

## Chapter 7 How to Document Your Qualifications

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### 7.1 Executive Summary

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- Properly documenting your qualifications in your report will make your opinions more persuasive and will help prepare you for both deposition and trial.
- Documenting your qualifications may be a legal requirement in the jurisdiction in question. Check with retaining counsel prior to writing your report.
- Qualifications are usually addressed toward the beginning of a report.
- It is a common and effective practice to reference and attach your up-to-date CV to the end of your report.
- Connect the dots for the reader by explaining why, specifically, you are qualified to give an opinion in the case at hand. This means that if you work on different types of cases, your qualifications section may vary depending upon the issue(s) at hand.
- Don't be modest, but make sure you are 100% accurate and objective.
- Reference your teaching, writing, education, certifications, and past acceptance as an expert witness.
- Be prepared to back up at deposition and on cross-examination every statement you make regarding your qualifications. Avoid providing opposing counsel with ready ammunition that can be used to attack you.

### 7.2 Why Documenting Your Qualifications Properly Is Important

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A well-written expert witness report is an excellent roadmap or cheat sheet to your testimony in the case. One of the key challenges of any expert testimony is answering the fact finder's question, "Why should I believe this expert?" Your report is the opportunity for you to present, in concise and powerful talking points, why you are very well qualified to opine on the issue(s) in the case at hand.

In effect, your report gives you a golden opportunity to connect the dots for the reader as to why you are qualified to opine *on the specific issues in the particular case at hand and perhaps are more qualified than the opposing expert*. In some cases, this is critical because your qualifications for the issues at hand may be less than obvious. In other cases, you will want to shine when documenting your qualifications in order to show how superbly well qualified you are.

#### **Practice Pointer**

Spend the time necessary to draft an outstanding qualifications section for your report. Your investment of time will be particularly valuable because you may be able to adapt this language for use in future reports.

Documenting your qualifications may also be legally required in the jurisdiction in question. This is certainly true in federal court, where FRCP Rule 26(a)(2)(B) requires experts to disclose in their reports, among other things, the witness's qualifications, including a list of all publications authored in the previous 10 years and a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition. When unsure of the legal requirements in the jurisdiction at hand, ask retaining counsel.

Failure to properly disclose your qualifications may result in the court disallowing your testimony. Please consider the following examples.

## HOW TO WRITE AN EXPERT WITNESS REPORT

### **Example 7.21: Qualifications should include publications, education, and connection to issue at hand**

*R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 905, 912 (N.D. Ohio 2008)

The court held:

Rule 26(a) requires that an expert report contain “the witness’s qualifications, including a list of all publications authored in the previous 10 years.” Fed.R.Civ.P. 26(a)(2)(B)(iv). Reid’s report contains information about his employment (Reid Report at 1-2.), but very little about why his previous and current jobs qualify him as an expert to determine whether CU Interface wrongfully copied Plaintiff’s software. Compare *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 282 (8th Cir.1995) (expert report invalid under Rule 26(a)(2)(B) because, even though affidavit and curriculum vitae disclosed substantial knowledge in mechanical engineering and racing car tires, they “did not divulge any direct professional experience in tire manufacture or tire failure analysis,” which was the subject of the expert report). He also fails to include any mention of his education, academic or technical. Finally, Reid’s report does not list what publications, if any, he has authored in the past 10 years. Thus, Reid’s report is deficient under Rule 26(a)(2)(B)(iv).

Plaintiff argues that Reid’s report complies with Rule 26(a)(2)(B)(iv) because it describes his professional experience. (Pl. Mem. Opp. Def. Mot. to Bar, at 14.) Plaintiff also notes that it provided Reid’s full resume in advance of his full report. (Id.) The first argument does not prove enough. While Reid’s report describes his professional experience, it lacks any mention of either his publications, if any, or his educational background, both of which are highly relevant to his qualifications as an expert. Moreover, just as in *Sylla-Sawdon*, Reid’s report provides no reason why his prior and present employment, which he concedes does not entail any knowledge of software code, somehow qualifies him to determine whether CU Interface wrongfully copied Plaintiff’s software.<sup>1</sup>

### **Example 7.22: Qualifications not specific enough**

*Hoss v. United Parcel Serv., Inc.*, No. CV 08-498-N-BLW, 2010 WL 672743 (D. Idaho Feb. 20, 2010)

The court found that an expert’s disclosures of his experience were too general to qualify him as an expert on the subject matter in the case at hand. The court explained:

Expert witness’s written reports must also include a list of the proposed witness’s qualifications and publications, and cases in which the witness has testified as an expert. Fed.R.Civ.P. 26(a) (2)(B)(iv) and (v). Melman’s Report does not include a resume nor list of cases. The report provides a general statement that Melman has “nearly 40 years of experience in the area of labor relations and grievance arbitration,” and specific experience as the Director of Labor Relations at the University of California, San Diego. Exhibit B to Declaration (Docket No.) at 81. Although Melman indicates his duties included “representing the University in Grievance/Arbitration,” it is unclear whether—or to what extent—he represented employees in grievance proceedings, as is at issue in this case. Indeed, the indication is that his involvement in such grievances and arbitrations was as the employer’s representative. The Court concludes that the Melman Report either fails to satisfy Rule 26(a)(2)(B)(iv)-(v)—to the extent that relevant experience has not been disclosed, or it fails to establish sufficient bases for reliability as discussed above.<sup>2</sup>

### **Example 7.23: Rule 26 report, qualifications not provided**

*Elswick v. Nichols*, 144 F.Supp.2d 758 (W.D. Kentucky 2001)

This was a medical malpractice case. Plaintiff’s expert nurse was not permitted to testify in part because her Rule 26 report did not include a list of her qualifications. The court stated:

The plaintiff’s counsel submitted a copy of this report to the defense counsel. However, the defendants were never provided with Craig’s qualifications, a list of her publications, any information regarding previous testimony by her, or a list of items that she reviewed in this case. Finally, there is no written report expressing Craig’s opinions about the causation of Plaintiff Elswick’s injury [FN4]. Discovery in this case is now closed. Clearly, these omissions indicate a substantial violation of Fed.R.Civ.P. 26(a). Therefore, Craig is unable to testify in this case as an expert witness because disclosures on this matter are clearly inadequate with respect to Rule 26(a).<sup>3</sup>

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<sup>1</sup> At 912.

<sup>2</sup> At 3.

<sup>3</sup> At 765.

## HOW TO DOCUMENT YOUR QUALIFICATIONS

### **Example 7.24: Qualifications not provided in report, testimony barred**

*Campbell v. McMillan*, 83 F.Supp.2d 761 (S.D. Mississippi 2000)

The court found the designated expert's report inadequate and precluded the expert from testifying. The court stated:

The fourth requirement mandates the expert to provide a list of his qualifications, including a list of all publications authored by the expert within the preceding ten years. This requirement was not met . . .

Based on an analysis of both Federal Rule of Civil Procedure 26 and applicable case law, this Court finds that the expert designation and disclosure of the expert's report were deficient. Therefore, unless the Plaintiffs can come forward with an excusable reason for the inadequacies, the use of Murray as an expert witness at trial should be barred. *See* Fed.R.Civ.P. 37(c)(1).<sup>4</sup>

### **Example 7.25: Report without qualifications insufficient, expert must supplement or will be barred from testifying**

*Nguyen v IBP, Inc.*, 162 F.R.D. 675 (D. Kansas 1995)

This case also involved an insufficient Rule 26 report. The court stated:

The disclosures served by plaintiff clearly and indisputably do not comply with Fed.R.Civ.P. 26(a)(2)(B). The only document signed by the expert witness was a letter addressing the expert's opinions and the basis therefor, the data considered by the expert, and exhibits to be used as a summary of or support for the opinions. While a curriculum vitae was provided, it was not signed by the witness and did not include publications authored by the witness within the past 10 years. Although plaintiff, by interrogatory answer, provided the compensation agreement, this agreement was not a part of the report signed by the witness. Plaintiff's counsel supplied a list of 137 patients about whom the witness had apparently testified during the 34 month period prior to October 28, 1994, and the dates of the deposition testimony. No identification of the "cases" in which these depositions were given is provided. The court or administrative agency in which the depositions were taken is not provided. Although an attorney's name is provided as to most of the patients, in many instances the first or last name of the attorney is missing. The telephone numbers are not supplied for the attorneys for 55 patients. The list is not signed by the witness. It includes entries for less than three years rather than for four years as required by the rule.<sup>5</sup>

Plaintiff's failure to provide a report including a statement of the expert's compensation agreement, the expert's qualifications, or an identity of the publications authored by the expert during the past 10 years, in light of the lack of any such publications, is harmless since the facts were otherwise supplied and the failure may be cured by simply having the witness sign a disclosure to these facts. As noted above, the failure to provide the listing of cases is not harmless. The court will allow the plaintiff to provide a supplemental disclosure which corrects the deficiencies identified herein within 40 days from the date of the filing of this order, otherwise, Dr. Shechter will not be permitted to testify at the trial of the action.<sup>6</sup>

#### **Practice Pointer**

Connect the dots for your readers so they understand *why* you are well qualified to testify to *the particular issues in the case at hand*.

<sup>4</sup> At 765.

<sup>5</sup> At 679.

<sup>6</sup> At 682.

## HOW TO WRITE AN EXPERT WITNESS REPORT

### 7.3 Where to Document Your Qualifications

Recall the logical flow that expert witness reports generally follow:

#### The Logical Flow of Expert Reports

1. This is what I was asked to do.
2. This is why I am qualified to do it.
3. This is what I did.
4. This is what I found.
5. These are my opinions.

Therefore, a good place to summarize your qualifications is toward the beginning of the report, immediately after you have specified the scope of your assignment. This summary should be tailored to the particular issues in the case and should connect the dots as to why you are qualified in the case at hand. This summary should serve as your talking points while testifying.

It is good practice to also attach your complete CV to the report as an exhibit. This allows the reader to see all of your qualifications, even those not directly relevant to the issues at hand. The attachment of your CV should be referenced by a simple sentence at the conclusion of your qualifications.

#### Practice Pointer

A well-written qualifications section will help prepare you for both deposition and trial because it will distill the most powerful and easy-to-remember reasons why you are qualified to opine in the case.

#### Example 7.31: Referencing attached CV

*Report States:*

I am President and Chief Executive Officer of Smith Consulting, LLC, a business valuation and litigation consulting firm based in Anyplace, California. I provide consulting services for companies regarding valuation-related matters, including the valuation of businesses, business interests, and intangible assets including the valuation of customer relationships, patents, trademarks and trade names, and copyrighted material. In addition, I provide consulting services and expert testimony in litigation matters concerning business valuation and damages, including the computation of lost profits. **Attached as Appendix A to this report is my curriculum vitae.**

#### Comment

The highlighted language above is a typical, accepted way to reference an attached CV. This is usually and optimally done at the conclusion of the expert's narrative description of qualifications. There are many other appropriate ways to reference an attached CV, including:

- "My curriculum vitae is attached to this report as Exhibit 1,"
- "A copy of my curriculum vitae is attached as Exhibit 1 to this report," or
- "I have attached my curriculum vitae as Exhibit 1."

#### Practice Pointer

Your CV should be attached to your report. Your CV needs to be free of mistakes, dated, accurate, and up to date. It should not contain avoidable fodder for opposing counsel such as subjective, self-promoting characterizations, superfluous information, padding, and unearned designations or degrees.

## HOW TO DOCUMENT YOUR QUALIFICATIONS

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### 7.4 Techniques for Effectively Documenting Your Qualifications

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The authors recommend the following techniques to effectively document your qualifications.

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#### Documenting Your Qualifications

1. Include your relevant knowledge, skills, training, education, and experience.
  2. Be specific.
  3. Be completely honest and objective.
  4. Use past testimony as an asset.
  5. Document relevant licenses and certifications.
  6. Don't be modest.
  7. Consider a separate section for your qualifications.
  8. Mention teaching or writing in this field.
  9. Reference your CV.
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1. **Include your relevant knowledge, skills, training, education, and experience.** (These five items govern expert witness qualifications under Federal Rules of Evidence Rule 702.)
2. **Be specific.** Document why, *specifically*, you should be trusted to provide an opinion for the issues in the case at hand. Connect the dots for the reader.

#### Practice Pointer

Think of the qualifications section of your report as similar to what you would be prepared to say at a job interview. You need to be able to succinctly highlight your experience and skills, *with examples*, to show why you are qualified for the job at hand. The examples may become powerful sound bites when testifying at trial.

3. **Be 100% honest and objective.** Do not exaggerate. Do not puff. Avoid subjective, self-serving characterizations.
4. **Don't run from your past testimony; use it as an asset.** If you have been qualified in numerous jurisdictions and worked on many cases, you should rightly portray this as a plus in terms of your skills, experience, and knowledge. The fact that numerous judges have found you qualified to testify is additional objective evidence of your qualifications that can and should be used.
5. **Document your relevant and legitimate licenses and certifications.** Beware, however, of relying on mail-order degrees and checkbook credentials that were in reality bought rather than earned.

## HOW TO WRITE AN EXPERT WITNESS REPORT

6. **Don't be modest.** This is similar to a job interview. You need to cogently, confidently, and objectively state the case for why you know what you are talking about regarding the issues at hand.
7. **Consider breaking out your qualifications into a separate section labeled with a topic heading.** (For additional information on formatting, please see Chapter 5.)
8. **If you teach or write in your field, be sure to mention this.** Jurors and readers tend to view teaching and publishing as objective indicators of knowledge in a subject matter.
9. **At the end of your summary, reference your CV, which should be attached as an exhibit to your report.**

Please consider the following examples of well-written qualifications sections.

### **Example 7.41: Superbly drafted qualification section**

*Report States:*

#### **2. Qualifications**

I am an electrical engineer with over 35 years of experience with the design and development of digital and analog electronic circuits and systems, including the design and development of battery-powered circuits and devices, the technologies of the '238 and '991 patents most relevant to my investigation. I have designed and developed electronic circuits and systems used in products, systems, and devices for industrial, consumer, commercial, military, medical, and manufacturing applications. I have also designed electronic test equipment and instrumentation systems used in the research and development of emerging technologies in the optical and magnetic disk data storage areas. Furthermore, my graduate research work focused on statistical communications theory and data communications, and I have developed and taught a course in computer networks.

The following list includes several of my projects that cover technologies relevant to this case:

- **Designed and developed the hardware and firmware for a small, battery-powered PIC microcontroller-based detector of the phosphorescent materials.**
- **Designed, developed, and manufactured a modem for the HART (Highway Addressable Remote Transducer) communications network, which is a 1200 Baud FSK link on a 4-20 mA current loop circuit.**
- **Designed and developed a battery-powered circuit board to collect shock, vibration, and temperature data and transfer it to a data analysis station. This device was installed and operated in a compartment of an avionics bay in a U. S. Air Force B-1 bomber.**
- **Investigated the technology of a startup company that had developed a system to monitor the lighting on billboards and report the status to a central office using a wireless network.**
- **Designed the hardware, built a prototype, and wrote the firmware for a battery-powered, handheld device that was used by automobile mechanics to monitor sensor signals.**
- **Designed, developed, and manufactured the electronics for a battery charger used with an orthopedic surgical tool.**
- **Provided technical direction and project management for a startup company as it developed a hospital-wide, wireless, bar code system for patients and medications.**

I received the Ph.D. and M.S. degrees in electrical engineering from the Massachusetts Institute of Technology in 1978 and 1976, respectively, and the B.S. degree in electrical engineering from Carnegie Mellon University in 1972. I am a Registered Professional Engineer (electrical) in the State of Pennsylvania, and a member of the Institute of Electrical and Electronics Engineers.

I have been an independent engineering consultant, doing business as Allright Engineering Consultants, for 25 years. My clients have included Acme Data, ABC Corporation, First Technology, and Star Corporation among others. Prior to that, I worked for two years as an electrical engineer in the U. S.