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INTRODUCTION TO EXPERT TESTIMONY

A Legal Primer

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INTRODUCTION

The purpose of this primer is to supplement the pre-conference workshop hosted by the Student Committee at the 2022 AP-LS Annual Conference. After skipping a year due to the pandemic, this sixth annual pre-conference workshop will focus on the law related to evidence and expert witnesses.

It is our hope that the topic will be pertinent to those engaged in work at the intersection of law and psychology, as many trainees, clinicians, and assessors are called to the stand at some point in their careers.

The workshop and this primer are meant to give an overview of the basic rules of evidence related to witnesses and expert testimony. The topics and law reviewed were carefully chosen to help psychologists in training understand some of the basic tenets of this specialized and complicated area of law. Additionally, the law related to these areas varies by jurisdiction, and so this primer serves as a broad overview of the general concepts. If you have any questions related to the presentation, please contact the creator, presenter, or student committee:

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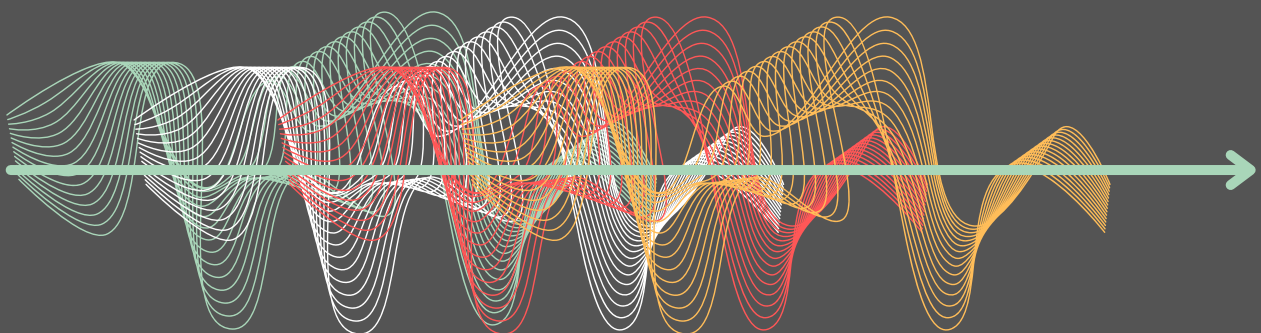
A NOTE ON EVIDENCE

Evidence covers a wide range of material (spoken, written, physical, etc.) that may come before a court in a criminal or civil case. Expert testimony is one kind of evidence and it relies on other types of evidence (e.g., interviews, testing, discovery).

There are two main threshold questions to determine whether that evidence will be used in the case. First – is it relevant? Relevance is the easy part here – does the evidence make a fact of the case more or less likely? Evidence must be relevant to be entered – otherwise, why talk about it?

The second question is admissibility. Admissibility is really what we'll be focusing on today using the rules of evidence as a guide.

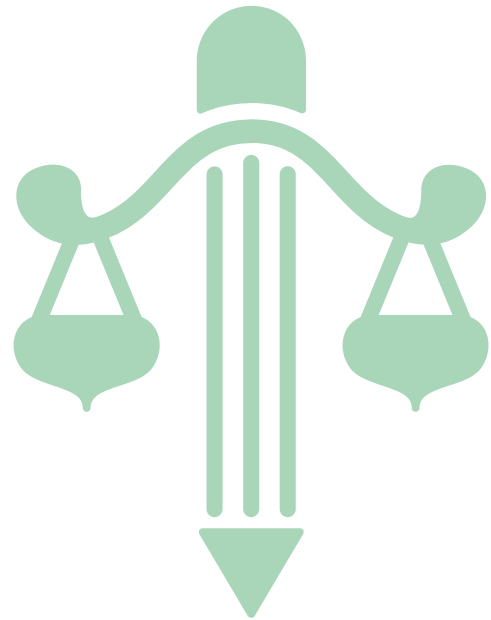
Think of each of the rules of evidence as another layer of a net catching evidence that, for a variety of reasons, shouldn't be included in the trial. In each layer, for different reasons, evidence gets caught. In reality, very little evidence gets all the way through each rule and is therefore included (admissible) in the trial. Generally, once evidence is determined to be relevant, the admissibility rules are designed to weigh out whether the importance of including that evidence (its probative value) outweighs any danger or inefficiency created by including it (its prejudicial effect).



WITNESSES & THE FRE

Given that each state has their own rules for evidence, this primer will focus on the guidelines provided by federal law and the Federal Rules of Evidence (FRE). These are broad guidelines that are adopted/adapted by many of the states. The FRE apply to all types of evidence and to the trial portion of legal procedures.

To narrow the scope of the primer, we will focus on rules dealing with witnesses. The FRE distinguish between two types of witnesses: lay witnesses and expert witnesses.



LAY WITNESSES

- Governed by FRE 602, 701
- Testify based on firsthand knowledge
- May give some opinions, but must be rationally based on perceptions and NOT experience
- Generally are not paid for their testimony

EXPERT WITNESSES

- Governed by FRE 702-706
- Testimony based on evidentiary standards established by case law (see page 7)
- May give broader opinions based either on observations or reported data
- Often paid for their testimony

DEFINING EXPERTISE

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:

1. 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;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; AND
4. The expert has reliably applied the principles and methods to the facts of the case.

Rule 702 distinguishes the expert witness from the lay witness. However, it begs the question - what makes someone an expert? This is typically determined through a process called "qualifying" an expert. When an individual is first called to the stand as an expert, the retaining attorney will typically ask a series of questions that give the court context to the reasons why they are calling their witness an "expert."

There are no specific rules on what makes an expert qualified, and the qualifying process often looks like a reading of the expert's CV. Experts don't need to be the top in their field, have licensure, or any specific title or degree. They just need to have specialized training or knowledge and provide testimony in that area of expertise.

Of note, psychological testimony used to be reserved for psychiatrists – psychologists weren't routinely admitted as expert witnesses until the 1940s and 50s.

DEFINING EXPERTISE

Federal Rule of Evidence 706(A) Court-Appointed Expert Witnesses

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.

Either party can retain an expert witness or attorneys may ask for a court-appointed expert witness. The court may choose an expert based on a recommendation from either party in the case or from their own roster of experts. However, they cannot appoint someone to be an expert who does not also agree to perform the job.

In this case, the expert is not retained by any one party, and therefore either party can call the expert as a witness, or cross examine them, and both parties must get copies of any findings.

There are, as with everything, pros and cons to having a court-appointed expert. It helps to cut down on "expert shopping" or finding a "hired gun" who will go along with whatever the attorney who retained them wants to say. It can also provide experts in cases where, because of the partisan nature of the case, the cost of an expert witness, or any other reason, an expert would not be readily available to one or both sides. However, some are concerned that judges put too much weight in the testimony of "their own" expert, especially if an outside expert is also retained.

BASES 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.

Unlike a lay witness, who can only speak about what they personally observed, an expert witness can base their opinions on facts or data they've observed or been made aware of. However, experts can't just base their opinions on anything – they need to be based on facts or data reasonably relied upon in their particular field.

Typically, allowable facts or data are obtained through discovery, interviews, and testing. They encompass the following areas: firsthand observation, record facts (e.g., court testimony), non record facts (e.g., case file reviews), other reports, and hearsay (e.g., interviews).

Finally, under **FRE 705**, experts don't need to verbally cite their sources when offering their opinions to the court. They can state their opinion and what factored into it first. Upon cross examination, however, it is likely that the opposing counsel will ask them what facts or data they used to come to that conclusion(s) – so an expert should be prepared with this information regardless.

CASE LAW

Frye v. United States (1923)

Frye was the preeminent standard for evidence in the field for decades. Under *Frye*, for scientific evidence to be admissible, it must be generally accepted by the relevant scientific community.

However, there were issues with this standard. Though it is straightforward in application, questions arose regarding which scientific communities got to "rubber stamp" various methodologies and data. Additionally, the standard did not allow for the introduction of data based on cutting edge techniques that had not yet been fully accepted into the scientific lexicon. As a result, a new standard was introduced.

Daubert v. Merrell Dow Pharmaceuticals (1993)

Under *Daubert*, for scientific evidence to be admissible, the judge must find that it is admissible and weigh whether the theory or technique:

1. Is generally accepted by the scientific community (*Frye*);
2. Has been subjected to peer review and/or publication;
3. Can be tested; and
4. Has a known, acceptable, error rate.

Daubert is a more exacting and structured standard than *Frye*. It uses the judge as a gatekeeper for making these determinations, which has its own pros and cons depending on their familiarity with the admissibility factors outlined above. *Daubert* also allows for other considerations (e.g., whether the data produced for the purpose of the current litigation, as it may speak to bias). Today, most jurisdictions use the *Daubert* standard.

Kumho Tire Co. v. Carmichael (1999)

Kumho expanded *Daubert* to cover all types of expert witness testimony, not just that which included scientific evidence. As such, the four-pronged test under *Daubert* covers all testimony provided by expert witnesses.

THE ULTIMATE ISSUE

One of the last main rules to be aware of is the rules on what is called the “ultimate legal issue.” Generally, answering a question that is close to an ultimate issue is not a problem – that’s what experts are there for! The exception here is of particular importance to experts in the field of forensic psychology. Often, psychologists are called to answer very similar questions (for example, conduct “insanity” evaluations or mental status at the time of the offense).

In the past, experts were allowed to testify about the ultimate legal issue - but this changed with the John Hinkley Jr. (1982) trial to give more power and discretion back to the legal decision-maker. In reality, judges apply FRE 704 differently, and most still allow for evaluators to give ultimate-adjacent opinions (e.g., whether someone is competent to stand trial/proceed or their mental state at the time of the offense). Judges will often allow experts to talk about or around the legal issue from a *psychological* perspective without coming to a *legal* conclusion, which is left for the fact-finder.

Federal Rule of Evidence 704 Opinion on an Ultimate Issue

1. **In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
2. **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.

TIPS FOR TESTIMONY

ON DIRECT

Direct examination is where you are asked questions by the attorney who retained you. Typically, this is where they will qualify you and then give you freedom to explain your opinions and the bases for those opinions.

- Come up with a few discrete take-aways and number them (e.g., example “there were three main conclusions” and then go into each one)
- Provide your opinion(s) first, then go back and discuss the data
- Stay away from psychological jargon; instead, use lay-language to explain what you mean in an accessible way
- Hit the highlights of the report – you should not be reading from it or going into everything you wrote down – if the attorney needs you to describe something further, they’ll ask you

ON CROSS

On cross examination, you’ll be asked questions by opposing counsel. They will mainly ask “yes” or “no” questions. They may not try to discredit you or your opinions completely but will try and at least take the “weightiness” of them away.

- Be cooperative
- “I don’t know” or “I don’t have the data to answer that” are perfectly good answers
- Take the time to think before answering or to read something that is handed to you before discussing it
- Answer in full sentences; if the answer is qualified (e.g., yes, but) – start with the explanation first
- Make concessions – if new data would change your opinion, answer that honestly
- Stop talking the moment an attorney says “objection.”

WHAT TO EXPECT

Services Provided

In most cases, experts are contacted by an attorney who gives them a general overview of the case. The expert's role, payment, and other expectations are discussed before the expert signs on. Next, the expert conducts whatever research is necessary – a review of the case file, testing, interviews, or any other methods necessary to collect the facts and data necessary to reach their conclusions. They then write a report outlining their process and opinions for the attorney.

In many cases, this is where the expert's involvement in the case ends. The attorney uses the report to argue for some sort of plea deal and is either successful or is not. In fewer and fewer cases, the case proceeds and the expert may be called in to court to testify. In this case, they may first be called for a deposition with the opposing counsel and then for their testimony.

Privilege and Sharing of Materials

Though you are typically working with one side in a case, you may be asked to hand over your materials and work product to the opposing side. This can come in the form of a subpoena – essentially a request for your materials. Court orders are the same but are demands from the bench and need to be complied with. Subpoenas, as requests on the other hand, need to be answered but not necessarily complied with.

Generally, it's easier to turn over most everything – “non-privileged material that is relevant” casts a wide net.

You do not need to turn over raw testing that has been conducted – psychologists have a duty to protect test security, privileged information such as individual case notes from therapy, or information that is irrelevant. For that last point, it is best for the lawyer who retained you to decide what is relevant and irrelevant, as they are the ones who would get sanctioned first for non-compliance.

COMMON MISTAKES

Finally, there are a number of common mistakes experts make that can undermine their testimony. Try to avoid these and keep the focus on the data at hand rather than what you are doing on the stand!

Avoid making overly broad assertions – “always” or “never” or “100%” is not usually the right answer. Stay in your lane and avoid going outside the scope of your expertise. Concede mistakes when you make them or make clarifications when necessary rather than doubling down. Be cordial and polite – you will not be able to out-argue a lawyer. Think before you speak and don’t talk too much – you may say something you don’t mean to or lose your audience. Lastly, be familiar with the legal standards for whatever you are discussing.

To succeed in becoming an expert witness, you don’t need to get a law degree. However, a basic understanding of the legal principles is helpful! Doing your research and avoiding these mistakes will make the process more smooth.

01

Making overly broad assertions

02

Going outside the scope of your expertise

03

Refusing to admit mistakes

04

Inappropriate demeanor / thinking out loud / talking too much

05

Not knowing the legal standard

QUESTIONS? CONTACT US.

It is our hope that this primer provided some of the basic information on the legal standards surrounding expert testimony. Again, if you have any additional questions, please feel free to contact the creator, presenter, or student committee:

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