



The Computer Forensics
Expert Witness
CV, Preparation, Testimony

◆ Your Curriculum Vitae

- ◆ Why should you have a Curriculum Vitae?
 - ◆ Project Professionalism.
 - ◆ Market yourself to other professionals.
 - ◆ Script your qualifications for examination.
 - ◆ Respond to Discovery or Disclosure Demands.
 - ◆ Keep track of what you have done.



◆ Relationship of CV and Bona Fides

- ◆ Bona fides are extracted from your Curriculum Vitae (CV)
- ◆ First stage of bona fides is drafting a CV
- ◆ CV very detailed



◆ Different Styles of CV

- ◆ No one format that is perfect
- ◆ Reflects the emphasis of the author-expert
- ◆ Should demonstrate why the author should be regarded as an expert.
- ◆ All assertions in CV should be defensible by expert. Keep a file with thank you letters, certificates and diplomas.

◆ Use of CV

- ◆ Discovery and Disclosure of Expert Witness
- ◆ Opposing party may legitimately demand provision of CV
- ◆ Opposing party may object to Expert Witness testimony if no CV provided



◆ Other Uses of CV

- ◆ Make it difficult for opposing party to object to your testimony as an expert.
- ◆ Well developed CV presents your qualifications clearly and convincingly.
- ◆ Opposing party may want to stipulate to your expertise or at least not cross examine in voir dire.

◆ Civil Litigation

- ◆ Use of CV is substantially the same in civil litigation as in criminal litigation.
- ◆ Required to be presented in Federal Court.
- ◆ Generally asked for in discovery and disclosure in criminal cases.



◆ Use of CV

- ◆ Disclosure of Expert Witness
- ◆ Opposing party may legitimately demand provision of CV
- ◆ CV is one of the required items under FRCP 26 when identifying an expert witness.
- ◆ Opposing party may object to Expert Witness testimony if no CV provided

◆ Bona Fides

- ◆ The statement of your qualifications given in an affidavit.
- ◆ May be done by attaching your CV, but you may also want to write a narrative statement of your qualifications to use at the beginning of affidavits.
- ◆ Typically 3-5 pages.
- ◆ Write it in sentences and paragraphs.
- ◆ Write in first person.

◆ Bona Fides

- ◆ Used in affidavit to support warrant:
 - ◆ Establishes your qualifications to make technical analysis.
 - ◆ Establishes your qualifications to render an opinion.



◆ Bona Fides

◆ Element:

◆ Bona fides

- ◆ Your position
- ◆ Your experience
- ◆ Your education
- ◆ Your training
- ◆ Your specific investigative experience (cases)
- ◆ Your testimonial experience (required under FRCP 26)

◆ Trial Consultant and Expert Witness

- ◆ Two different roles of expert.
- ◆ Trial Consultant advises attorney, name and reports are not releasable under discovery rules.
- ◆ Expert Witness, prepares to testify, name must be provided, CV must be provided and reports are discoverable.

◆ Trial Consultant

- ◆ When an attorney initially hires an expert for a litigation matter, the expert's proper title during the discovery phase is "consultant". The attorney may ask the consultant to investigate, research, consult, advise, experiment, test, study, read and perform many other functions. Normally, such activities are confidential and, opposing parties cannot obtain the expert's name or work product without a special court order.

◆ Trial Consultant

- ◆ To the extent the consultant uncovers information unfavorable to the client, the other side cannot obtain such information absent special circumstances.
- ◆ Once an attorney is satisfied that a consultant has opinions favorable to the client, the attorney may notify the other side that he will use the expert to testify. This is called "identification" in federal practice and may have other names in state practice varying from State to State.

◆ Trial Consultant

- ◆ A consultant must fully disclose to the attorney all information that may affect the client's case, including matters which may allow the other side to impeach the expert's credibility. This should be done while a confidential consultant relationship exists so that the attorney can decide whether such information may seriously harm a client's case and choose not to designate that consultant to testify.

◆ Trial Consultant - Attorney

ATTORNEY SHOPPING FOR A FAVORABLE OPINION

- A consulting expert's responsibilities in such circumstances are to make clear to the attorney that his opinion will be based on the facts. The expert should explain that he will make a thorough analysis of the facts and provide an honest preliminary opinion to the attorney at the earliest available opportunity so that the attorney can decide whether to use that expert's services.

◆ Trial Consultant - Attorney

CONTINGENT FEE FOR EXPERT TESTIMONY

- There are certain limited exceptions, primarily in the field of medical malpractice, where consultants who do not testify may earn a contingent fee for locating appropriate testifying experts or investigative leads. However, expert activity leading to testimony cannot be compensated on a contingent basis. Only one case that is contra to this proposition, but reversed on appeal (EDNY 1976, USCA 2d Circuit 1977)

◆ Expert Witness

- ◆ Some of the issues are summarized:
- ◆ What is an expert witness?
- ◆ What are some of the differences between the lawyer's motives and the technician-examiner's duty that may affect how the technician-examiner acts, or is expected to act, as an expert witness?
- ◆ Is the function of the expert witness in conflict with the code of ethics professed by the technician-examiner?

◆ Conflict Protection

- ◆ If so, in what specific instances? Is it possible to mitigate, eliminate, or profit from conflicts?
- ◆ How? Have tools in place (a pre-drafted letter, fax or email) that you may interpose that create a contract if the person you are communicating with wants to disclose information that would generate a potential future conflict.
- ◆ At least you will get paid (or you may argue that since the attorney did not perceive that he/she had a duty to pay you that no potential conflict resulted).

◆ Expert Witness

- ◆ The rules governing expert testimony are the domain of the lawyer and the trial judge. It is unnecessary for the expert witness to be familiar with the intricacies of the rules of evidence. It is enough to say that the admissibility of expert evidence is predicated on the existence of knowledge and experience that is beyond that of the ordinary citizen and is applicable to the matter before the court. It has the effect of proving facts.

◆ Attorney-Expert Witness

- ◆ Lawyers need to recognize the need for a consultant early on. They should obtain a qualified consultant on their team as soon as possible. Consultant should be cautious about entering the case late.
- ◆ Part of the qualification should include current professional certification, experience (including testimony), training, publications and membership in the appropriate professional organizations.

◆ Attorney-Expert Witness

- ◆ The lawyer should look for a consulting expert with a broad experience in a specific area. A CV displaying a broad background involving education, experience teaching, supervision in his/her chosen field.
- ◆ A consultant with career activities in only one s is not as credible as one with a broader background. Actual work experience in the field may be more impressive and important than primary experience in academia.

◆ Attorney-Client

- ◆ Lawyers need to explain to their client the need for expert assistance. The lawyer and his or her client will feel more confident about the case if they know that the qualifications of the team are to be enhanced by the addition of a consulting expert. Provide the attorney with a statement of what you do in plain language; help the attorney communicate your value to the client. The client will recognize the wisdom of the financial investment.

◆ Expert Witness

◆ Pre-Trial Preparation

- ◆ Any person may be summoned to testify to describe a circumstance personally experienced. This witness has no special status. A person who may be summonsed as an expert witness has special status and may give opinion evidence based on expertise. The following practice points concern the latter.

◆ Expert Witness

- ◆ Practice Point #1 - Attend by court ordered summons or subpoena only.
- ◆ The expert witness attends court at the request of a party or by court summons or subpoena. The expert witness should consider being formally ordered to attend rather than attending voluntarily. There are advantages to attending by court order.

◆ Expert Witness

- ◆ Practice Point #2 - Take to court only what the subpoena commands.
- ◆ Read the summons or subpoena to find out what you must bring with you to court. If the order commands the witness to attend in person, that is all that is required. If it commands attendance plus the delivery of materials, take only what is specified.

◆ Expert Witness

- ◆ Practice Point #3 - Clarify precisely what area of expertise it is you will be expected to testify to.
- ◆ Most requests to testify as an expert witness begin with a telephone call from counsel. Immediately begin the process of clarifying why counsel requires an expert opinion and what expertise may be required. Reach an understanding of the expertise required early. It will focus preparation if the request is written and reduce the risk of misunderstanding later.

◆ Expert Witness

- ◆ Practice Point #4 - Clarify if a written report is required.
- ◆ Written reports form the basis for pre-trial preparation, settlement negotiations and testimony during trial. They may lead to a decision not to call the expert witness, or a settlement and hence prevent a trial. Reports may be a few paragraphs or voluminous. If a written report is requested, incorporate only what is necessary.

◆ Expert Witness

- ◆ Practice Point #5 - Review the file and relevant information.
- ◆ Testifying may occur any time after initial communications and written reports are submitted. Before attending court or deposition, review the specific circumstances to refresh memory, focus attention on important facts and issues to enhance the credibility of your factual and opinion testimony.

◆ Expert Witness

- ◆ Practice Point #6 - Ask for a convenient time to attend.
- ◆ Trials requiring expert testimony may lengthy. Expert witnesses have other business. Counsel are responsible for planning and presenting their evidence, including testimony of witnesses. The witness may request a convenient time to testify. Counsel should estimate time required for the witness to testify.

◆ Expert Witness

- ◆ Practice Point #7 - Clarify what pre-trial involvement is contemplated.
- ◆ Find out what meetings with counsel or pre-trial proceedings such as depositions, are necessary, under what circumstances and who will make the arrangements.

◆ Expert Witness

- ◆ Practice Point #8 - Clarify if other experts are being called to testify.
- ◆ Expert witnesses do not always agree on the interpretation or effects of specific circumstances or facts. The witness should be prepared to respond to a challenge to his or her opinion through another expert witness' opinion.

◆ Expert Witness

- ◆ Practice Point #9 - Provide a curriculum vitae.
- ◆ Opinion or expert testimony is permitted only if the court declares a witness to be an expert in a specified field. The statement of qualifications is made after the witness is sworn in and before testifying. Education, training, related experience and current knowledge are essential ingredients to be a credible expert witness.

◆ Expert Witness

- ◆ Practice Point #10 - Answer questions in plain language.
- ◆ The expert witness attends court to interpret and express opinions about facts. Plain language assists the jury in understanding interpretations and opinions. It will tell the court that the witness understands the subtleties of the situation without resorting to professional jargon.

◆ Expert Witness

- ◆ Practice Point #11 - Answer only what is asked.
- ◆ Be precise and do not offer gratuitous comments. Answer only what counsel or the court asks. If clarification or interpretation is needed, do so as necessary.

◆ Expert Witness

- ◆ Practice Point #12 – Accept the rules of evidence and rules of the court. Accept the rulings and orders of the court with good grace.
- ◆ The main objections raised by counsel to expert testimony will arise out of assertions of lack of proper foundation for the opinions expressed.

◆ Expert Witness

- ◆ Practice Point #13 Anytime a potential conflict exists, an expert's obligation is to disclose the nature of the conflict to the attorney
- ◆ The attorney will then have to determine whether the expert may continue to function on the client's behalf and what he or she must do to keep the expert witness on the case.

◆ Expert Witness

- ◆ Practice Point #14 Develop the ground rules with the lawyer. Is he or she asking for a report, a document review and an opinion?
- ◆ Does the lawyer have specific questions he or she wants answered? Work on precise questions.
- ◆ Perhaps the most important ground rule involves time lines, schedule and cost. When can the consultant expect to be deposed? If a report is necessary, when will it be required?

◆ Expert Witness

- ◆ Practice Point #15. Lastly, make sure you have sufficient time so that you can do a professional job and not have to rush or make last-minute modifications.
- ◆ Avoid coming into the case late; after the close of discovery is a particularly bad point to enter a case.

◆ Expert Witness

- ◆ A few closing thoughts
- ◆ Curriculum Vitae
- ◆ Roles of the Consulting Expert and Expert Witness
- ◆ Witness Preparation
- ◆ Practice Points

◆ Contact Information

◆ Christopher K. Stuart

cks@stuartlaw.com

phone 206-767-5758

fax 206-767-5446

