to use physical violence against his partner as a means of controlling her.
- Many battered women spend their lives doing everything in their power to avoid the abuse and try desperately to discern what might "trigger" the abuse.
- The batterer knows which persons in his life that he can abuse. He does not physically abuse his boss at work who "gets on his nerves" and does not abuse his co-workers, friends, and others who "bug" or "nag" him.
- No person deserves to be abused.

Myth #5

Alcohol and drugs cause a batterer to “lose control” and commit acts of domestic violence. If he just gets sober everything will be o.k.

Truth

- While alcohol and drugs decrease inhibitions and increase impulsivity they do not “cause” domestic violence.
- Domestic violence is a pattern of power and control.
- Batterers who use drugs or alcohol do not physically abuse their employers, co-workers, or friends when they are intoxicated.
- Some batterers consciously and intentionally use drugs and alcohol before inflicting harm on their partners so that they can deny personal responsibility for their actions.

Myth #6

The batterer was never violent with the kids, so custody is appropriate for him.

Truth

- Children in homes where domestic violence occurs are more likely to suffer abuse themselves at the hands of the batterer.
- Children who witness domestic violence are also profoundly impacted by the violence. Some studies indicate that witnessing domestic violence is just as traumatic for children as suffering actual physical abuse themselves.
- Batterers tend to display an authoritarian and verbally abusive parenting style even when no physical abuse is directed towards the children. This parenting style can have further traumatic effects on children already traumatized from witnessing abuse against their mother.

Myth #7

There must be something wrong with her. She's probably co-dependent. She just needs to get some counseling.

Truth

- These statements shift the blame for the abusive behavior on to the victim rather than on to the person perpetrating the violence.
- The batterer is the person with the problem. He is the one who chooses to emotionally and physically abuse his partner. He has the choice to stop the abuse.
- An intensive batterer re-education treatment program for the abuser is the most appropriate counseling option in cases of domestic violence.

The “Ultimate Issue”

- As an expert witnesses you may be allowed to testify as to “the ultimate issue” in a case (**caveat: criminal cases**).
- This is the essential question the judge or jury must finally answer in the case, e.g.:
 - Should the Court issue a Protection Order?
 - Should custody be with the Mother?

The Logistics of Expert Witness Testimony

- Expert Witness “Disclosed”
- Deposition or Pre-trial Interview
- Hearings On Motions - Qualifying The Expert Witness
- Trial/Hearing Testimony
 - Direct examination
 - Cross examination
 - Re-Direct (infrequently, Re-Cross)

Impeachment

At trial, an attorney can question the expert witness directly from a pre-trial interview or deposition transcript & try to impeach their credibility

- inconsistencies between statements the expert has made at trial & those made in the deposition/pre-trial interview
- Bias or prejudice: law enforcement must be careful if you are testifying in a civil or criminal case your own dept. investigated (also your own dept may not allow you to testify)
- Bias: advocates may get a lot of “man hating questions”

Swearing In

Before testifying, all witnesses must be “sworn in” (i.e. give an oath or affirmation/ promise/ swear to tell the truth) while standing in front of or in the witness box.

The Sequence of Direct Examination

- First the attorney has to introduce you as the witness & then, through questioning, “ lay the foundation” for your testimony as an expert witness.
- Next the attorney will ask for your testimony about the specific case at hand.
- Finally the attorney will ask for your expert opinion & explanation of that opinion.

Stipulation & Voir Dire

The opposing attorney can:

- “Stipulate” (agree) to your qualifications, **or**
- Challenge your qualifications as an expert witness by “*voir dire*” of the witness”
 - Voir Dire = asking questions to challenge your qualifications/argue that you don’t have more knowledge about Native DV or SA, etc than a lay person /theory is not widely accepted

Once the judge determines that you can testify as an expert witness, the attorneys will begin questioning you about issues or information in the case.

Purpose of Direct Examination

- To elicit from the witness
- in a narrative form
- through non-leading, open-ended questions
- in a clear, logical progression
- the observations, opinions & actions of the witness
- so that the trier of fact understands, accepts, and recalls the testimony.

The 5 Open-Ended Questions

1. Who . . . ?
 2. What . . . ?
 3. When . . . ?
 4. Why . . . ?
 5. How . . . ?
- On direct examination, the attorney's questions to the witness will usually take these forms.

Credibility is the Key to Effective Testimony

- The judge & jury will believe a witness' testimony & remember it based on:
 - who the witness is
 - the content of the witness' testimony, &
 - the witness' professionalism & demeanor

Meet With the Attorney Calling You As an Expert Before Trial

- Before trial, meet with the attorney who is calling you as an expert witness to provide him or her with information:
 - that may be critical to the case, &
 - about your qualifications as an expert witness (background & experience) including your c.v. or resume.

Be Prepared to "Draw the Sting"

- Ask the attorney what you might expect to be asked on cross examination in this case so that you can "draw the sting" (i.e. diffuse the potential impact of negative information) on direct examination.

Other Tips for Effective Expert Witness Testimony

- Ask the attorney to explain the elements of the crime (or basis for decision-making if it's a civil case).
- Show the attorney any & all charts, diagrams, etc. - you may plan to use in the course of your testimony. (Discussion of use of demonstrative evidence such as charts and diagrams later today)

- Time-permitting - ask the attorney to do a "dry run"
- Conduct yourself in a thoroughly professional manner throughout the process.
- Abide by any & all subpoenas and other court orders.

Language, & Volume

- Whenever possible, use simple language & try to avoid technical, medical, or legal terms (e.g. "legalese").
 - If you must or do use such terms, explain them.
- Speak clearly and with enough volume that at least the trier of fact can hear your testimony without straining.

Testifying for the Record

- The proceedings will be recorded by a court reporter or on audio tape.
- If the case goes up on appeal, the appellate court will rely on this transcript or recording.
- Therefore, avoid using gestures in your answers. Sample testimony:
 - Q: "What was Shirley doing when you arrived?"
 - A: "Shirley was rocking back & forth with her knees to her chest"
- Answer questions that call for a yes or no answer with either "yes" or "no" (do not use "uh huh," "nah," "yeah" etc.).

Do Not Speculate!

- If you are not sure about the answer to a question, do not speculate.
- If you do, your answer could come back to haunt you!

Spell It All Out for the Court!

- Remember that the judge or jury have never heard your testimony before now.
- You must therefore be very explicit, descriptive, and precise in your testimony.
- Do not assume they will "fill in the blanks" for you or that any of what you are saying is "common knowledge." To be safe, spell it all out for them!

Objections

- During your testimony, an attorney may object to a question or to your answer. The attorney then explains her objection to the judge, who makes a ruling on it.
- If there is any objection, make sure you wait for the judge's ruling before you (finish your) answer!

You can always ask the attorney to please repeat the question if you forget while you are waiting for the judge's ruling on the objection (or didn't hear properly).

Common Objections

- "irrelevant" = has nothing to do with the issues in the case
- "asked & answered" / "cumulative" = already asked & answered on direct or previously during the cross
- "calls for speculation"/"speculative" = the question is hypothetical with no basis in fact

“Sustained”
= Don’t answer the question

“Overruled”
= answer the question

Attorneys’ Goals on Cross-Examination

- On cross-examination of a witness, an attorney is trying to:
 - elicit information favorable to her client by using leading questions, &
 - “impeach” or discredit the witness’ prior testimony on direct examination

Leading Questions

- The attorney will try to box you in to giving a yes or no answer.
- This gives the impression that this attorney is in control, his or her theory of the case is correct, & that the opposing attorney's case is full of holes.

Impeaching the Witness

- There are several ways in which attorneys will try to "impeach" (i.e. discredit) you as a witness:
 - prior inconsistent statements - in depositions, pre-trial interviews, or at trial
 - contradiction of facts within your testimony
 - bias - preconceived notions/ideas (in DV cases, generally re: perceived bias against men in favor of women or law enforcement bias)
 - prejudice - e.g. personal animosity toward/hatred for the other side &/or his family, people of his race/ethnicity/religion/etc.
 - witness' reputation for untruthfulness
 - inability to perceive - see/hear/touch/taste/smell/feel

Preparing for Cross-Examination

- Before coming to court, review any & all transcripts or recordings of your prior depositions, pretrial interviews, documents, etc. from before trial.
- Review your résumé or C.V. & bring copies with you.

Cross Examination

- Remember that cross examination is not a personal attack on you.
- It is important for you to remain calm, composed, neutral, & professional.
- Remember that you are in court to help the judge & jury understand and to make an informed decision in the case.

Cross Examination on your Qualifications as an Expert Witness

You can anticipate the following types of questions on cross examination:

- your credentials including how many times you've testified as an expert witness
- whether, by whom, & how much you've been paid for your testimony & whether you make a substantial part of your income by testifying like this
- whether you have any long or significant relationships (personal or professional) with anyone else involved
- whether you've ever testified for a male victim of dv or on behalf of a man accused of committing DV

Other Common Questions

- asking you to define different dv terms (e.g. "predominant aggressor")
- asking you about different theories of DV (e.g. cycle of violence) or research/statistics
- hypotheticals - to determine whether your opinion would change if the facts were slightly different
- what documents or information you relied on in forming your opinion & how you got the documents or information
- about any inconsistencies between your pre-trial statements or in previous publications & your present trial testimony

Cross-Examination Is Not Required

- Attorneys sometimes choose not to cross-examine a witness if:
 - they believe they won't gain anything by doing so,
 - the witness' testimony didn't hurt their side (much), &/or
 - they have another witness to call later who will contradict this witness' testimony so they don't want to draw any more attention

Judge or Jury Questions

- The judge might ask you some more questions if she needs clarification or believes the attorneys did not ask all the relevant questions.
- In some jurisdictions the jury may be allowed to ask you questions *in writing* as well.

Re-Direct

The attorney that called you to testify may also have an opportunity to conduct re-direct examination to clarify anything raised during the cross-examination.

“Re-Cross” is also possible.

After Your Expert Testimony

- The judge might order you to remain under oath (& subpoena) & be available for further testimony later.
- The judge might “release” you, meaning you are free to go back to work or home or remain in the courtroom & observe the rest of the trial or hearing.

Résumés or C.V.s Demonstrate Your Specialized Knowledge, Skills, etc.

- Besides the usual education and jobs, remember: Regularly update your résumé or c.v. with:
 - the total number of years and months experience you have working in the specific field,
 - your paid and unpaid work in the field including volunteer positions,
 - service statistics including numbers (but not names!) of victims served,
 - presentations, trainings, and conferences you attend or at which you present (keeping a file of all completion certificates), &
 - articles or papers you have written.

Resumes And CV's

- You should also include a section on special skills/qualifications regarding the community served (e.g. ability to speak the language, living in the same community, enrollment as a member of that Tribe).

Expert Witness Experience on Your Resume or C.V.

- Keep track of all your past experience as an expert witness, including:
 - the name & location of the court,
 - type of case, &
 - the party for whom you testified.
- For example:
 - *April 5, 2003/Hopi Tribal Court/Protection Order Hearing/Plaintiff*
 - *March 2, 2003/United States District Court for the District of Montana/Sexual Assault Criminal Trial/United States Attorney for the District of Montana*

In Conclusion, Remember:

- regularly update your c.v. or résumé.
- maintain a current list & copies of the data, publications, etc. commonly used & on which you rely upon to formulate your expert opinions.
- if possible, don't provide direct advocacy for the victim if you will be testifying as an expert.
- **you may already be an expert & your expert witness testimony will help provide justice for Native victims!**
