

**FORENSIC SCIENCE, ETHICS AND THE EXPERT WITNESS**

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Gil Sapir, JD, MSc

The Science of DNA Profiling  
Bioinformatics 6<sup>th</sup> Annual Conference - 2008  
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Gil I. Sapir, JD, MSc  
Forensic Science Consultant & Attorney  
PO Box 6950  
Chicago, Ill. 60680

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FORENSIC SCIENCE, ETHICS AND THE EXPERT WITNESS

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TABLE OF CONTENTS

|   | Page |
|---|------|
| Title Page  |      |
| Speaker Information . . . . .   | 3    |
| Lecture Material . . . . .  | 4    |
| Resources . . . . .   | 52   |
| Appendix A  |      |
| Voir Dire Questionnaire . . . . .   | 53   |
| Appendix B  |      |
| Mitchell's Motion to Reconsider Denial<br>of Court Appointed Consulting and<br>Testimonial Experts . . . . .  | 55   |
| Articles  |      |
| Larry S. Pozner, Why Do We Do It?, Champion, vol.22,<br>no.8, Sept/Oct. 1998, p.5   |      |
| Larry S. Pozner, Lessons Learned, Champion, vol.23,<br>no.5, June, 1999, p.5  |      |
| Gil Sapis, Qualifying the Expert Witness: A Practical<br>Voir Dire, Forensic Magazine, vol.4, no.1,<br>February/March, 2007, p.30   |      |
| Raina Kelley, Real-Life 'CSI' Isn't Sexy, Newsweek Technology<br>& Science MSN, Feb. 27, 2007, <a href="http://www.msnbc.msn.com/id/17366500/site/newsweek/from/ET">http://<br/>www.msnbc.msn.com/id/17366500/site/newsweek/from/ET</a> |      |
| Max M. Houck, CSI: Reality, Scientific American,<br>July, 2006, p.85  |      |

## **SPEAKER INFORMATION**

### **Gil Sapir, JD, MSc**

As a forensic science consultant and attorney in Chicago, Illinois, Mr. Sapir's occupation encompasses the preparation and examination of scientific evidence and he testifies on scientific matters in court. His work includes applied information analysis, litigation and court testimony on breath alcohol testing machines. He regularly lectures locally and nationally to law schools and attorneys on various topics in forensic sciences, including the role of expert witnesses, forensic DNA analysis, breath alcohol analysis, and the examination and use of scientific evidence in court. Mr. Sapir has published articles and book chapters concerning forensic science and breath alcohol testing, and he is on the editorial advisory boards of James Publishing Company and DWI Journal: Science and Law. As an attorney, admitted to practice law before the United States Supreme Court, in Illinois, Texas and Colorado, his felony jury trial experience has been at both the Federal and State level. Mr. Sapir is a Cook County Circuit Court arbitrator, a former assistant public defender and licensed private detective. A graduate of IIT/Chicago-Kent College of Law, Mr. Sapir has a master's degree in criminalistics from the University of Illinois-Chicago, as well as degrees in science, microbiology and biology, from Colorado State University, and he has studied at Lancaster and Oxford Universities in England. He attended the Clinic for Criminal Defense Attorneys at Northwestern University Law School and the National Criminal Defense College at Mercer Law School. His professional memberships include the American Academy of Forensic Sciences, American Society for Microbiology and American Association for Advancement of Science.

Gil Sapir, JD, MSc  
PO Box 6950  
Chicago, Ill. 60680  
(312) 458-0665

Gil Sapir  
Forensic Science Consultant & Attorney  
PO Box 6950  
Chicago, Ill. 60680  
(312) 458-0665

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## **FORENSIC SCIENCE, ETHICS AND THE EXPERT WITNESS**

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There are no degrees of honesty.

"Forensic science is the application of scientific principles and technological practices to the purposes of justice in the study and resolution of criminal, civil and regulatory issues."

American Academy of Forensic Sciences, 1999 Membership Directory and Bylaws, page v.

Forensic science is used to convict the guilty and protect or exonerate the innocent.

### **I. Reasons For Increased Use Of Scientific Evidence.**

- A. Advances in scientific technology
- B. Increased value of physical evidence
- C. Increased crime rate
- D. United States Supreme Court decisions enhancing rights of people, therefore greater reliance on scientific evidence and investigative techniques.

### **II. Why Question Laboratory Test Results / Expert Witness Opinion**

When scientific testimony is offered, the proponent must prove the testimony is produced by valid, scientific techniques and that the process or system produced an accurate result.

Imwinkelried, Exculpatory Evidence, sect. 6-4, Michie Co., c. 1990.

The introduction of the laboratory test into evidence is merely a means to an end.

#### A. Integrity & Truth

"The right to search for truth implies also a duty; one must not conceal any part of what one has recognized to be true." Albert Einstein (1879-1955)

#### B. Accountability

- to society and scientific community

#### C. Aura of Mythical Infallibility

1. The reliability of scientific evidence is premised on its applicable theory and technique, with proper application of that scientific process to a specific occasion. P. Giannelli & E. Imwinkelried, Scientific Evidence, 1-3, Michie Co., c. 1986

2. If the technique is either inappropriate or improperly applied, the results will be subject to charges of unreliability. P. Giannelli & E. Imwinkelried, Scientific Evidence, Michie Co., c. 1986

3. Specimens can be misplaced or misidentified, flaws can exist in the equipment used for the tests, and laboratory technicians can make mistakes in testing. Despite the procedures employed to safeguard the validity of drug testing, test results cannot be accepted uncritically as evidence. United States v. Van Horn, 26 M.J. 434, 439 (1988)

D. Effect of Science and Technology  
historically profound and governing effect on society,  
(computers, electronics, disease, medicine etc.).

E. Truth Seeking Procedure Through Use of Facts

F. Must Prove Innocence Until Financially Ruined

"The essence of science is to ask an impertinent question, and you are on your way to a pertinent answer." Jacob Bronowski

### III. Standards of Proof

A. Preponderance of the Evidence: Civil Cases

1. Greater weight and degree of credible evidence admitted in the case.

- a) more probable/likely that not.
- b) 51%

#### B. Clear & Convincing: Civil Cases

- 1. Child custody and involuntary commitment -- clearly convinced
  - a) a firm belief or conviction as to the truth of the allegations sought to be established.
- 2. How much proof is required to have the state take your child away from you (considerable, a lot) take children from parents.
- 3. 75-80%

#### C. Beyond a Reasonable Doubt: Criminal Cases

Commission of crime must be proved beyond a reasonable doubt, not based upon speculation, conjecture, ambiguities or maybes. Vachon v. New Hampshire, 414 US 4788, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974)

- 1. Doubt can originate from:
  - a) conflicts in the evidence
  - b) from the evidence
  - c) a lack of the evidence
- 2. Our law permits jurors to believe all that a police officer says is true, all the evidence presented is true, and yet still have a reasonable doubt as to guilt of a person.
- 3. 94-96%

Civil attorneys are litigators.  
Criminal defense attorneys are trial attorneys.

### IV. Expert Evidence

#### A. Expert Witness

- 1. Federal Rules of Evidence

A qualified expert may give his opinion to 1) help the court to understand evidence, or 2) to establish a fact

in issue.

2. State Supreme Court Rule - Ill. S.Ct. Rule 201

"An expert is a person who, because of education training or experience, possess knowledge of specialized nature beyond that of the average person on factual matter, to claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial. He may be an employee of a party, a party or an independent contractor." (Illinois Supreme Court Rule 213, 1996, codified into Illinois Supreme Court Rule 201 b(2) (3))

B. Types of Experts

1. Consulting

Person is retained or specifically employed in anticipation of litigation or preparation of trial, but will not testify. The identity, theories, mental impressions, litigation plans and opinions of a consultant are work product and protected by the attorney client privilege.

2. Testimonial

Person is retained for purposes of testifying at trial. The confidentiality privilege is waived and all materials, notes, reports, and opinions must be produced through applicable discovery proceedings. If an expert relies on work product or hearsay as a basis for their opinion, that material must be disclosed and produced through discovery. Unites States v. Lawson, 653 F.2d 299, 302 (7<sup>th</sup> Cir. 1981)

C. Attorney Client Privilege (basis/criteria)- elements

- legal advice of any kind is sought;
- from a professional legal advisor in their capacity as such;
- communications relating to that purpose;
- made in confidence;
- by the client;
- are at their insistence is permanently protected;
- from disclosure by the client/declarant or by the legal advisor;
- except if the protection is waived by the client/declarant.

(People v. Adam, 51 Ill.2d 46, 280 NE2d 205, cert. denied 409 US 948 (1972))

### C. Applicability

"Forensic science is generically applied to a spectrum of expert opinion testimony that spans the sciences, arts and all kinds of skilled professions ... (T)he testimony offered by its specialists is frequently couched in terms of opinions, conclusions and evaluations, which themselves are not scientifically measurable." A. Moenssen, F. Inbau, J. Starrs & C. Henderson, *Scientific Evidence in Criminal Cases*, 4/ed., p.1, Foundation Press, Mineola, NY, c.1995

### D. Application

Attorneys seldom feel comfortable or confident in their ability to obtain, interpret and understand scientific information. Hence, they rely on experts to provide them with scientific material relevant to the case as a basis for expert evidence. V. Miller, and L. Callaghan, A Lawyer's Pathway to Medical and Scientific Information: New Options for Bridging the Gap (Part II), 2 *Shepard's Expert and Scientific Evidence Quarterly*, 579 (Fall, 1994)

Need expert to explain absence of evidence, alternative theories and control flow of information.

E. If not for jurisprudence, the legal system and its rules of evidence, the consulting and expert witness would not exist.

F. Paradox - must use an attorney

"Lawyers as a group evidence an appalling degree of scientific illiteracy, which ill equips them to educate and guide the bench in its decisions on admissibility of evidence proffered through expert witnesses." Andre A. Moenssen, Prof. of Law, University of Richmond, Genetic Witness: Forensic Uses of DNA Tests, OTA-BA-438, U.S. Government Printing Office, 1990.

Ozian Option: I can't give you brains, but I can give a diploma.  
(The Wizard of Oz to the Scarecrow)

## V. Criteria for Expert Witness

A. Knowledge, reputation for honesty, objectivity, personal appearance, dignity, voice, modesty, even temperament,

memory for facts without references, communication skills, integrity, trustworthy, and ability to teach and educate.

B. More than do you have an opinion, what is that opinion

C. Major elements always present in expert witness testimony:

1. Pretrial preparation
2. Expert's technical expertise/specialized knowledge
3. Organization of expert's testimony
4. Expert's ability to educate the fact-finder

D. Fiction that good attorneys do not need experts

- attorney competency cannot replace an expert

## **VI. Classification of Expert Witnesses**

A. Win At Any Cost Mentality

1. "Sleaz factor"
2. Boy Scout Law is irrelevant

B. Hierarchy for Competency, Ethics & Accountability  
(aka "Peter Principle")

1. Lay people c. Gil Sapir 2008  
common sense and life long experience
2. Technician/Examiner  
limited and concentrated training, applies known techniques, works in system & taught in a system.  
eg. criminalist, investigator, supervisors.
3. Practitioner  
material & information analysis and interpretation
4. Specialist  
devoted to one kind of study or work with individual characteristics
5. Scientist  
conducts original research, published in own field with peers, and advances his field of knowledge

C. Formal vs. Experience based (forensic science)

1. formal - empirical science & error analysis
2. experience based (firearms, documents, handwriting, fingerprints)

D. Information on experts is from legal community, not experts themselves.

E. Qualified versus competent

1. obtain background information and history
2. current curriculum vitae/resume
3. subpoena all information relating to expert's entire background, including but not limited to, education, training, experience, licensing, accreditation, certification, academic teaching or lecturing, publications, training, experience, expert's complete personal file, training records showing the courses taken, results of all examinations, all certifications, standards required to obtain or receive that certification, all documents showing expert complied with all subsequent post certification requirements, standards, protocols and record keeping.
4. police record background check (rap sheet) on expert
5. fees, payments from governmental agencies - use FOIA request on state and county treasurer's office for monies paid to named expert.
6. list of expert's previous clients
  - a) contact them, clarify strengths/weakness, obtain transcripts
  - b) know who, what, when, why, where, how expert previously testified
7. professional memberships/associations
  - a) membership requirements
  - b) grades/levels of membership
  - c) current membership status in organization
  - d) membership based upon a nominal fee
  - e) missing membership in organizations/associations other comparable self-respecting experts would have.
8. Publications
  - a) does publication actually exist
  - b) type of publication - peer review journal, textbook, newsletter etc.
  - c) actual author

- acknowledgment section

d) actual involvement

- place and order in which person is listed

- sequential placement on list of acknowledgments, closer to bottom of list means less, if any,  
actual work

9. Expert's internet web page

a) self-promotion/advertising

b) exaggerations

10. Academic degrees/education

a) verify person's enrollment, degrees, transcripts and grades

- contact school's registrar or bursar

- ([www.studentclearinghouse.org](http://www.studentclearinghouse.org))

11. Internet search (partial resource list)

-expert witness directories

-general internet research

[google.com](http://google.com)

[lycos.com](http://lycos.com)

[AltaVista.com](http://AltaVista.com)

[excite.com](http://excite.com)

[lawcrawler.findlaw.com](http://lawcrawler.findlaw.com)

[dogpile.com](http://dogpile.com)

-referral services (name, area of expertise,

location)

[hgexperts.com](http://hgexperts.com)

-databases (library catalog of bibliographic

information)

[worldcat.org](http://worldcat.org)

[google scholar](http://google.com)

[google books](http://google.com)

-expert witness sites (locators)

[freereferral.com](http://freereferral.com)

[expertlaw.com](http://expertlaw.com)

expertpages.com  
expertwitness.com  
witness.net (pay site)

hgexperts.com/hg/consultants\_expert\_witness.asp  
seakexperts.com/index.aspx  
washlaw.edu/expert

-scientific literature sites (free/inexpensive)

standford.edu  
pubmedcentral.nih.gov  
ojose.com

-scientific / medical index electronic sources

SciSearch citation index  
Annual Reviews  
cinahl  
ebSCO host  
Psycinfo (psychology)  
medline  
science citation index  
ScienceDirect

-scientific associations (Encyclopedia of Associations)

-universities

-published periodicals & works

Westlaw, Nexis, findarticles.com, ingentaconnect.com

-transcripts

idex.com, netcourt.com

-newspapers

-list server lists, bulletin boards & usenet

alta.com, expert-l (witness.net/html/lisit.htm)

-myspace

F. Educational level - crime laboratories \*

- Doctorate (PhD) degree: 1%
- Master of Science degree: 3%
- Bachelor of Science degree or less: 96%

Alcohol intoxication and drug recognition experts (DUI & DRE) - police officers conduct laboratory work and teach it at drunk driving programs.

Non-scientist practicing science

- rely upon equipment, manufacturer and reputation.
- do not intrinsically know and understand science, interpretation and use.

\* Michael Saks, What Makes Forensic Scientists Open Or Closed To Change?, Bioinformatics 5<sup>th</sup> Annual Conference - 2006, The Science of DNA Profiling, August 13, 2006, Dayton, Ohio.

G. Knowledge

1. limited knowledge may be a blessing. Increase knowledge, then increase vulnerability to cross examination.
2. increased collaboration and interrelationship between disciplines and outside sources (no longer pure sciences)
  - questioned document examiner (inks, paper, biochemistry, printing etc.)

H. Imprimatur

1. The imprimatur of a governmental agency, laboratory, office or title does not automatically make either the results or witness' testimony inherently trustworthy, credible and reliable. Justice Department Investigation of FBI Laboratory: Executive Summary, 61 Crim.L. (BNA) 2017 (April 16, 1997)

The principal findings and recommendations of the Justice Department's report addressed "significant instances of testimonial errors, substandard analytical work, and deficient practices" including policies by the Federal Bureau of Investigation Laboratory. Justice Department Investigation of FBI

Laboratory: Executive Summary, 61 Crim.L. (BNA) 2017 (April 16, 1997) "The (517 page Inspector General's) report provided plentiful evidence of pro prosecution bias, false testimony and inadequate forensic work ... No defense lawyer in the country is going to take what the FBI lab says at face value anymore. For years they were trusted on the basis of glossy advertising." Tainting Evidence: Inside the Scandals at the FBI Crime Lab, John F. Kelly and Phillip K. Wearne, p.3-4, The Free Press, NY, NY, c.1998.

#### I. Synonyms - Expert Witness

Common derogatory synonyms for expert witnesses include: charlatan, whore, prostitute, commercial witness, hired gun, black knight and courtroom assassin.

The most dangerous lies are those that most resemble the truth.

E.C. McKenzie, ed., 14,000 Quips & Quotes for Writers and Speakers, p.521, Greenwich House Publ., NY, c. 1980

#### VII. Application and Use of Experts (Daubert)

A. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) Daubert focuses on valid scientific methodology and process which the "scientific expert" used to reach their opinion. The latent unanswered question was whether Daubert only apply to experts offering opinions on natural sciences, (chemistry, toxicology, physics, medicine engineering etc.) or whether it applies soft or social science (psychology, document and handwriting analysis etc.) and to other "technical" experts who offer specialized testimony (real estate, values, design defects, standards of care and "state of the art" issues).

#### B. Fed. Rule 702

A summary of Federal Rule 702 - 706 is that a qualified expert may give his or her opinion to help the court understand evidence or to establish a fact in issue. States have similar rules.

#### C. Fed. Rule Civil Procedure 26 (a)(2)(A)), (B), (C)

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##### a) summary of opinion

-subject matter of testimony

-substance of facts & opinion

-basis for opinion

- b) reports
- c) record of all previous testimony for last 4 years
- d) all publications authored for last 10 years
- e) file with court signed expert witness disclosure statement
- f) continuing duty exists to provide additional and corrective information. FRCP (e)(1)
- g) compensation of expert

-party requesting the deposition pays expert a reasonable fee for his/her time

- h) must have complete compliance with Rule or expert is barred from testifying, especially regarding reports. Salgado v. General Motors Corp., 150 F.3d 735 (7th Cir. 1999); Pride v. BIC Corp., 218 F.3d 566 (6th Cir. 2000); Sherod v. Lingle, 223 F.3d 605 (7th Cir. 2000)

#### D. Reliability test for scientific evidence

Daubert Trilogy: Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric v. Joiner, 522 U.S. 136, 141, 118 S.Ct. 512 (1997) and Kumho Tire v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999).

1. Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993) The primary procedural rules for scientific and expert evidence in federal courts are governed by statute and substantive law and are codified in Daubert.

- a) standards: valid scientific process and methodology
- b) guidelines: error rate, peer review, publication, general acceptance, testing and existence of standards
- c) essentially - reliability std for admissibility
- e) trial court judges are gatekeepers of scientific evidence

Just because subject discipline resembles science, does not mean it is admissible reliable science. (astrology, fingerprints, document examination,

handwriting analysis)

2. General Electric Co. v. Joiner, 522 U.S. 136, 138-139, 118 S. Ct. 512, 517 (1997) judges are gatekeepers - determine the admissibility of expert witness testimony absent an abuse of judicial discretion.

3. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 1171, 1174 (1999)

a) Reliability requirement applies to all expert opinions (hard, technical and other specialized knowledge), not just scientific ones.

b) Distinction between "scientific knowledge" and "technical" or "other specialized knowledge" is illusory, and without support in the federal rules.

c) Daubert applies to all expert evidence and testimony regardless if it is "scientific" in nature.

-hard: math, chemistry, physics

-soft: psychology, hair, bitemark, firearms identification comparisons etc.

-non-scientific: auto mechanics, dog handlers, document examiners, handwriting analysis, appraisers - those steeped in practicalities of their discipline

See, Moore v. Ashland Chemical Inc., 126 F.3d 679, cert denied 119 S.Ct. 1454 (April 19, 1999) compartmentalization of experts into 3 categories

d) trial court not required to hold a "Daubert hearing" every time expert testimony is challenged.

e) Kumho is applicable to both civil and criminal cases.

f) can confront reliability of science (discipline) through motion in limine and again before a jury. US v. Velasquez, 64 F3d 844 (3<sup>rd</sup> Cir. 1995)

E. Good science practiced.

(accuracy & reliability of results, underlying process, techniques, standards, controls, methodologies, quality control & assurance etc.)

Valid scientific methodology and process. Daubert vs. Merrell Dow Pharmaceuticals Inc., 113 S.Ct. 2786,

125 (1993)

1. Do not imply more that the test can determine, otherwise incompetent or advocates.
2. Pseudo-science
3. Falsibility
  - can the result or statement be tested
  - pathological science

F. Analytical Procedure Involves Compromise

1. Balance validity of analytic method versus testimonial simplicity. Shellow, The Application of Daubert to the Identification of Drugs, Shepard's Expert and Scientific Evidence Quarterly, p.600, Winter 1995.
2. Goal of scientist is truth; goal of forensic analyst is persuasion. Shellow, The Application of Daubert to the Identification of Drugs, supra, p.602.
3. Frye Test and Junk Science

"Bad data serves as a springboard for spurious inferences with temporal errors being the most familiar result. To the unethical or unformed mind, a sequence of events can be powerfully suggestive ... an approximation of results without details is 'junk science'." Huber, Galileo's Revenge: Junk Science In The Courtroom, pp. 29, 159, Basic Books, c.1991

When will trial courts let expert witnesses testify (scientific, technical or other specialized knowledge).

The assumption of this issue is juries tend to believe almost anything the professed expert says, so judges should protect impressionable jurors from experts who lack objective credibility.

G. Function of a Forensic Scientist

1. Analyzes physical evidence
2. Provides expert testimony
3. Furnishes training in recognizing, collecting and preserving physical evidence at crime scene

#### H. Function of a Forensic Scientist

1. Analyzes physical evidence
2. Provides expert testimony
3. Furnishes training in recognizing, collecting and preserving physical evidence at crime scene.

Truth does not equal justice.

#### VIII. Application and Use of Experts (Frye - Minority)

Frye v. United States, 293 F.1013, 1014 (D.C. Cir. 1923)

Frye focuses on the nature of the opinion through general acceptance and sufficient reliability in the scientific community for admissibility.

Frye Jurisdictions: Calif., Fla., Ill., Md., N.Y. and Penn.

##### A. Illinois Law - Scientific Evidence & Expert Witnesses

1. Most explicit applications of Frye by Ill. S.Ct.

Donaldson v. Central Illinois Public Service Co.,  
199 Ill.2d 63 (2002) - unequivocally commands  
Illinois follow Frye.

In Re Commitment of Simmons, 213 Ill.2d 534 (2004)  
- expert witness requirements: qualified and relevant  
to case is in discretion of trial court; and  
admissibility of scientific evidence subject to de  
novo review under Donaldson.

2. Federal Rule 702 - not applicable, not followed.

##### B. Medium through which a party can present their theory of the case to the trier of fact.

1. Requirements to testify - Frye information.

a) is it scientific evidence.

b) is it good/true science (general acceptance in relevant scientific community, not universal acceptance). 1

- trial court does not make an independent determination of reliability - look to scientific community for acceptance based upon

reliability.

c) qualified expert

d) reliable science with explanatory theory

- general acceptance test.
- new or novel if it is original, not something formerly known or used.
- new or novel does not mean general acceptance
- procedure: consensus versus controversy over a particular technique

e) probative value vs. prejudicial effect.

## **IX. Law of Evidence**

A. Evidence: is any matter, verbal or physical, that can be used to support the existence of a factual proposition. It must be relevant & material.

B. Categories of Evidence

1. Direct Evidence:

- a) tends to show the existence of a fact in question.
- b) without the intervention of proving any other fact.
- c) is it the evidence to be believed without inferences or conclusions from it.
- d) depends on the credibility of the witness.

2. Circumstantial evidence:

- a) indirect evidence
- b) from which inferences or conclusions can be drawn.
- c) depends on both
  - credibility witness
  - inferences from the witness

C. Types of Evidence

1. Testimonial (witness)

- a) Premised upon the witness'

- personal knowledge
- relies on their 5 senses

2. Physical (tangible things and parts of the body)

- a) perceived as indisputable, scientifically sound
- b) most importantly - neutral
- c) silent and definitive
- d) offers certainty - and certainty equals proof
- e) becomes proof through forensic science
- f) directly involved with situation or incident  
(document, weapon, narcotics, drugs, clothing, blood, hair etc.)

3. Demonstrative

- a) an audio/visual aid
- b) designed to assist the trier of fact
- c) understanding the witness' testimony  
(maps, models, x-rays, diagrams, computer graphics/simulations etc.)

\* Demonstrative evidence: use it -- important

- if government objects or court prohibits it;
- can and will use any relevant and material item, even guano (aka chicken shit),  
Rust v Guinn, 429 NE2d 299 (1981 Ind App Ct).

The value of physical evidence cannot be understated.

"Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibers from his clothes, the glass he breaks, the tool marks he leaves, the paint he scratches, the blood or semen he deposits or collects, all of these bear mute witness against him. This is evidence that does not forget, it is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical cannot be wrong; it cannot perjure itself; it cannot be wholly absent only its interpretation can err. Only human failure to find it, study it and understand it, can diminish its value."

## **X. Jury's Perception of Expert Witness**

### A. Prejudicial awe or disbelief - impressions/opinions

#### 1. Quincy Standard, CSI

- science v. entertainment
- procedure, but not context of test and appropriateness
- increase public awareness of science

#### 2. Accepting or rejecting testimony

#### 3. Subject matter presentation

#### 4. Condescending demeanor

#### 5. Pedantic arrogance

#### 6. Simplistic ignorance

#### 7. Argumentative

#### 8. Evasive

#### 9. Disdain for academics who lack real world experience and knowledge

#### 10. Elementary education of subject matter

must know historical perspective, developments, and current methods all through a 10th grade level presentation.

### B. Attire

#### 1. Clean, neat & presentable

#### 2. Comfortable clothing

#### 3. Regional attire - conservative

#### 4. No lapel pins or buttons

### C. Body Language

#### 1. Calling of name and approach to witness stand

2. Taking of oath

3. Subliminal communication

video tape expert and yourself during actual direct & cross examination (simulated)

4. Experts must obey the oath to tell the whole truth

5. Posture, diction, voice projection, eye contact, gestures etc.

6. Aura of composure & humility combined with self-confidence & conviction

D. Common Courtesy & Manners

1. Address jurors and court

2. Listen carefully

3. Ask judge for instruction

4. When dismissed from witness stand - thank you to judge

E. Credibility - jury instruction

1. read jury instruction to jury on credibility of witnesses and testimony/facts/evidence in the case (sect. XXXII, infra)

2. provides basic rules for expert witness testimony

3. informs jury of what to expect

F. Fear in the Courtroom

1. Constant urge to urinate

2. Nervousness, preparation

3. Use of water

"(J)uries are increasingly making determinations on the credibility of a forensic scientist's evidence, not on scientific fact, but how it is presented. Michael A. Peat, Guest Editorial, J. Forensic Sci., vol.42, p.775, 775 (1997).

## **XI. Credentialing Bodies and Laboratory Accreditation**

### **A. Common Agencies/Organizations (informational)**

American Association of Crime Laboratory  
Directors/Laboratory Accreditation Board  
(ASCLD/LAB)  
College of American Pathologists (CAP)  
American Board of Criminalistics (ABC)  
National Association of Medical Examiners (NAME)  
American Board of Forensic Toxicology (ABFT)  
American Board of Forensic Psychiatry (ABFP)  
American Board of Forensic Psychiatry and Neurology,  
certified in Forensic Psychiatry (ABPN-FP)  
American Board of Pathology, certified in Forensic  
Pathology (ABP-FP)  
American Board of Forensic Anthropology (ABFA)  
American Board of Forensic Document Examiners (ABFDE)  
American Board of Forensic Odontology (ABFO)  
American Board of Medicolegal Death Investigators (ABMDI)

### **B. Personal Certification**

1. Certification establishes a verifiable level of training and experience.
2. Assists in determining person knowledge of subject matter (knows/does not know) from basics to intricacies.
3. Requires continuing education (formal & informal) to stay current.
4. Another way to demonstrate competency in chosen field/endeavor, regardless if proficiency testing is required.
5. Provides self-assurance.

### **C. Question Areas - Basic: (laboratory/personal)**

1. Is accreditation/certification relevant to current work.
2. Requirements to obtain certification.
3. Accreditation of certifying agency or authority.
4. Requirements for continuing education for certification.
5. Who created certification programs - credentials of

creators.

6. Is membership in professional associations required to maintain certification.

7. Is certification recognized or approved by other certifying agencies or authorities.

D. Problems Areas - certification

Remember certification of laboratory

1. Does not prevent mistakes

2. Is on periodic basis - every 5 years

3. Does not cover issues during interim period

4. Applies only to laboratory - not individuals/technicians

5. Board certified is not board qualified. Either certified or not certified.

\*\* 6. Certification, lack of certification or failing certification does not prevent a crime laboratory from conducting examinations.

**XII. Ethical Issues**

A. Important due to proliferating use of experts.

B. Special weight accorded by jurors to expert witness testimony.

1. 70% of judges and attorneys believe jurors give more credibility to expert/scientific evidence than other types of evidence.

2. 25% of jurors believe case would have been decided differently without forensic evidence.

3. Expert witness testimony is most persuasive of all witnesses.

D. Organizational Theories

1. Crime Laboratories Are Part of Law Enforcement.

a) must disconnect crime laboratories from law

- enforcement agencies.
  - b) create sovereignty and independence.
  - c) serve both prosecution and defense equally
  - d) end the monopoly on services
2. Error and misconduct are normal (inevitable) aspects of human behavior, endemic to any organization.
  3. Crave secrecy
  4. Standard Explanation
    - a) operator or management error.
    - b) have crime because have criminals.

#### E. Moral Distinctions

"All lies, unlike all men, are not created equal. Philosophers from Aristotle to Niebuhr have made moral distinctions among falsehoods, whether "white lies" told for social convenience or to spare feelings, "excuses," that are only half true but that rationalize our own behavior, lies told during a crisis, lies told to liars, paternalistic lies told to protect those we care about, and lies told for the social good - also known as "noble lies." Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 58

The person seems to believe what they are saying, even if what they are saying is not true. This explanation is offered as exculpation, possibly based upon "character motivation." Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 65.

Faith does not trump facts in the judicial system. The law is applied to the facts. But are the facts actually true.

Even if the person believed something was true when stated, it becomes a lie if the person does not act upon new information, correct themselves when proven wrong or learned of contrary information.

A willful disregard for the truth, is the moral equivalent of lying.

"Relativity applies to physics, not ethics." Albert Einstein

### XIII. Fraud / Lies

A. Test Results. All too often the laboratory states a conclusion, then gets data so support it after being challenged, thereby supplying facts post hoc.

B. Ethics and scientific testimony are inextricably intertwined, because science is neutral and based upon facts.

C. Impartiality of forensic science is used to convict the guilty and protect or exonerate the innocent.

D. Frequently ideological and personal beliefs prejudice an expert witness's testimony.

1. Experts prevaricate for reasons other people do: pathology, politeness, paternalism, convenience, shame, self-promotion, insecurity, ego, narcissism, and even, on occasion, to further a noble goal." Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 58

a. Biographical lie - tends to represent braggarts or fabricators derived from a job description which seems to demand some alteration with one's pedigree or accomplishments as a way to achieve recognition or acceptance. p. 59

2. People or agencies have distorted and fabricated scientific evidence to obtain civil judgements or convict innocent people.

a. Short cuts are taken with facts in order, supposedly, to get at a larger truth." Posterity rewards success, not truth. Consequences matter more than truth. Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 65. Bring the criminal to justice. Remove the criminal and guilty person's from society. If the expert witness is able to contribute to convictions through their work, then justice has been served from their perspective. The most dangerous lies an expert witness can tell are apparently those they tell themselves.

3. Evidence shaping (colloquialism)

Defined: selective testing, selective reporting, biased interpretation, overstating the significance

of test results, ignoring or withholding results inconsistent with a biased viewpoint, inappropriate collection and testing of evidence and fabrication of data.

Stanley G. Schneider and Kevin D. Ballard, Convincing But Erroneous: The Courtroom Impact of Evidence Shaping, Proceedings of the American Academy of Forensic Sciences, vol. 4, p. 119, Feb. 1998.

4. Rhetorically a.k.a "juicing the testimony."

Tainting Evidence: Inside the Scandals at the FBI Crime Lab, John F. Kelly and Philip K. Wearne, p.312, The Free Press, NYC, NY, c.1998. (discussing stretching the truth or even lying on witness stand.)

5. Evidence shaping incorporates:

bias, intellectual dishonesty and fraud by the expert witness. It also involves performances, interpretation and presentation of science deliberately designed to favor a particular viewpoint.

little way of knowing what is true or actually was true when an expert shades their testimony or lies - there are empirical reasons to wonder. Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 67

6. Fraud is not self-correcting. There can be a thin line between optimism and delusion.

Fraud is perpetuated by 1) laboratory managers that defer to a subordinate's intelligence, 2) because the laboratory work conforms to a prevailing view, and 3) financial remuneration. Sapir, G., Legal Aspects of Forensic Science, ch. 1, p.7 in "Forensic Science Handbook," vol.I, 2/ed, R. Saferstein, ed., Prentice-Hall Publ., c.2002

7. Problem areas

a. lack of honesty and integrity - falsification of tests and reports.

- inadequate or proper supervision
- lack of whistle blowers on co-workers

b. competency

- testifying beyond area of expertise
  - pathologist cannot discuss toxicology findings Pickett v. Brown, 6 Fed.Supp. 81, 85 (1985)
  - bad science
  - do incompetent people realize they are incompetent.
- c. boasting
- first cousin to the white lie is the idle boast
  - not quite so harmless, but not nefarious, either. Carl M. Cannon, Untruths and Consequences, The Atlantic January/February 2007, vol. 299, no. 1, 2007, p.56, 59
- d. organizational structure of crime laboratories (broad generalities)
- insular, prosecutorial, anti-intellectual
  - lack insight
    - . tunnel vision, bias assimilation, impression preservation
  - inertia dominates (keep status quo)
- e. quality of work - NIJ study of 200 police labs
- 142 labs misidentified a blood sample
  - 136 labs failed to determine cow from human hair
  - 102 labs failed to match paint chips
- f. role of expert
- expert balances validity of analytic method versus testimonial simplicity. J.M. Shellow, The Application of Daubert to the Identification of Drugs, 2 Shepard's Expert and Scientific Evidence Quarterly 593, 600 (Winter, 1995)
- g. purpose of test
- purpose of a forensic test is not to identify an item or result, but to convince a jury that the item or result has been identified.

h. goal

- goal of scientist is truth, the goal of forensic analyst is persuasion.

J.M. Shellow, The Application of Daubert to the Identification of Drugs, 2 Shepard's Expert and Scientific Evidence Quarterly 593, 602 (Winter, 1995)

i. lack of adequate proficiency testing.

j. forensic disciplines do not police themselves beyond initial certification.

k. resisting the short term gain from a lie.

l. The public, victims and judiciary bristle when confronted with realities of lying experts or law enforcement. Instead of parties responsible for directly correcting the blase optimism of faith in the testimonial oath and the truth seeking process, they either ignore it, falter or fall back on platitudes or rationalize its existence. (for example rouge experts, overwork personnel, mistakes happen, not enough resources to prosecute perjury crimes, mistakes happen etc. ) Self-deception is not reversible.

m. credibility gap

n. relying on certification/accreditation of laboratory to bolster credibility of lab, personnel and test results.

8. American Academy of Forensic Science Code of Professionalism (1990 Proposed Draft)

"The measure of a man's real character is what he would do if he knew he never would be found out." Thomas Babington Macaulay (1800-1859)

#### **XIV. Trial Preparation**

A. Work product protection

1. Consulting expert

2. Testifying expert

3. Engagement letter

-prepare materials to assist in trial for representation of named client; all your efforts, results, work and material is confidential and work product based upon attorney client privilege.

4. Correspondence

- write work product and date on everything.
- confidentiality is paramount
- information transmitted through non-encrypted electronic mail (e-mail) is neither a privileged nor confidential communication. This privilege extends to expert witnesses engaged by the attorney on behalf of the client. J.W. Hall, E-Mail and Confidentiality, 21 Champion 52 (June, 1997); American Civil Liberties Union v. Reno, 929 F.Supp. 824, 830-838 (E.D.Pa.) (three-judge court)
- all communications must be in traditional and conventional reproducible and verifiable medium -- telephone calls and e-mail does not exist.

5. Discoverable evidence (anything written)  
use oral reports & if use at trial, then reduce results to writing.

6. Work product

7. Fees - no contingencies

8. Compensation - expert gets paid

9. Impartiality & integrity  
expert has no pride, no shame, no self-respect, only their integrity

10. Ethics standards are higher than disciplinary standards; follow ethical standards and will not be sanctioned for disciplinary standards

B. Discovery - Federal Rule Criminal Procedure 16 (a) (1) (g)

"Perseverance, n. - A lowly virtue whereby mediocrity achieves and inglorious success." Ambrose G. Bierce

**XV. Expert Witness' Role, Duty and Obligation**

A. Attorney interview

1. If not contacted - initiate interview
2. Obtain complete case materials
3. Review qualifications, expertise & work product
4. Discuss problems areas
5. Meet at least twice with attorney, 2 weeks & 2 days before trial
6. If attorney does not follow advice
  - confirm it in writing; letter & memo to file

B. Trial Preparation by Expert Witness

1. Expert

- review & know all case materials
- bring all personal notes, memoranda & formal reports
- curriculum vitae, certifications, license(s)
- vocabulary list of terminology for ct. reporter
- demonstrative evidence (show & tell)
- location of courthouse
- familiarization with court room, procedure & surroundings, sit in witness chair
- never be late
- never talk in elevators, hallways, restrooms or with opposing counsel or jurors

2. Know methodology and procedure

- state of art technology
- literature review
- experience
- maintain current library

3. Reasonable degree of scientific certainty

a) prevents speculations by expert

b) ensured that expert's opinion is one generally accepted within that area of expertise.

Prevents speculation by applying a relevance test to the expert's opinion. Again look to Frye v. United States, 293 F.1013 (D.C. Cir. 1923) or Daubert v. Merrell Dow, 509 US 579, 113 S.Ct. 2786 (1993).

-based upon reason and quantity: not quality of isolated points

-opinion testimony - nothing else

-not any scientific certainty: nothing is absolute to all facts

-pursue reasonable doubts: omission, inadequate sampling, human and technological error

4. When does mathematical probability and legal reason coincide

5. Use analogies

a. speak at two levels

-an item can function mechanically, but not operate accurately (clock example)

-single point linear calibration (car tire balance)

6. Lexicon - destroy/neutralize/enhance it

a. use familiar words, terms, phrases in simple concise and well structured presentation

C. Basis for opinion

1. First hand knowledge

2. Relevant scientific principles without regard to facts in case

3. Use of specialized knowledge and techniques by expert in this case

D. Current knowledge

1. Maintain current library and literature - fertile cross-examination area

"The trouble with being an expert is that you can't turn to anybody else for advice."

E.C. McKenzie, ed., 14,000 Quips & Quotes for Writers and Speakers, p. 167, Greenwich House Publ., New York, c.1980

#### E. Attorney

1. Educate attorney - (books, articles & materials to facilitate presentation and competency)

-prepare outline of testimony & exhibits

Civil attorneys are litigators.

Criminal defense attorneys are trial attorneys.

### **XVI. Client Preparation**

- A. 6 Ps - prior preparation prevents piss poor performance
- B. Difference between the best and the rest is preparation
- C. Know and use own exhibits and documentation.
- D. Obtain current curriculum vitae/resume and biographical statement.
- E. File curriculum vitae/resume with court - make part of common law record.

"Failure to prepare is a preparing to fail." John Wooden

### **XVII. Witness Preparation**

c. Gil Sapir 2008

- A. Review testimony
- B. Exhibits
- C. Records, reports, documentation
- D. Demonstrative exhibits
- E. Entire file
- F. Vocabulary list for attorney and stenographer
- G. Bring to deposition only material requested in subpoena,

at trial, bring everything.

### **XVIII. Expert Witness Opinions**

#### **A. State/Prosecution/Government Witness**

1. Declare opponent's witness adverse witness.
2. Cannot be compelled against will to testify as expertise, a proprietary right.
3. Problem is if job description states witness must testify on behalf of prosecution.

#### **B. Opinion - Reasonably Relied Upon Facts, Data or Opinions**

1. Admissible evidence can be used to rebutte or challenge reliability of facts, data or opinions reasonably relied upon by expert testifying for opposing party. People v. Robles, 314 Ill.App.3d 931, 733 NE2d 438 (2000)
2. Terminology of "might", "could", "possibly," "in terms of probability" remains admissible. Wojcik v. City of Chicago, 299 Ill.App.3d 964, 702 NE2d 303 (1998)
3. Proper for expert to reasonably rely on authoritative literature without either identifying it or disclosing its contents on direct examination. Becht v. Pala, 317 Ill.App.3d 1026, 740 NE2d 1131 (2000)
4. Examination permitted on material reviewed by expert, but not relied upon or disregarded or did not use. Leonardi v. Loyola University of Chicago, 168 Ill.2d 83, 658 NE2d 450 (1995); People v. Pasch, 152 Ill.2d 133, 604 NE2d 294 (1992)
5. Cannot testify as summary expert or conduit by relying on information or opinion by other experts without providing additional input. Rock v. Pickleman, 214 Ill.App.3d 368, 574 NE2d 682 (1991) (Rakowski concurring); Kochan v. Owens-Corning Fiberglass Corp., 242 Ill.App.3d 781, 610 NE2d 683 (1993)
6. Cannot summarize literature for purpose of educating trier of fact when expert has not conducted tests and does not know actual test methods and procedures. Mielke v. Condell Memorial Hospital, 124 Ill.App.3d 42, 463 NE2d 216 (1984)
7. Cannot rely solely on self-serving statements of defendant. People v. Britz, 123 Ill.2d 446, 528 NE2d 703

(1988)

8. If an expert relies on work product or hearsay as a basis for their opinion, that material must be disclosed and produced through discovery. United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981)

9. An expert cannot base a opinion, even partially, on illegally obtained and inadmissible evidence. Wong Sun v. U.S., 371 U.S. 471, 484 (1963)

10. When expert testimony is based on mechanical or electronic device, the expert must provide foundation of the method of recording information and proof the device was functioning properly when used. The trial court ensure the admission of scientific evidence, including expert's scientific testimony, is based on a testing device that is both relevant and reliable. People v. Raney, 324 Ill.App.3d 703, 710-11, 756 NE2d 338 (1st Dist. 2001)

11. Expert opinion testimony must be in fact expert opinion and not merely an opinion given by an expert. People v. Sifunetes, 248 Ill.App.3d 248, 252-53, 618 NE.2d 643, 646 (Ill.App. 1st Dist. 1993)

12. Improper to examine witness on defendant's failure to offer favorable evidence - but permissible examination that defense criticisms of prosecution's expert not based on independent testing by defendant. People v. Oliver, 306 Ill.App.3d 59, 713 NE2d 727 (1999)

13. Questions/Answers beyond expertise. Expert witnesses notoriously stray outside the fields of their expertise. Frequently this is not the expert's fault because lawyers often ask questions on issues beyond the witness's experience. The opposing attorney then fails to object because neither lawyer knows any better. This problem is caused by the appalling scientific illiteracy that exists among the bar and bench. Andre A. Moenssens, Novel Scientific Evidence in Criminal Cases: Some Words of Caution, Journ. of Criminal Law and Criminology, vol. 1, p.1, 7 (Spring 1993); A Crisis in the Forensic Sciences: Real or Imagined?, Scientific Sleuthing Review, vol 21. no.4 p.15 (Winter, 1997); David Faigman, Legal Alchemy: The Use and Misuse of Science and the Law, p.xi-xii, 53-54, 64, W.H. Freeman & Co., NY, NY, c.1999.

Experts are among the best malingerers.

## **XIX. Use Demonstrative Evidence**

- A. Notice provisions
- B. Show & tell prevails
- C. Exhibits for all parties
- D. Fair and accurate representation
- E. Practice & rehearsal with exhibits
- F. Handling exhibits

- 1. Mark and number all exhibits for consistency, continuity and cross referencing.
- 2. Do not pile evidence up on table in front of you.
- 3. Keep everything separate.
- 4. Document catalog and check list.
- 5. Use notebooks

**XX. Expert Witness Demeanor**

c. Gil Sapir 2008

- A. Attire
  - 1. Clean, neat & presentable
    - clean finger nails & polished or shined shoes
  - 2. Comfortable clothing
  - 3. Regional attire - conservative
  - 4. No lapel pins or buttons
- B. Personal preparation
  - 1. Urinate before testimony
  - 2. No carbonated liquids
  - 3. No caffeine
  - 4. Room temperature water - no ice
  - 5. Take couple of aspirin half hour before testimony
  - 6. Be on time
  - 7. Eat light meal or candy bar before deposition

8. No chewing gum
9. Do not discuss case anywhere except in deposition room
10. Read transcripts before testifying - will be asked about them so be prepared.
11. Sit next to your attorney and near court reporter

**XXI. Attitudinal Problems with Expert Witnesses / Vulnerability**

- A. Always correct or right all of the time syndrome
- B. We have always done it this way syndrome
- C. Integrity for growth and change
- D. Do not tell them anything or give them anything (stone wall) syndrome
- E. Over developed sense of intelligence and infallibility

**XXII. Trial Testimony**

- A. The effective expert witness' testimony is almost always dependant upon:
  1. Experience
  2. Communication skills (clear, concise, understandable language)
  3. Educational background and training
  4. Scientific validity of tests and results
- B. Scope
  1. Limit expert to only their field of expertise.
    - pathologist cannot discuss toxicology findings.  
Pickett v. Brown, 6 Fed.Supp. 81, 85 (1985)
  2. Can use and rely on reports by other credible professionals in the same field as a basis for expert's opinion. People v. Anderson, 113 Ill.2d 1, 495 NE2d 485 (1986)
  3. Adoption and application of FRE 703, 705. Wilson v.

Clark, 84 Ill.2d 186, 417 NE2d 1322 (1981);

4. Do not ask questions to seek information
5. Facts, no conjecture or speculation
6. Objectivity
7. Content
8. Candor & honesty
9. Cogent & concise
10. KISS (keep it simple stupid)
11. Questions: improper, incorrect & inept
  - restrict answers to facts personal knowledge
  - ask for clarification of questions
  - caution on questions that include "absolutely," "positively," "always," and "never"
  - compound questions
  - generalizations
12. Demonstrative evidence (play show & tell)
13. Use analogies
14. Scientists in the courtroom; lawyers in the laboratory.
15. Difference between truth and justice; as difference between science and law.

#### C. Objective

Juror must be able articulate expert's opinion and movant's theory or else cannot convey it during deliberations

The more I study, the more I learn. The more I learn, the more I know. The more I know, the more I forget. The more I forget, the less I know. The less I know, the less I forget. The less I forget, the more I remember. So why study? Anon.

### **XXIII. Voir Dire Testimony - Expert**

c. Gil Sapir 2008

#### A. Expert's Voir Dire

1. Creates standard for testimony
2. Discuss qualifications as basis for formulating an opinion
3. Elicit opinion
4. Explain opinion
5. Never stipulate to credentials
6. Must be stringent and rigorous to establish credibility.
  - a. direct, cross & ruling by court regarding qualifications of expert
  - b. moving party must establish expert's competency and knowledge in profession and field (not experience, education or specialized training) subject to judicial approval, through examination of expert's credentials.
7. Does the prosecution/movant have and use true expert witnesses in routine cases. (eg.DUI/DWI)
8. Employment/services contract
  - a. requirements, fees, bias, duty to testify, incentives etc.
9. Job description  
qualifications, motive, interest, bias
10. Actual work: analyzes drugs or actually compares spectral lines. (similar to hand writing analysis and wavy lines with peaks and valleys)
11. Curriculum vitae not biographical statement - puffing.
  - a. voir dire can be made to sound impressive, without substance to support qualifications and credentials.
  - b. accurate & not overstated curriculum vitae
12. Qualified versus competent
  - a. board qualified versus board certified accountant versus a CPA

13. Put resume or curriculum vitae into evidence - even if stipulate to credentials
14. Never take voir dire for granted or will not get properly qualified

See Appendix A - Expert Witness Voir Dire

See, G. Sapir, Proper Voir Dire: Qualifying the Expert Witness, DWI Journal: Science & Law, vol.13, no.12, Dec. 1998, p.5;

Sapir, G., Legal Aspects of Forensic Science, ch. 1, p.10, 25 in "Forensic Science Handbook," vol.I, 2/ed, R. Saferstein, ed., Prentice-Hall Publ., c.2002

#### **XXIV. Direct Examination**

##### A. Scope of Testimony - Time to Teach/Educate

1. Facts, no conjecture or speculation
2. Overview of results based upon analysis
3. No leading questions
4. Objectivity
5. Content
6. Candor & honesty
7. Cogent & concise
8. KISS (keep it simple stupid)
9. Questions: improper, incorrect & inept
  - restrict answers to facts personal knowledge
  - ask for clarification of questions
  - \*\* -caution on questions that include "absolutely," "positively," "always," and "never"
  - compound questions
  - generalizations
10. Demonstrative evidence (play show & tell)

11. Use analogies, idioms, metaphors, similes etc.

B. Problem areas

c. Gil Sapir 2008

1. Too technical
  - skip argots & jargon, except when necessary
2. Narratives
3. Assumptions versus presumptions
4. Overstatements
5. Prejudice & bias
6. Merely state conclusion without citing authoritative basis
7. Testimony implies more than the test can determine & basis for being incompetent or advocate
8. Must end testimony on strong point and high note

C. Understand Terminology/Phraseology of Reports

ASCLD/LAB Rule 5.10.1 General - "The results of each test, calibration, or series of tests or calibrations carried out by the laboratory shall be reported accurately, clearly, unambiguously and objectively, and in accordance with any specific instructions in the test or calibration methods."

1. Context and informational bias
  - (Risinger, Saks, Thompson, Rosenthal, The Daubert/Kuhmo Implications of Observer Effects in Forensic Science, 90 Cal. L. Rev. 1, (2002))
2. Key words/phraseology - look to context and environment for problems, cautionary markers.
3. Terms of implication to justify results.
4. Order of uncertainty in wording and conclusions apparent through vague, confusing or "mush" words.
- 5 Vagueness, ambiguous (as specifically to what?)
  - eg. similar to, could have, might have, compatible, consistent with, inconclusive etc.
  - a. if "A" is consistent with "B," then also consistent with "X,Y,Z." must state all items that are consistent and list the reasons why it is or is not consistent.

b. remove confusing, vague, inconclusive or mush wording - then what is opinion.

c. must state why could not reach a scientifically valid conclusion.

6. Never identical with or identical to anything.

7. Remove extemporaneous terms and necessary to examination - use correct terminology.

8. Read entire document carefully.

9. Do not have to prove intelligence, only communication skills.

"An expert knows all the answers - if you ask the right questions."  
E.C. McKenzie, ed., 14,000 Quips & Quotes for Writers and Speakers, p. 167, Greenwich House Publ., New York, c.1983

#### **XXV. Cross Examination**

Understanding and appreciating effective cross examination involves condor, honesty and technique. It entails preparation and control.

"Cross examination is much more science and application of technique than it is art." L. Pozner and R. Dodd, Cross-Examination: Science and Technique, 2/ed., p.1-20, LexisNexis, c.2004

Primary objective:

Cross examination is the attorneys primary opportunity to give the jury reasons not to believe the opposing expert's testimony. It focus largely on issues of credibility - should this expert be believed.

Impeachment is directed at the substance of the person's testimony or confronting the witness' credibility.

#### **A. Questions Always To Ask Expert on Cross Examination**

1. Named witness - have mislead or mistaken any fact in our testimony and report that you want to correct at this time.

2. Science is neutral and based upon facts.

3. If a mistake or error exists, your will inform the court and both attorneys of it due to being unbiased.

4. Witness has reviewed and discussed your testimony with attorney before testifying hear today.

5. Is this method, procedure and instrument infallible.

#### B. Problem Responses

c. Gil Sapir 2008

1. Vagueness will survive the deposition, but be the demise at trial.

2. Do not know, cannot remember, cannot recall cannot cross examination these answer, but will be commented adversely upon during closing argument.

3. Speculation and conjecture.

4. Bias.

5. Consultation with attorney after question asked and before answer is usually improper unless privileged.

6. Answer has complete confidence of total ignorance.

"Truth cannot be altered - But testimony can."

Ashleigh Brilliant, 1999

#### C. Major Areas of Expert Witness Examination

1. Opinion testimony

2. Fallibility of methodology and result

3. Reproducibility of results

4. Compensation

5. Integrity

#### D. Topics For Cross Examination

1. Reasonable degree of scientific certainty.  
witness trying to define it -- get written definition from questioning attorney before answering term.

2. Rationale is:

a) prevent speculations by expert

b) ensured that expert's opinion is one generally accepted within that area of expertise.

-based upon reason and quantity: not quality of isolated points.

3. Reasonable people in your field can differ.

4. Opinion evidence - only opinion and nothing more  
other experts in field  
reasonable people can disagree

-not any scientific certainty: nothing is absolute to all facts

-pursue reasonable doubts: omission, inadequate sampling, human and technological error

5. Know how to say, I DO NOT KNOW

6. Answer has complete confidence of total ignorance

7. Fees and compensation

8. Bias

- Can examine about witness being a member of a professional expert witness referral agency. Snelson v. Kamm, 319 Ill.App.3d 116, 745 NE2d 128 (2001)

9. Report writing

E. Problem Areas

c. Gil Sapir 2008

Either carefully orchestrated vivisection or radon blunt trauma mutilation.

1. Expect the unexpected

2. Do not look to counsel for assistance

3. Witnesses' fears

-attorney has same or greater knowledge as witness

-attorney with no knowledge

-attorney does not protect witness

4. Improper impeachment foundation by treatise, inconsistent statement, transcripts, other cases

5. Motive, bias, prejudices and interest
6. Selective reliance on facts to support own position
7. Lack of brevity.

- narratives
- non-responsive
- yes/no
- mental studdering (ah & ahems)

8. Omissions

- reluctant to admit mistakes & limitations, even though increases image of honesty.
- will not say, "I do not know"
- reason for not doing something is important
- impeachment by treatise
  - . current expertise and edition, or else expert will not recognize it as authoritative
- impeachment by own earlier publications, lectures, interrogatories, deposition etc.  
(keep all previous transcripts)
- limited knowledge in area
- experience
- factual bias
  - did not visit scene, did not test or examine object, second hand knowledged of item or events
- prior inconsistent statements
- loss of self-control
  - provoking negative behavior of witness
- lack of experience
- unavailable relevant facts
- lack of personal knowledge of underlying facts  
(relies only hypothetical or reports)

-relevant facts unavailable - relies on incomplete data for opinion

-different facts would alter opinion

9. Change hypothetical facts used on direct
10. Reasonable people in your field can differ
11. Opinion evidence - only opinion and nothing more
12. Do not volunteer information - don't ask, don't tell.
13. Hypothetical
  - be sure all facts are present before answering.
  - change or different hypothetical facts than used on direct.
14. Pattern of past testimony
15. Evasiveness dilutes credibility

"Get your facts first, and then you can distort them as much as you please." Mark Twain, Quoted in Kipling, Sea to Shining Sea, c.1989, Letter 37

F. Difficult questions c. Gil Sapir 2008

1. Something is possible or could have occurred
2. Anything with speculation
3. Reasonable degree of scientific certainty or probability or certitude
4. Absoluteness

G. Examination by Treatise or Publication

1. Publication is recognized as authoritative in field.
2. Ask to see referenced source or insist on reading the quote being used.
3. Work cannot be out of date or quote taken out of context, otherwise inapplicable or inappropriate.

4. Perjury -- Inference when an expert witness deliberately denies the existence, authoritativeness, use or reliance of a recognized treatise or publication in their field to restrict or terminate cross examination, that expert witness knowingly embraces perjury. J.M. Shellow, The Application of Daubert to the Identification of Drugs, 2 Shepard's Expert and Scientific Evidence Quarterly 593, 603, fn 20 (Winter, 1995)

5. Refusal to acknowledge as authoritative -- Witness cannot evade cross-examination by avoiding words of "rely" or "authority" or any forms of these words. The requisite reliance/authoritativeness for a treatise can be established without express acknowledgement by that witness relied upon it or is authoritative. Freshwater v. Scalded, 86 Ohio St.3d 260, 269, 714 NE2d 891 (1999)

#### H. Maintaining Credibility during Examination

General Rules - to avoid appearing less than credible while testifying.

1. Be nervous.
2. Tell the truth.
3. Listen to the question
4. Pause then answer
5. Admit mistakes and problems.
6. If do not know, say so.
7. If do not remember, admit it.
8. Speak to the jury.
9. Continuity of attitude.
10. Just answer the question.

#### I. Medieval Confrontation

"For the two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross examination, the 'truth' for direct examination as a essential portion of the trial. Not even the abuses, the misunderstandings, and the puerilities which are so often found associated with cross examination have availed to nullify its value. It may be

that in more than one sense, it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond a doubt the greatest legal engine ever invented for the discovery of the truth." 5 Wigmore, Evidence, sect. 1367 (Chadborn Rev. 1794); L. Pozner and R. Dodd, Cross-Examination: Science and Techniques, 2/ed., p.1-3, LexisNexus, c.2004

## J. Constitutional Confrontation

Our adversary system of justice encourages the accused to question the testimony of a witness, to "confront witnesses against him." U.S. Constitution, Amendment VI.

## XXVI. Fees and Compensation

Examination on compensation is a matter of right. Chicago v. Van Schaach, 330 Ill. 264, 161 NE 486 (1928)

### A. Areas

#### 1. Amount of fees

##### 2. Reasonableness of fees.

a. record keeping/accounting.

##### 3. Contract & directives.

##### 4. Paid for time not testimony.

##### 5. Who is paying the fees.

- Examination on previous employment by same party and income from testifying as an expert witness is permissible. Trower v. Jones, 121 Ill.2d 211, 520 NE2d 297 (Ill. 1988)

- Referrals from same attorney. Davis v. Gulf, Mobile & Ohio RR, 130 Ill.App.2d 988, 272 NE2d 240 (1971)

- Fee arrangements, prior testimony for same party and financial interest in case outcome. Sears v. Rutishauser, 102 Ill.2d 402, 466 NE2d 210 (1984); Goldern v. Kishwaukee Community Health Services Center, 269 Ill.App.3d 37, 645 NE2d 319 (1994)

##### 6. Frequency of testimony.

- Show person is regularly or frequently employed by litigant as expert witness. Chicago City Railways Co. v. Handy, 208 Ill. 81, 69 NE 917 (1904)

- Number of times expert testified within a period of time and for whom. Wilson v. Chicago Transit Authority, 159 Ill.App.3d 1043, 513 NE2d 443 (1987)

#### 7. Sources of income

- Annual income and frequency of testimony as expert regarding credibility. Tower v. Jones, 121 Ill.2d 211, 520 NE2d 297 (1988); Pruett v. Norfolk & Western Railway Co., 261 Ill.App.3d 29; 632 NE2d 652 (1994)

#### 8. Services contract controls

9. Create and maintain a paper trail - telephone calls do not exist.

#### 10. Pigs get fatter, hogs get slaughtered.

"That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal work place is the laboratory or field, not the courtroom or the lawyer's office." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, (9th Cir. 1995), Also see, Paul C. Giannelli, "Junk Science": The Criminal Cases, Journ. of Criminal Law and Criminology. vol. 1, p.105, 117 (Spring 1993).

#### 11. Court appointed witness

- Jury should not be told expert witness is court appointed. Morrison v. Pickett, 103 Ill.App.3d 643, 432 NE2d 2 (1981)

### **XXVII. Answering Techniques**

A. Set your own pace - do not be coerced into anything.

B. Digest the question and think first - engage brain before disengaging mouth.

C. If repeatedly ask attorney for assistance, it will be noted on the record for subsequent bias. eg. going off the record.

- D. Answer with an explanation instead of yes/no when possible.
- E. Do not volunteer anything
- F. Cite verifiable authority
- G. Be factual, truthful, concrete
- H. Stick to point - no narratives
- I. Do not argue
- J. Stay composed - do not get upset
- K. Breathing techniques - a single breath to calm down
- L. Appear deliberate
- M. Be courteous
- N. Tell the truth

c. Gil Sapir 2008

#### **XXVIII. Tricky Questions - Types**

- A. Leading questions
- B. Summarizing testimony
- C. Approximations
- D. Compound questions
- E. Assumptions of fact
- F. Absolute terms (never, always etc.)
- G. Speculation
- H. Precise recall
- I. Withheld or unavailable documents used basis for question
- J. Inaccurate instructions
- K. Use of improper legal work product, documents, pleading etc.
- L. Opinion of other expert witnesses in case or community
- M. Statistics (lies, dam lies & statistics)
  - 1. Probability

-experts cannot discuss probability

- .not a statistician
- .no personal knowledge & experience
- .relative to what population & sampling
  - eg. blood groups exhibit same genetic profile, not identical or same blood.

2. Debunked expert or laboratory report

- how many reports, results or opinions go unnoticed and are used as misleading unreliable evidence?

### **XXIX. Common Actions Against Expert Witnesses**

- A. Malpractice
- B. Fraud
- C. Negligent misrepresentation
- D. Breach of fiduciary duty
- E. Breach of contract
- F. Breach of implied covenant of good faith and conduct.
- G. Fraudulent concealment

"Justice is too good for some people and not good enough for the rest." Norman Douglas. From, L.J. Peters, Peter's Quotations: Ideas For Our Time, p.294, Bantam Books, New York, NY, 1979

### **XXX. Common Sense Perspectives - Expert Witness**

- A. Fees
  - 1. Specify dollar amount - no contingencies
  - 2. Arrange for compensation and fees before consultation, being hired and before beginning any type of work.
- B. No guarantees on case outcome
- C. Maintain and keep strict well documented records
- D. Keep attorney/client informed of everything

- E. Work within competence level
- F. Do not overstate credentials, resume/curriculum vitae, publications.
- G. Professional Affiliations/Membership

Fraudulent claims of professional status and association by an expert witness with an organization that owns a federal registered trademark subjects the infringer to injunctive relief and damages. ABPN v. Johnson-Powell, 123 F.3d 1 (1997)

- H. Do not be pressured by peers.
- I. Preserve confidentiality.
- J. Avoid all conflicts of interest and possible allegations of impropriety.
- K. Tell the truth.
- L. Once a person starts compromising their integrity, it is nearly impossible to reclaim it.
- M. Maintain and preserve your integrity.

#### **XXXI. Prohibitions - Attorney Conduct**

- A. Attorney is prohibited from:

1. Vouching for credibility/truthfulness of witness. American Bar Association Standards for Criminal Justice, Standard 3-5.8(b)(80) (3rd ed. 1992).

2. Bolstering witness testimony/truthfulness. Berger v. United States, 295 U.S. 78, 88 (1934); United States v. Mordica, 663 F.2d 1173, 1178-79 (2d Cir. 1981)

3. Prohibition is especially important in summation arguments. United States v. Mordica, 663 F.2d 1173, 1178-79 (2d. Cir. 1981).

#### **XXXII. Jury Instructions**

- A. State (sample)

You are the sole judges of the believability of the witnesses and the weight to be given the testimony

of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, (his age), his memory, his manner while testifying, and interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case. (Illinois Pattern Jury Instruction 1.02 - Jury is Sole Judge of the Believability of Witnesses)

B. Federal (sample)

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in the light of all the evidence in this case. (Federal Criminal Jury Instructions of the Seventh Circuit, No. 3.27 Weighing Expert Testimony)

**XXXIII. Credibility and Common Sense - Attorney**

"Some lawyers establish unquestioned credibility in a lawsuit by a continuous course of admirable professional conduct that leads judges, who are also lawyers, to grant equitable relief for a lapse, an oversight, or a document gone astray. Others, by their conduct, engender in the judge a certain wariness in the exercise of equitable relief." Teller v. Semonis, 263 Ill.App.3d 653, 657; 635 NE2d 572, 574 (1st Dist., 4th Div. 1994)

**XXXIV. Dicta**

Most people generally color the evidence to fit their notions. People whose minds are not disciplined by training tend to notice and remember events that support their view and forget others.

Expert Witness: "Someone whose qualifications we defer to when he seems to confirm our prior judgement, and whose credentials we impugn when he rejects our judgments."

Sidney J. Harris

Observation: "Our research has yielded thousands of examples of expert misinformation, disinformation, misunderstanding, miscalculation, egregious prognostication, boo-boos, and occasional just plain lies. And based on our preliminary findings we can say with some confidence that the experts are wrong without regard to race, creed, color, sex, discipline, specialty, country, culture, or century. They are wrong about facts, they are wrong about the future, they are wrong about date, they are wrong about geography, they are wrong about the future, they are wrong about the past, and at best they are misleading about the present, not to mention next week."

The Experts Speak, by Cerf & Navasky - Introduction, Pantheon Books, NY, c.1984

"Every great advance in natural knowledge has involved the absolute rejection of authority." Thomas H. Huxley

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This article is intended to provide general information; it does not provide legal advice applicable to any specific matter and should not be relied upon for that purpose. Interested parties should review the laws with their legal counsel to determine how they will be affected by the laws.

**Freedom Is Only a Word Until It Is Lost!**

## RESOURCES

Imwinkelried, E.J., *The Methods of Attacking Scientific Evidence*, 4/ed., LexisNexis, c. 2004

Giannelli, P.C., and Imwinkelried, E.J., *Scientific Evidence*, 3/ed., LexisNexis, c.1999

McKay. J., *What All Experts Have In Common: A Five-Step Analytic Approach To Dealing With Expert Testimony*, *Champion*, July, 2006, p.28

Pozner, L. and Dodd, R., *Cross-Examination: Science and Technique*, 2/ed, LexisNexis, 2004

Rogers, "Cross Examining the Expert Witness," *21 Defense Law Journal*, 491 (1972)

Sapir, G., *Legal Aspects of Forensic Science*, ch. 1, in "*Forensic Science Handbook*," vol.I, 2nd ed, R. Saferstein, ed., Prentice-Hall Publ., c.2002

Tobin, W., and Thompson, W., *Evaluating and Challenging Forensic Identification Evidence*, *Champion*, July, 2006, p.12

APPENDIX A

Voir Dire Questionnaire \*\*

An effective, elementary, practical outline questionnaire for qualifying a person as an expert witness is provided below.

QUALIFYING QUESTIONS FOR THE EXPERT WITNESS  
(Sample Expert Witness Voir Dire)

---

1. Name.
2. Occupation.
3. Place of employment.
4. Present title.
5. Position currently held.
6. Describe briefly the subject matter of your specialty.
7. Specializations within that field.
8. What academic degrees are held and from where and when obtained.
9. Specialized degrees and training.
10. Licensing in field, and in which state(s).
11. Length of time licensed.
12. Length of time practicing in this field.
13. Board certified as a specialist in this field.
14. Length of time certified as a specialist.
15. Positions held since completion of formal education, and  
length of time in each position.
16. Duties and function of current position.
17. Length of time at current position.
18. Specific employment, duties and experiences (optional).
19. Whether conducted personal examination or testing of (subject

matter/person/instrumentality).

20. Number of these tests or examinations conducted by you and when and where were they conducted.

21. Teaching or lecturing by you in your field.

22. When and where were your lecture or teach.

23. Publications by you in this field and titles.

24. Membership in professional societies/associations/organizations, and special positions in them.

25. Requirements for membership and advancement within each of these organizations.

26. Honors, acknowledgments, and awards received by you in your field.

27. Number of times testimony has been given in court as an expert witness in this field.

28. Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

29. Put curriculum vitae or resume into evidence.

30. Your Honor, pursuant to (applicable rule on expert witness),

I am tendering (name) as a qualified expert witness in the field of \_\_\_\_\_.

\*\* Sapir, G., Legal Aspects of Forensic Science, ch. 1, in "Forensic Science Handbook," vol.I, 2/ed., p.10, 25, R. Saferstein, ed., Prentice-Hall Publ., c.2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CRIMINAL DIVISION

People of Illinois )  
 ) No. 00-CR-3709-02  
vs. )  
 ) Judge Thomas Sumner  
John Mitchell )

NOTICE OF MOTION, FILING AND SERVICE

TO: Cook County States Attorney  
Assigned to Courtroom 404 (Mary Jennings & Mary Lacy)  
2650 S. California Ave.,  
13th Fl.  
Chicago, Ill. 60608

On April 26, 2005 I filed with the Clerk of Court, Criminal Division, 2650 S. California Ave., Chicago, Illinois, Mitchell's Motion to Reconsider Denial of Court Appointed Consulting and Testimonial Experts which is to be heard on April 26, 2005 at 10:30 AM before Judge Sumner, Room 400, 2650 S. California Ave., Chicago, Ill. 60608. A copy of the motion is attached.

Dated this 26th Day of April, 2005.

/s/ Gil Sapir

\_\_\_\_\_  
William P. Murphy and Gil Sapir,  
Attorneys for John Mitchell

Gil Sapir, Atty No. 54527  
PO Box 6950, Chicago, Illinois 60680  
tele. 312-458-0665

CERTIFICATE OF SERVICE

I, the undersigned, being first duly sworn on oath, depose and state that I delivered a copy of the foregoing Notice of Filing and Service by first class mail, postage prepaid with each stated document to each person to whom it is directed on this 25th Day of April, 2005.

/s/ Gil Sapir

\_\_\_\_\_  
William P. Murphy and Gil Sapir,  
Attorneys for John Mitchell

Gil Sapir, Atty No. 54527  
PO Box 6950, Chicago, Illinois 60680  
tele. (312) 458-0665

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CRIMINAL DIVISION

People of Illinois                    )  
  )  
vs.                                        )  
  )  
John B. Mitchell                    )  
  )

No. 00-CR-3709  
Judge Thomas Sumner

Mitchell's Motion to Reconsider Denial of  
Court Appointed Consulting and Testimonial Experts  
-----

The Defendant, John B. Mitchell, through his attorneys, William P. Murphy and Gil Sapir, files this Motion to Reconsider Denial of his motions for court appointed consulting and testimonial experts. In support of this motion the following is stated.

1. Mitchell is charged with the double murder and aggravated arson. He is indigent. The case is premised upon voluntariness of Mitchell's confession, medical and scientific evidence.
2. Mitchell's jury trial is scheduled to begin on May 3, 2005.
3. On April 16, 2005 the State notified Mitchell of its intention to use and rely upon the forensic DNA test results at trial to obtain a conviction. The State reconfirmed its intention to use and rely upon Mitchell's confession, arson evidence (fire science and accelerants), forensic science, forensic pathology, and crime scene evidence. This evidence will be presented through Illinois State Police Crime Laboratory reports, Chicago Fire Department Reports, Cook County Medical Examiner's Office reports and testimony of experts in these fields at trial to obtain a conviction in this case.
4. The State is relying entirely on Mitchell's confession,

medical and scientific evidence (forensic DNA, trace, analytical chemistry, fire science, forensic pathology etc.) for the prosecution of its case. This evidence is critical to the State's case. Without this critical evidence, the case ceases to exist. People v. Lawson, 163 Ill.2d 187 (1994); People v. Keene, 169 Ill.2d 1, 7-8 (1995).

5. Mitchell's motion to reconsider appointment of consulting and testimonial experts is based upon exceptional circumstances in this case. Every motion for appointment of consulting and testimonial expert assistance has been denied, regardless of statutory or common law right to appointed assistance. Each motion identified the expert, their credentials and fee schedule. These motions were denied over defendant's objection. Mitchell has not waived his right to assistance and testimony from court appointed experts. The basic right to counsel has not been implemented. Giannelli, Ake v. Oklahoma: The Right To Expert Assistance In A Post-Daubert, Post-DNA World, 89 Cornell L.Rev. 1305, 1307 (2004) The following is a list of the motions:

- Motion for Appointment of Arson Expert, filed March 25, 2003, denied March 25, 2003.
- Motion for Appointment of Expert on Psychological Evidence, filed March 31, 2003, denied March 31, 2003.
- Reply to Motion for Appointment of Expert on Psychological Evidence, filed Sept. 30, 2003, denied Sept. 30, 2003.
- Motion for Appointment of Document and Handwriting Expert, filed Oct. 21, 2004, denied Oct. 21, 2004.
- Mitchell's Motion for Appointment of Expert Witness in Criminalistics, filed February 4, 2005, denied February 4, 2005.
- Mitchell's Motion for Appointment of Expert Witness in Forensic DNA Analysis (oral motion) February 4, 2005, denied February 4, 2005. (See, Exhib. 1 - Feb. 4, 2005 Tr. p.3-6; Exhib. 2, Court Order Feb. 4, 2005)
- Mitchell's Motion for Appointment of Medical Doctor to Determine Scar Tissue filed March 11, 2005, denied April 6, 2005.
- Motion for Appointment of Expert Witness in Forensic Pathology filed March 11, 2005, denied April 6, 2005.
- Motion for Appointment of Expert Witness in Forensic DNA Evidence filed April 18, 2005, denied April 26, 2005.

6. A predominant focus of Mitchell's defense has been the use and admission false or coerced confessions and police misconduct in this case. Mitchell's confession is critical to the prosecution of this case. False or coerced confessions are not unique to this case or to Illinois. The American Academy of Forensic Sciences recognized the problem when it conducted a "Multidisciplinary Symposium on the Uses of Forensic Science, Anatomy of a Coerced Murder Confession: Can Post Conviction Relief Repair the Integrity of the Criminal Justice System?" during its 56th Annual Meeting, February 17, 2004 in Dallas, Texas. Proceedings, American Academy of Forensic Sciences, vol.10, p.5, Feb. 2004.

7. Counsel for Mitchell does not possess the specialized knowledge, training, experience and expertise to effectively represent their client in the sophisticated areas of coerced confessions, fire science, crime scene investigation, medicine, forensic pathology, forensic DNA analysis, criminalistics, the forensic sciences, etc. without the assistance and testimony of experts.

8. The proposed expert testimony would rebutt the State's case and would address:

- a) The "purposefulness and flagrancy" of police misconduct;
- b) Corroboration of Mitchell's credibility and assertions of coercion, duress, physical abuse and police misconduct;
- c) Evidence of injuries to his wrist, psychological stress, physical forms of abuse and torture;
- d) Defects in crime scene analysis, fire science and arson

investigation, evidence collection, evidence processing and forensic analysis of physical evidence, forensic pathology (time, manner and cause of death); and

e) Collection, analysis, use and results of forensic DNA evidence.

9. Mitchell's defense cannot be properly prepared and developed without the assistance of a person with specialized education, training, experience and knowledge of experts. (See, Affidavits of Experts, Exhib. 3-13, Affidavits from: Richard Ofshe, PhD - sociology and coerced confessions; William Hillman, PsyD - forensic psychology; Michael Welner, MD - forensic psychiatry; Julia C. Goodin, MD - forensic pathology; Gerald Feigin, MD - forensic pathology; Richard Saferstein, PhD - criminalistics; Edward T. Blake, DCrim - forensic DNA analysis; Marc Scott Taylor - forensic DNA analysis; John Lentini - fire science and arson; ; Bruce Blacker, MD - tissue scarring; Ellen Schuetzner - documents and handwriting analysis.) People v. Lawson, 163 Ill.2d 187 (1994); Ake v. Oklahoma, 470 U.S. 68 (1985); United States v. Van Horn, 26 M.J. 434, 439 (CMA, 1988); Williams v. Martin, 618 F.2d 1021, 1026 (CA4 1980)

10. The proposed experts contacted by Mitchell's attorneys are ready, willing and able to assist John Mitchell in preparation of his case, and render an opinion within their expertise at trial, upon appointment by the court, if called to do so. (See, Affidavits of Experts, Exhib. 3-13)

11. Mitchell is required to proceed to trial without the assistance of any experts in the preparation, examination and

rebuttal testimony in these specialized areas.

12. Very seldom will the government discuss the limitations, methods and means of medical or scientific analysis. The Defendant is entitled to rebut this critical evidence through use of experts. People v. Keene, supra; People v. Lawson, supra, People v. Watson, 36 Ill.2d 228, 233-34 (1966); E. Imwinkelried and R. Scofield, The Recognition of an Accused's Constitutional Right to Introduce Expert Testimony Attacking the Weight of Prosecution Science Evidence: The Antidote for the Supreme Court's Mistaken Assumption in California v. Trombetta, 33 Ariz. L. Rev., 59 (1991); Giannelli, P. and Imwinkelried, E., 1 Scientific Evidence, 2nd ed., chpt. 4 & 5, (1996 supp.), Michie Co., Charlottesville, NC.

13. Consulting and testimonial experts are necessary to assist Mitchell in providing effective representation by counsel.

14. Mitchell is entitled to assistance of a court appointed expert services, indigent or otherwise. People v. Lawson, supra, cf. 725 ILCS 5/113-3(d), 1996. Also see: Sapir and Giangrande, supra, 33 J.Marshall L.Rev. 1, 8-14, (1999). S.B. Bright, 21 Champion, supra, 31 (June, 1997); E. Monahan and J. Clark, supra, 21 Champion 12 (May, 1997); E. Imwinkelried and R. Scofield, supra, 33 Ariz. L.Rev., 59 (1991). Also see: Margolin and Wagner, The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards, 24 Hastings L.J. 647 (March 1973); Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigent, 51 Cincinnati L.Rev. 574 (1982); Note, Expert Services and the Indigent Criminal Defendant: The Constitutional:

Mandate of Ake Oklahoma, 84 Mich. L. Rev. 1326 (May, 1986).

15. If the evidence is such as to require an expert as a basis of the prosecution, then the accused is entitled to have an expert. People v. Lawson, supra. It is only fair that the accused be given meaningful access to experts who are willing to challenge the scientific evidence, forensic DNA evidence and issues of false and coerced confessions. Imwinkelried and Scofield, Attacking The Weight Of The Prosecution's Scientific Evidence, Champion, vol.17, no.3, April 1992, pg.6; Sapir and Giangrande, Right to Inspect and Test Breath Alcohol Machines: Suspicion Ain't Proof, 33 J.Marshall L.Rev. 1, 11, (1999).

16. Attorney effectiveness cannot replace either a consulting or testimonial expert. Cross examination is not a substitute for an expert. The examiner can only generate or neutralize specific facts, but cannot address general propositions. Attorney competency cannot replace an expert. People v. Lawson, supra; Sapir and Giangrande, supra, 33 J.Marshall L.Rev. 1, 38, (1999)

17. The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." If rebuttal testimony is capable of generating a reasonable doubt, then it is admissible. Imwinkelried, 33 Ariz Law Rev. 59, 81 discussing Crane v. Kentucky, 476 U.S. 683, 689-690 (1986). The defendant has a constitutional right to present critical evidence. This right supersedes any statutory and common law application to the contrary. Imwinkelried, 33 Ariz Law Rev. 59, 85 discussing Olden v. Kentucky, 488 U.S. 227 (1988).

18. The quality and effectiveness of Mitchell's defense has been prejudiced and irreparably harmed. Denial of professional assistance is a denial of equal protection and compulsory process. Mitchell is deprived of a fundamentally fair trial. People v. Watson, 36 Ill.2d 228, 233-34 (1966); Messed v. Keep, 831 F.2d 964 (11th Cir. 1987) (en blanc), Roseboro v. State, 258 Ga. 39, 365 S.E.2d 115 (1988); Giannelli, Ake v. Oklahoma: The Right To Expert Assistance In A Post-Daubert, Post-DNA World, 89 Cornell L.Rev. 1305, 1347, 1349 (2004)

19. Mitchell's motion to reconsider denial of court appointed consulting and testimonial experts is timely and based upon due diligence.

20. This Honorable Court should reconsider the denial of court appointed consulting and testimonial experts based upon the evidence and circumstances.

WHEREFORE, based upon the above information, Defendant John B. Mitchell requests this Honorable Court enter an Order appointing consulting and testimonial experts on his behalf, or provide any other relief it deems appropriate and just.

Respectfully submitted,

/s/ Gil Sapir

---

William P. Murphy and Gil Sapir,  
Attorneys for John Mitchell

William P. Murphy, Atty #26202  
407 S. Dearborn St., #1735  
Chicago, Illinois 60605  
(312) 697-0022

Gil Sapir, Atty #54527  
PO Box 6950  
Chicago, Illinois 60680  
(312) 458-0665

Affidavit of Julia C. Goodin, MD

I, Julia C. Goodin, MD, do on oath state and would so repeat in a court of law the following information.

1. I am employed as Chief State Medical Examiner for the State of Iowa, with my offices at Iowa Department of Public Health, Office of the Medical Examiner, 2250 Ankeny Blvd., Ankeny, Iowa 50021, and am licensed in good standing as a Medical Doctor in the State of Iowa and Board Certified in Forensic Pathology.
2. Because of my education, training, knowledge and experience, I possess knowledge of a specialized nature beyond that of the average person in the area of medicine and forensic pathology.
3. I have been qualified as an expert witness in courts of law on previous occasions in the area of forensic pathology and medicine.
4. On February 20, 2005 I spoke with Gil Sapir who is the court appointed attorney representing John Mitchell in the case of People v. John B. Mitchell, No. 00-CR-3709, Cook County, Illinois. Mr. Mitchell is charged with two homicides and aggravated arson.
5. Based upon information and belief, the defense of Mr. Mitchell cannot be properly prepared and developed, including rebuttal, without the assistance of a person with specialized education, training, experience and knowledge in the area of forensic pathology and medicine.
6. Mr. Mitchell's motion requesting appointment of my services as a consulting and testimonial expert witness was denied. I have not been retained in this case due to Mr. Mitchell's indigence.
7. I am ready, willing and able to assist John Mitchell in preparation of his case and render an opinion within my expertise at trial, if called to do so, upon appointment by the court.
8. Affiant says nothing further.

Date: \_\_\_\_\_, 2005                      Subscribed and Sworn to Before Me  
on this                      Day of                      2005.

\_\_\_\_\_  
Julia C. Goodin, MD

\_\_\_\_\_  
Notary Public





Affidavit of Edward T. Blake, DCrim.

I, Edward T. Blake, D.Crim., do on oath state and would so repeat in a court of law the following information.

1. I am employed as a forensic science consultant and criminalist at Forensic Science Associates, 3053 Research Dr., Richmond, Calif. 94805.

2. Because of my education, training, knowledge and experience, I possess knowledge of a specialized nature beyond that of the average person in the area of forensic DNA analysis.

3. I have been qualified as an expert witness in courts of law on previous occasions in the area of criminalistics and forensic DNA analysis.

4. On February 3, 2005 I spoke with Gil Sapir who is the court appointed attorney representing John Mitchell in the case of People v. John B. Mitchell, No. 00-CR-3709, Cook County, Illinois. Mr. Mitchell is charged with a double murder and aggravated arson.

5. Based upon information and belief, the defense of Mr. Mitchell cannot be properly prepared and developed, including rebuttal, without the assistance of an person with specialized education, training, experience and knowledge in the area of criminalistics and forensic DNA analysis.

6. Mitchell's oral motion requesting appointment of a consulting and testimonial expert witness in the area of forensic DNA analysis was denied. I have not been retained in this case due to Mr. Mitchell's indigence.

7. I am ready, willing and able to assist John Mitchell in preparation of his case and render an opinion within my expertise at trial, if called to do so, upon appointment by the court.

8. Affiant says nothing further.

Date: \_\_\_\_\_, 2005                      Subscribed and Sworn to Before Me  
on this                      Day of                      2005.

\_\_\_\_\_  
Edward T. Blake, DCrim

\_\_\_\_\_  
Notary Public





Affidavit of Ellen Schuetzner

I, Ellen Schuetzner, do on oath state and would so repeat in a court of law the following information.

1. I am self-employed as a forensic document examiner with my offices at PMB 161, 6348 N. Milwaukee Ave., Chicago, Ill. 60646
2. Because of my education, training, knowledge and experience, I possess knowledge of a specialized nature beyond that of the average person in the area of handwriting and document examination.
3. I have been qualified as an expert witness in courts of law on previous occasions in the area of handwriting and document examination.
4. On October 17, 2004 I spoke with Gil Sapir who is the court appointed attorney representing John Mitchell in the case of People v. John B. Mitchell, No. 00-CR-3709, Cook County, Illinois. Mr. Mitchell is charged with a double murder and aggravated arson. We discussed variations and factors influencing the quality and characteristics of a signature, including but not limited to, mental coercion, duress, pain, temperature and physical infirmities. Also, to compare known natural signatures to those provided under different conditions. The requested analysis is different from stylistics and graphology.
5. Based upon information and belief, the defense of Mr. Mitchell cannot be properly prepared and developed, including rebuttal, without the assistance of an person with specialized education, training, experience and knowledge in the area of handwriting and document examination.
6. Mitchell's motion requesting appointment of my services as a consulting and testimonial expert witness was denied. I have not been retained in this case due to Mr. Mitchell's indigence.
7. I am ready, willing and able to assist John Mitchell in preparation of his case and render an opinion within my expertise at trial, if called to do so, upon appointment by the court.
8. Affiant says nothing further.

Date: \_\_\_\_\_, 2005

Subscribed and Sworn to Before Me  
on this \_\_\_\_\_ Day of \_\_\_\_\_ 2005.

\_\_\_\_\_  
Ellen Schuetzner

\_\_\_\_\_  
Notary Public

Affidavit of William "Kip" Hillman, PsyD

I, William Hillman, PsyD, do on oath state and would so repeat in a court of law the following information.

1. I am self-employed as a clinical forensic psychologist with my offices at 4064 N. Lincoln Ave., Suite 290, Chicago, Ill. 60618 and am licensed in good standing as a clinical psychologist in the State of Illinois.

2. Because of my education, training, knowledge and experience, I possess knowledge of a specialized nature beyond that of the average person in the area of clinical psychology.

3. I have been qualified as an expert witness in courts of law on previous occasions in the area of clinical forensic psychology.

4. On February 9, 2003 I spoke with Gil Sapir who is the court appointed attorney representing John Mitchell in the case of People v. John B. Mitchell, No. 00-CR-3709, Cook County, Illinois. Mr. Mitchell is charged with double murder and aggravated arson. We discussed integrated background assessment (social, psychological, psychiatric) mental capacity, clinical testing and examination relevant to vulnerability, coerced confessions and police interrogation methods.

5. Based upon information and belief, the defense of Mr. Mitchell cannot be properly prepared and developed, including rebuttal, without the assistance of an person with specialized education, training, experience and knowledge in the area of clinical forensic psychology.

6. Mitchell's motion requesting appointment of my services as a consulting and testimonial expert witness was denied. I have not been retained in this case due to Mr. Mitchell's indigence.

7. I am ready, willing and able to assist John Mitchell in preparation of his case and render an opinion within my expertise at trial, if called to do so, upon appointment by the court.

8. Affiant says nothing further.

Date: \_\_\_\_\_, 2005

Subscribed and Sworn to Before Me  
on this \_\_\_\_\_ Day of \_\_\_\_\_ 2005.

\_\_\_\_\_  
William Hillman, PsyD

\_\_\_\_\_  
Notary Public



Affidavit of Richard Ofshe, PhD

I, Richard Ofshe, PhD, do on oath state and would so repeat in a court of law the following information.

1. I am employed as a Professor of Sociology at the University of California-Berkeley with my offices at the Dept. of Sociology, 488 Barrows Hall, University of California-Berkeley, Berkeley, Calif. 94704.

2. Because of my education, training, knowledge and experience, I possess knowledge of a specialized nature beyond that of the average person in the area of coerced and false confessions, including applied integration of psychology and sociology for interrogations, confessions and police techniques.

3. I have been qualified as an expert witness in courts of law on previous occasions in the area of coerced and false confessions.

4. On March 20, 2003 and May 12, 2003 I spoke with Gil Sapir who is the court appointed attorney representing John Mitchell in the case of People v. John B. Mitchell, No. 00-CR-3709, Cook County, Illinois. Mr. Mitchell is charged with double murder and aggravated arson. We discussed the overall integrated background assessment (social, psychological, psychiatric), mental capacity, clinical testing and examination, vulnerability, coerced confessions and police interrogation methods.

5. Based upon information and belief, the defense of Mr. Mitchell cannot be properly prepared and developed, including rebuttal, without the assistance of an person with specialized education, training, experience and knowledge in the area of coerced and false confessions.

6. Mitchell's motion requesting appointment of my services as a consulting and testimonial expert witness was denied. I have not been retained in this case due to Mr. Mitchell's indigence.

7. I am ready, willing and able to assist John Mitchell in preparation of his case and render an opinion within my expertise at trial, if called to do so, upon appointment by the court.

8. Affiant says nothing further.

Date: \_\_\_\_\_, 2005

Subscribed and Sworn to Before Me  
on this \_\_\_\_\_ Day of \_\_\_\_\_ 2005.

\_\_\_\_\_  
Richard Ofshe, PhD

\_\_\_\_\_  
Notary Public

