

HOW TO PROPERLY FORM AND EXPRESS EXPERT WITNESS OPINIONS

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About SEAK, Inc.

SEAK is [The Expert Witness Training Company](http://www.seak.com). We have trained many thousands of expert witnesses since 1990. Our services include:

- [SEAK Expert Witness Directory](#) – The #1 Rated Directory of expert witnesses (online and print).
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- [Expert Witness Preparation](#) – performed in person or via video conference.

This white paper provides succinct advice for expert witnesses on how to properly form and express opinions. It is designed for both novice and experienced expert witnesses. The information herein has been adapted from material in the “opinions” chapter of the text, [*How to Be a Successful Expert Witness: SEAK’s A-Z Guide to Expert Witnessing*](#).

Introduction

One of the primary responsibilities of an expert witness is to render an opinion that will assist the trier of fact.¹ This opinion needs to be stated in a legally sufficient manner and must be based upon reliable facts, data, and methodology. Experts can expect to be closely questioned on their opinions, how they were formed, and the facts and data upon which they are based.

The Level of Certainty Required When Stating an Expert Opinion

Expert witnesses need not state their opinions with absolute certainty. However, expert opinions must at least be stated in terms of the probable and not merely of the possible. The test of whether an expert’s testimony expresses a reasonable probability is not based upon the use of “magic words” but is determined by looking at the entire substance of the expert’s testimony. Although no magic words are required, certain phrases are commonly used by experts to express the idea that their opinions are based on greater than 50% probability. These phrases include:

- “based on a reasonable degree of medical certainty,”
- “based on a reasonable degree of scientific probability,”
- “based on a reasonable degree of scientific certainty,”
- “based on a reasonable degree of medical probability,” and more probable than not
- “more likely than not.”

When an expert does not express the concept that she is greater than 50% sure of her opinion, the opinion might be excluded by the judge. Thus, it is important to state an opinion in a way that clearly communicates that it is based upon a reasonable degree of probability and not just possibility or speculation.

In stating opinions expert witnesses face a certain dynamic, between giving themselves wiggle

¹ Experts are also retained to help counsel understand the evidence and to help counsel deal with the opposing expert witnesses.

room and conveying a strong certainty in their opinion. On the one hand, they may feel the pressure to hedge their bets and understate their opinions. The problem here is two fold. First, if the expert does not express sufficient confidence in his opinion, the judge may exclude it. Second, if the judge does allow the opinion, the jury may not trust the opinion of an expert who is less than certain and appears to be hedging.

On the other hand, experts may understandably want to state their opinions with strong certainty. The danger here is that the more strongly worded the opinion, the harder that opinion is to defend.² If it can be shown on cross that the expert was exaggerating³, this fact will also not be missed by the jury.

Facts and Data Relied Upon

The sophisticated expert understands what she is permitted to rely upon in forming an expert opinion. Federal Rule of Evidence 703 provides that the facts or data upon which the expert bases her opinion need not be admissible in evidence “if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” In other words, it is appropriate for an expert to base her forensic opinions on facts and data that an expert in that field would typically rely upon in a non-forensic setting.

Ultimate Issue

Except in criminal cases where the issue is the mental state of a defendant, experts are permitted to give opinions that embrace “an ultimate issue”⁴ to be decided by the trier of fact. Experts who are qualified to testify are permitted to offer their opinions on ultimate issues, such as causation, negligence, speed, intoxication, handwriting, value, and damages.

Foundation of an Opinion

The expert’s opinion is only as strong as the facts and data upon which it is based (i.e. the expert’s investigation). The more thorough the expert’s investigation and the more facts the expert has access to,

² What we usually tell our experts is simply, “Think long and hard about what positions you take. You will need to defend each and every one of them from opposing counsel whose job it is to show that you are not credible. The more you lay down the gauntlet, the harder it will be to defend what you have said.”

³ A form of dishonesty and an indication of bias toward retaining party.

⁴ Fed. Rule Evid. 704(a).

the stronger the expert's opinion will be. Like your qualifications, your investigation is the foundation upon which your opinion sits. The stronger your facts and data, the better off you will be.

The rules permit an expert to testify regarding her opinion without first testifying to the underlying facts or data.⁵ This does not mean, however, that the testifying expert will not have to disclose these facts or data.

The facts and data upon which an expert bases her opinions are legitimate areas of cross-examination that she needs to be prepared to address. In attacking these facts and data, counsel will try to prove "garbage in, garbage out." Counsel may also try to show that the expert's opinions are improper because she did not consider key information, did not have time to do an adequate analysis, or considered flawed information.

Methodology

Experts can expect to be scrutinized closely regarding the methodology they used in determining their opinions. In federal court, and in most state courts, the judge will act as a gatekeeper to exclude unreliable expert testimony that was not based upon sound methodology. Under Federal Rule of Evidence 702, expert testimony is only admissible if "the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case." Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶ line of cases, a judge in a jurisdiction following *Daubert* will evaluate carefully the expert's methodology in forming her opinion. The judge will consider several factors, including, but not limited to:

1. Whether the theory or technique used by the expert can be, and has been, tested,
2. Whether the theory or technique has been subjected to peer review and publication,
3. The known or potential rate of error of the method used, and
4. The degree of the method's or conclusion's acceptance within the relevant scientific community.

Even if the judge does not exclude an expert's opinion under Rule 702 or the *Daubert* line of cases, an

⁵ Fed. Rule Evid. 705, Disclosing the Facts or Data Underlying an Expert: "Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination."

expert's methodology and the reliability of the facts and data upon which the opinion is based will remain legitimate areas of inquiry on cross-examination. Opposing counsel will try to show on cross that the expert's methodology was weak, flawed, or unreliable in order to demonstrate that the expert's opinion should be given little or no weight.

Experts are well advised to form opinions based upon reliable facts and data and a reliable methodology.

Conclusion

Experts need to be prepared to express and deliver their opinions in a legally sufficient way. Speculation and guessing are not permitted. Opinions need to be based upon reliable facts and methodology or they may be excluded from evidence. Counsel during cross-examination will challenge the expert's opinions, methodology, and the facts and data upon which the opinion is based. The expert needs to be prepared for such challenges.

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