

Introduction to Expert Testimony: A Legal Workshop

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Overview

Introduction to evidence and the Federal Rules

What makes an expert witness

Bases for expert opinions

Relevant case law

What limits an expert's testimony

What to expect as an expert

Common mistakes experts make

Threshold Questions for Evidence

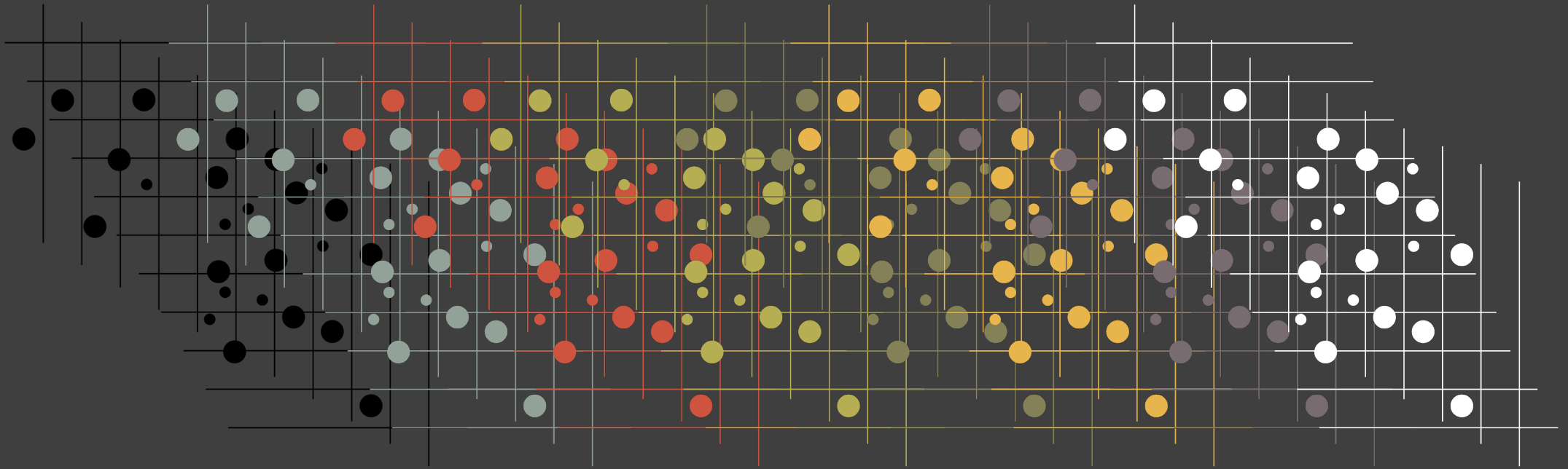


IS IT RELEVANT?



IS IT ADMISSIBLE?

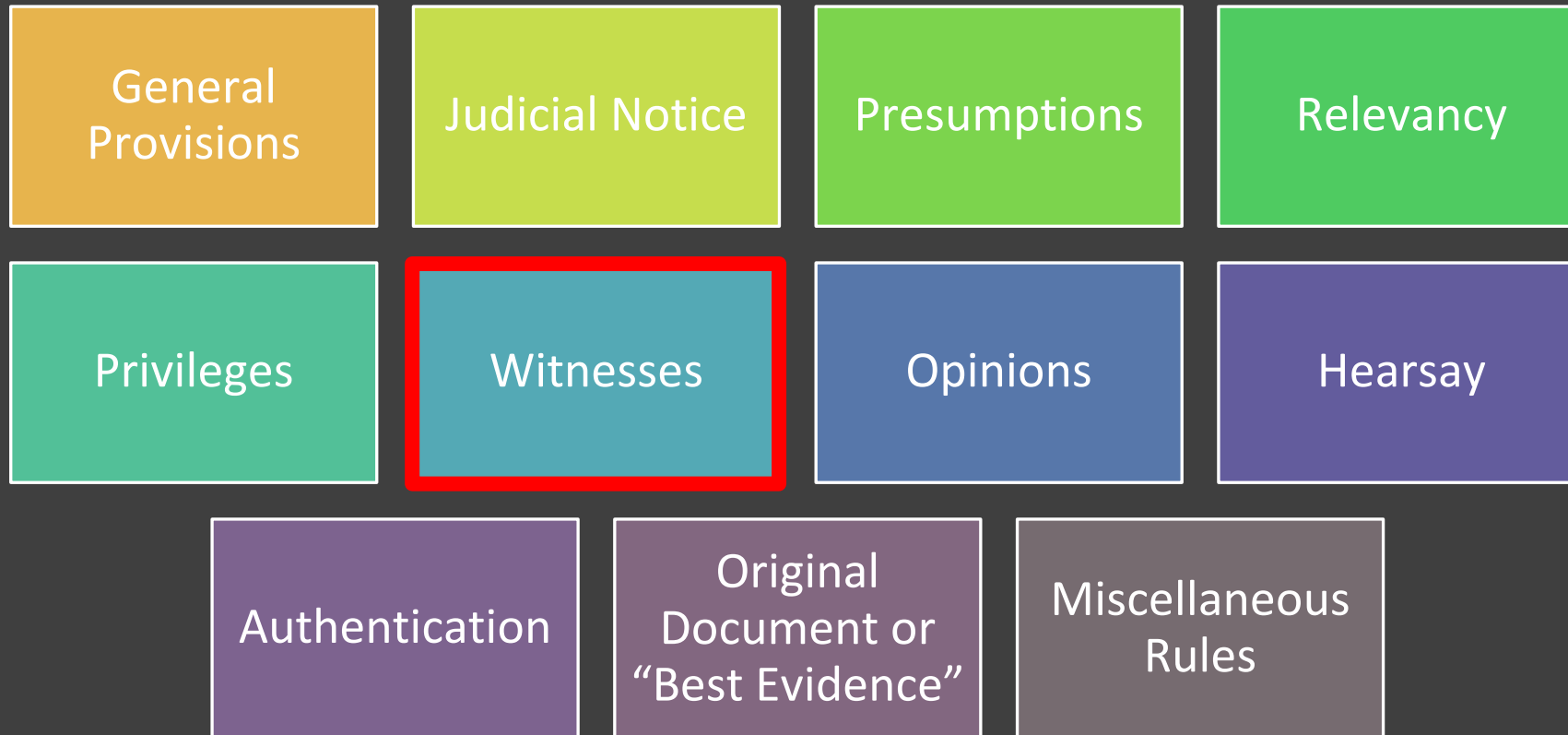
Threshold Questions for Evidence



Federal Rules of Evidence (FRE)

- Guidelines for determining what is introduced in court and what is not
- States may have their own rules, but many (most) are based off of the FRE
- Applies to all types of evidence
- Applies to trial portion of legal procedures

What the Federal Rules Cover



Types of Witnesses

LAY WITNESSES (FRE 602, 701)

- Testify based on firsthand knowledge (something coming from five senses)
- May give some opinions, but need to be rationally based on perceptions and **NOT** expertise
- Generally are not paid for their testimony

EXPERT WITNESSES (FRE 702-706)

- Testimony is based on evidentiary standards established by case law for the jurisdiction
 - Frye
 - Daubert
 - Kumho Tire
- May give broader opinions based either on observations or reported data
- Often paid for their testimony

What Makes an Expert Witness

Federal Rule of Evidence 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skills, experience, training, or education may testify in the form of an opinion or otherwise if:

- A. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- B. The testimony is based on sufficient facts or data;
- C. The testimony is the product of reliable principles and methods; AND
- D. The expert has reliably applied the principles and methods to the facts of the case.

Qualifying an Expert Witness

- “Qualifying” ? When the attorney bringing the expert to the stand proves their qualifications as an expert
- No specific rules on what makes an expert qualified
- Many qualifying questions come from the expert’s actual or metaphoric CV
- They don’t need to be the top individual in their field
- Generally, the expert does not need to be licensed or have any specific title or degree
- The scope of the testimony is limited by the type of expertise the witness can provide (e.g., qualifying as a psychologist is different than qualifying as a *forensic* or *child* psychologist)



Court-Appointed Expert Witnesses

Federal Rule of Evidence 706 – Court-Appointed Expert Witnesses

- A. Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

Court-Appointed Expert Witnesses

Federal Rule of Evidence 706 – Court-Appointed Expert Witnesses

- B.** Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate.

The expert:

1. must advise the parties of any findings the expert makes;
2. may be deposed by any party;
3. may be called to testify by the court or any party; and
4. may be cross-examined by any party, including the party that called the expert.

Court-Appointed Expert Witnesses

Federal Rule of Evidence 706 – Court-Appointed Expert Witnesses

- C. Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
 - 1. in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
 - 2. in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
- D. Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.
- E. Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Basis for Testimony

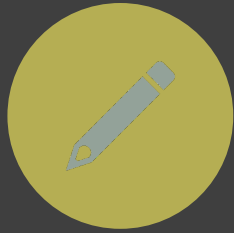
Federal Rule of Evidence 703 – Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury substantially outweighs their prejudicial effect.

Allowable Facts or Data



FIRSTHAND
OBSERVATION



RECORD
FACTS



NON RECORD
FACTS



OTHER
REPORTS



HEARSAY

Disclosing Facts or Data

Federal Rule of Evidence 705 – Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying as to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Frye v. United States (1923)

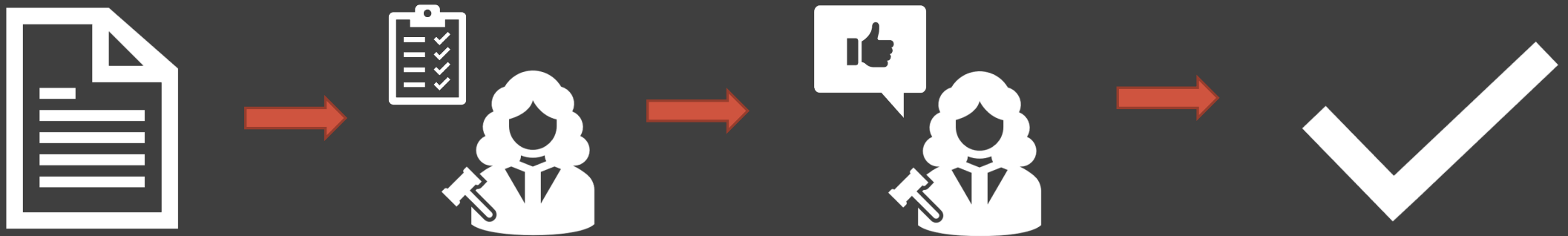
Scientific evidence is allowed in the courtroom if it is **generally accepted** by the **relevant scientific community**



Daubert v. Merrell Dow Pharmaceuticals (1993)

Admissibility of scientific evidence is determined by the judge, and requires consideration of relevance and four additional factors:

- Whether the theory or technique is generally accepted by the scientific community (*Frye*)
- Whether the science has been subjected to peer review and/or publication
- Whether the technique can be tested
- Whether the potential or known error rate is acceptable



Frye vs. Daubert

Frye

- **Pros:** easy application, requires no additional expertise on the part of the court
- **Cons:** can eliminate cutting edge or newer techniques, can keep older techniques around too long

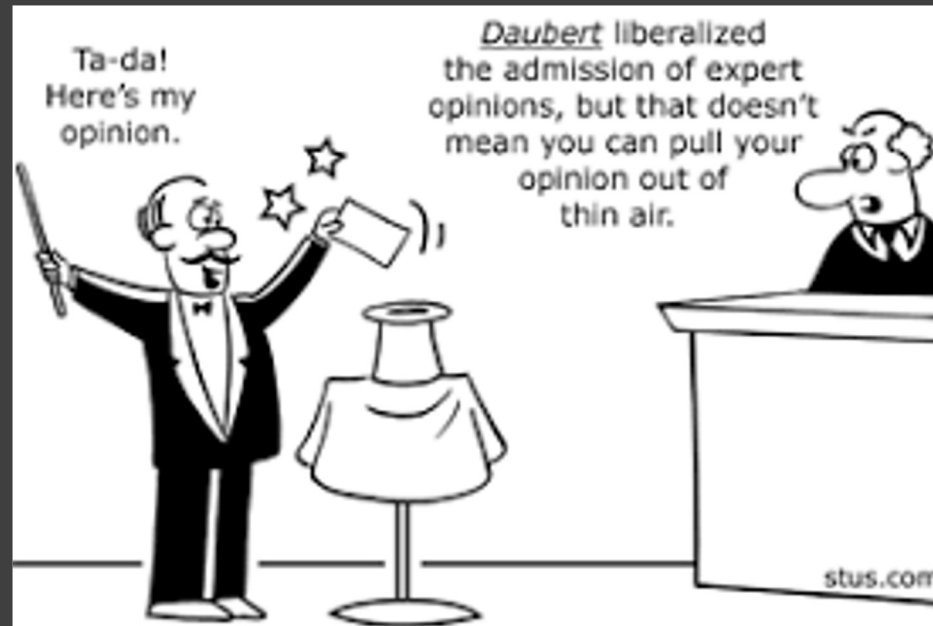
Daubert

- **Pros:** more structured analysis of reliability and validity of evidence
- **Cons:** requires nuanced understanding of admissibility factors



Kumho Tire Co v. Carmichael (1999)

Expanded *Daubert* to cover all types of expert witness testimony, not just scientific testimony.





The Ultimate Legal Issue

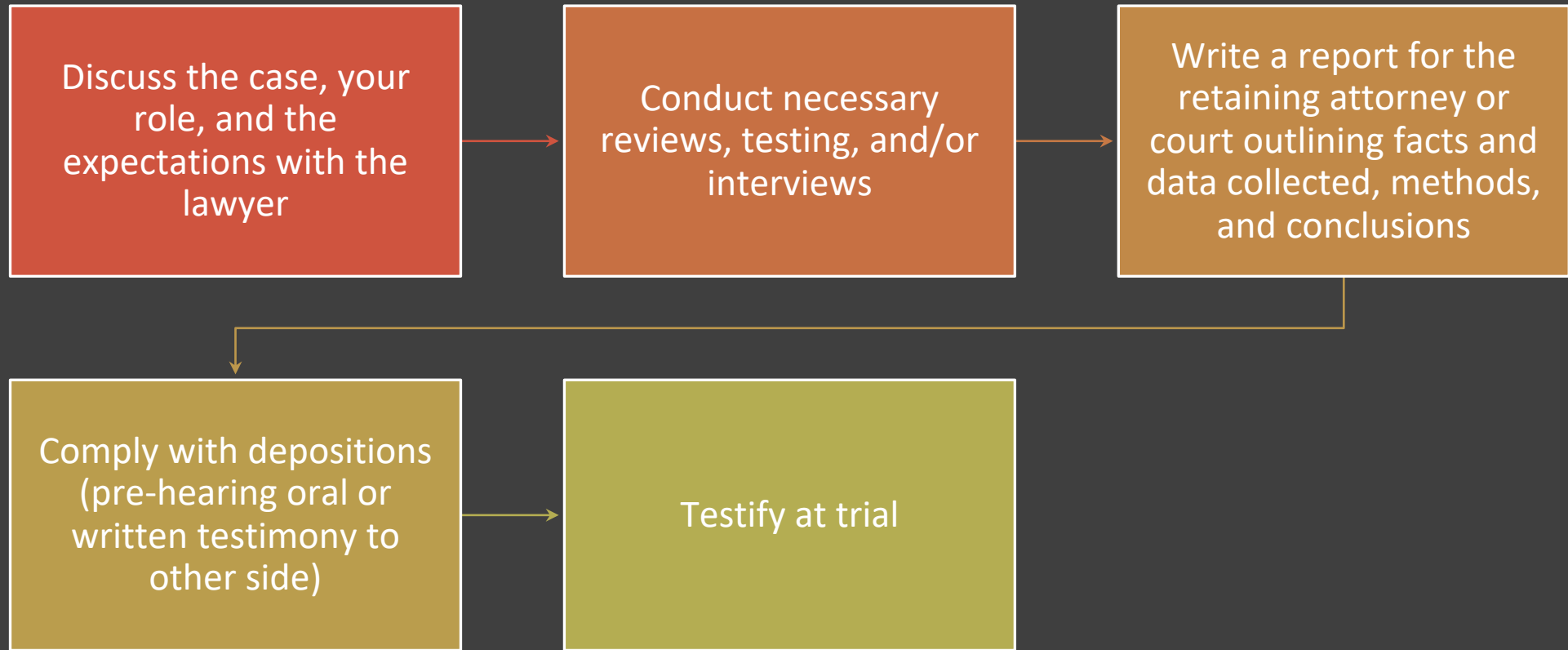
Federal Rule of Evidence 704 – Opinion on an Ultimate Issue

- A. In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
- B. Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

The Ultimate Legal Issue

- FRE 704(b) is a relatively new rule – in the past, expert witnesses *were* allowed to testify about the ultimate legal issue
- Changed with the trial of John Hinkley, Jr. (1982) to give more power/discretion back to the legal decision-maker
- Judges apply this rule differently and most still allow for evaluators to give ultimate-adjacent opinions
 - E.g., opinions on the prongs of competency, legal insanity or mental state at the time of the offense
 - Allows experts to talk about or around the ultimate issue from a *psychological* standpoint without coming to a *legal* conclusion

What to Expect as an Expert



What to Expect as an Expert

- Subpoenas ¶ requests from one side to turn over materials called discovery
 - Court orders are the same but coming from the judge and *must* be complied with
 - Subpoenas need to be answered, but don't require compliance
- What to turn over:
 - Non-privileged material that is relevant
- What not to turn over:
 - May not need to turn over raw testing (due to test security)
 - Privileged information
 - Irrelevant information (talk to the retaining lawyer)

Tips for Expert Testimony

ON DIRECT EXAMINATION

- Identify a few discrete and digestible “take aways” you want the jury to remember
- Provide your opinion(s) first, then go back and discuss the data leading to the opinion(s)
- Use lay-language
- Hit the highlights of your report



Tips for Expert Testimony



ON CROSS EXAMINATION

- Be cooperative
- Stick to what you know and can defend
- Take your time and think before answering
- Don't get stuck in the "yes" / "no" trap if those answers do not fit
- Make concessions as necessary
- Stop for rulings on objections

Common Mistakes



Making overly broad assertions



Going outside the scope of expertise



Refusing to admit mistakes



Inappropriate demeanor



Thinking out loud



Talking too much



Not knowing the legal standard

Questions?

Thank you!

