

BECOMING AN EXPERT WITNESS & DEVELOPING YOUR CURRICULUM VITA OR RÉSUMÉ¹

Materials by Hallie Bongar White & Jane Larrington

I. RULES OF EVIDENCE

Most courts have written rules governing the admissibility of evidence at trials and hearings. Expert witness testimony is an important kind of evidence that can greatly assist battered Native women in both criminal and civil domestic violence cases. The admissibility of evidence (including testimony by expert witnesses) in federal courts is governed by the Federal Rules of Evidence (FRE). Most state courts have adopted evidence rules that are similar to the federal rules. Tribal courts may have their own distinctive rules of evidence or may adopt, in whole or in part, the Federal Rules of Evidence or the rules of neighboring states.

II. The Two Types of Witnesses: Eyewitnesses and Expert Witnesses

A. Eyewitnesses:

The most common type of witness is an “eyewitness” (sometimes called a “percipient witness” or a “lay witness”). This type of witness testifies about what they have seen, heard, or experienced.

Sometimes domestic violence advocates are called as eyewitnesses to testify in court about an event that occurred in their presence. For example, an advocate could be called as an eyewitness to testify about photographs she took of the victim’s injuries or about the quality of the victim’s parenting skills that she observed while the victim and her children were at the shelter. Eyewitnesses are usually under subpoena (court order) to provide their testimony in most criminal and civil trials or hearings. In protection order hearings there may not be sufficient time to issue subpoenas for all witnesses. Eyewitnesses usually appear voluntarily at those types of hearings.

¹ © 2005 Southwest Center for Law and Policy & Office on Violence Against Women, U.S. Department of Justice.

B. Expert Witnesses:

An expert witness is a person who, by reason of education **or** specialized experience, possesses greater knowledge about a particular subject than a lay person. There are two ways that a person may qualify to testify as an expert witness in a court: (1) the parties can agree that the person is qualified to testify in court as an expert witness or (2) the judge can decide that the person is qualified to testify as an expert witness after hearing evidence in court about the person's credentials, education, and specialized experience.

The general rule is that a person can testify at a trial or hearing as an expert witness if that person's testimony will assist the judge or jury in understanding the evidence or in determining a fact in issue. For example, an advocate testifying as an expert witness could explain to the judge or jury why a victim believed that her own life was in danger when the abuser killed her dog or why the abuser's threats of suicide mean that the victim is at a greater risk of death or serious injury.

Expert witnesses may also give an opinion or raise an inference on a relevant issue even if the opinion or inference goes to the main or ultimate issue in the hearing or trial. For example, in a criminal case an advocate testifying as an expert witness could express her opinion as to whether the victim acted in self-defense or whether the abuser was the predominant aggressor. In a child custody case an advocate testifying as an expert witness could express her opinion as to whether it is in the best interests of the children to remain with the victim or with the abuser.

Judges and juries often hold many misconceptions about domestic violence. Expert witness testimony can explain why a survivor doesn't leave her batterer and the barriers that most survivors of domestic violence face when attempting to leave their abusers. Experts can explain the many ways that survivors of domestic violence protect their children even though they may not leave. An expert can explain to the court that a survivor of domestic violence knows best how to protect her and her children and that her choices may have actually saved her life and the lives of her children.

Jurisdictions that follow the Federal Rules of Evidence adhere to the standard for admissibility of expert witness testimony announced in

Kumho Tire Co. v. Carmichael.² In *Kumho* the United States Supreme Court held that the judge's "gatekeeping" function in determining admissibility of expert witness testimony also applies to non-scientific expert witness testimony grounded principally in the witness' training, observation, and experience. Victim advocate expert witness testimony on the dynamics of domestic violence most likely falls within this category.

In courts that follow the Federal Rules of Evidence, the judge must make a number of determinations prior to the admission of non-scientific expert witness testimony. Judges in these jurisdictions must consider whether the testimony is relevant and reliable and whether the testimony will assist the trier of fact to understand or determine a fact in issue. The advocate's work history, published peer reviewed articles, and training can greatly influence a judge's decision to allow a victim advocate to testify as an expert witness in court's following the rule set forth in *Kumho*.

States and tribal jurisdictions that do not follow the Federal Rules of Evidence follow a series of cases stemming from a 1923 D.C. Circuit Court case, *Frye v. United States*.³ The *Frye* case states that expert testimony must be based on information that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye* allows testimony as to the "general acceptance" to be given by the expert herself. In jurisdictions that follow the *Frye* test, a victim advocate testifying as an expert witness will need to present testimony about the wide acceptance of basic domestic violence theory by social scientists, law enforcement, prosecution, the courts, legal professionals, academicians, state and tribal bar associations, the federal government, national domestic violence advocacy organizations, federal legislation such as the Violence Against Women Act, etc. Advocates testifying in jurisdictions following the *Frye* test should cite studies, statistics, articles, books, etc. prepared by the preeminent authorities in the domestic violence field. A partial list of widely-recognized authorities includes:

- United States Department of Justice, Office on Violence Against Women

² 119 S. Ct. 1167 (1999).

³ 293 F. 1013 (D.C. Cir. 1923).

- United States Bureau of Justice Statistics (whose various studies provide the most accurate and widely quoted statistics about domestic violence)
- Domestic Abuse Intervention Project in Duluth, MN (who designed the widely accepted "Power and Control Wheel")
- Nancy Lemon (who wrote a widely used casebook called *Domestic Violence Law*)
- Barbara Hart and her colleagues at the Pennsylvania Coalition Against Domestic Violence (who have been at the forefront of developing many widely accepted theories about domestic violence, including the concept of "lethality risk factors")
- Lundy Bancroft (who is widely regarded as the preeminent authority on the effects of domestic violence on children and on the ability to parent)
- Sacred Circle and Mending the Sacred Hoop (who are the leading technical assistance providers on domestic violence victim advocacy in Indian Country and have published numerous valuable and widely accepted publications).

III. Testifying As An Expert When You Have Served As The Survivor's Advocate

Most advocates working directly with survivors receive large amounts of confidential information. Usually survivors do not want to have this confidential information divulged in court. Any time an advocate who has worked directly with the victim takes the stand there is a danger that the batterer's attorney may force her to testify about confidential issues that arose during the course of her advocacy. Some jurisdictions have adopted a "victim-advocate privilege" protecting the confidentiality of all victim-advocate communication. However, by taking the stand on behalf of the victim that privilege may be "waived" (invalidated) and the batterer's attorney may be able to ask a victim advocate on the stand about confidential matters.

The best practice is to have someone other than the survivor's advocate take photographs of the survivor's injuries or to provide other eyewitness testimony. The batterer's attorney may be able to question an advocate who has worked directly with the survivor about confidential matters. Ideally, an advocate serving as an expert witness should not work for the same organization where the victim

has received services. However, this may be impossible for many Tribal and rural domestic violence programs.

If an advocate from another organization is not available, an advocate from the same organization who has not provided direct services to the victim should testify as an expert witness. This may lessen the possibility that confidential victim-advocate communications will be revealed in court.

IV. Qualifying As An Expert Witness In Domestic Violence Cases

The Federal Rules of Evidence require that an expert witness have greater knowledge about a subject than a lay person. The court takes into account the witness' knowledge, skill, experience, training, and/or education when determining whether a person can qualify as an expert witness.

Mostly victim advocates in Indian country already have the knowledge, skills, experience, training, and education to qualify as an expert witness on domestic violence against Native women. The following is a partial list of factors that may qualify an advocate as an expert witness in Tribal, state, or federal court:

- Work at a domestic violence shelter
- Work as a victim advocate
- Provide legal advocacy for victims
- Work in a program funded by the DOJ Office on Violence Against Women
- Participate in a community domestic violence task force and/or other domestic violence related coalitions
- Assisted in drafting the domestic violence code, court forms, law enforcement protocols, etc.
- Train or present on domestic violence in local schools, community colleges, universities, chambers of commerce, communities, etc.
- Attend trainings, conferences and workshops
- Write articles on domestic violence for newsletters, local newspapers, and other publications
- Have education and degrees (e.g., A.A., B.A., M.S., etc.)
- Appear on television or radio presenting information on domestic violence

For domestic violence cases involving Native survivors the following factors may also assist an advocate in qualifying as an expert witness:

- Live in the same community as the victims
- Speak the same language
- Participate in the same culture and ceremonies

Advocates do not need to have all of the above skills and knowledge to qualify as an expert witness. There are many other factors that may also assist an advocate in qualifying as an expert.

If the two parties to the case do not stipulate or agree that an advocate qualifies as an expert witness, there will be a brief hearing to determine whether the advocate may testify as an expert. Both parties have the opportunity to question the advocate on her knowledge, skill, experience, training, and/or education in domestic violence. The judge makes the final determination as to whether the advocate possesses greater knowledge, skill, experience, training, and/or education than a lay person and may testify as an expert.

V. Writing A Curriculum Vita or Résumé

Advocates seeking to testify as an expert witness in a domestic violence case will generally be asked to provide copies of their most recent curriculum vita ("c.v.") or résumé to the attorneys for both sides and to the court prior to trial or the hearing. An advocate's c.v. or résumé outlines their qualifications to testify as an expert witness and highlights their knowledge, skill, experience, training, and/or education in domestic violence.

When creating a c.v. or résumé it is important to remember the following:

- Regularly update the résumé or c.v. with all domestic violence paid and unpaid work including volunteer positions
- Regularly update the résumé or c.v. with all domestic violence presentations, trainings, and conferences attended (keep a file of completion certificates)
- Regularly update the résumé or c.v. with all domestic violence training, presentations, and speeches given

- Regularly update the résumé or c.v. with all domestic violence articles or papers written
- Keep track of service statistics—number of victims served, number of years working/volunteering
- Note special skills/qualifications regarding the community served— ability to speak the language, living in the same community, enrollment as a member of that Tribe, etc.
- Be sure to include the number of years and months working in the field of domestic violence work
- Keep track of every court where successfully qualified as an expert witness, the type of case, and the party for whom testimony was given. For example:

Prior Expert Witness Testimony:

April 5, 2003/Hopi Tribal Court/Protection Order Hearing/ Plaintiff

March 2, 2003/ United States District Court for the District of Montana/Sexual Assault Criminal Trial/United States Attorney for the District of Montana

Below is a template or guide that advocates can use in developing their c.v's or résumés:

Name:

Address:

Telephone:

Fax:

Email:

Employment:

(current employer/dates of employment)

(previous relevant employment/dates of employment)

Education:

(Name of school/name of degree/date of degree)

Domestic Violence Training and Certificates: (includes conferences, workshops, training, in-services, seminars, etc.)
(Name of training, dates of training, type of certificate)

Organizational Affiliations: (d.v. taskforces, tribal community programs, Native women's coalitions, state coalitions, etc.)
(Name of organization, any position(s) held, dates of service)

Publications: (includes articles for newspapers, newsletters, professional journals, brochures, academic publications, etc.)
(Name of article, name of publication, date of publication)

Presentations: (includes in-service, community presentations, conferences, etc.)
(Name of presentation, name of conference, date of presentation)

Awards: (victim services related and community related)
(Name of award, presenting agency, date of award)

Prior testimony as an expert witness:

(Name of the court, year of testimony, party for which you testified, type of case)

Tribal Enrollment: (if any)

Languages: (other than English)