



Engineering Sciences Section – 2011

C15 Examining the Sources of Expert Opinions

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After attending this presentation, attendees will gain a better understanding of how journal articles, textbooks, studies, and experiments may be used to substantiate or attack an expert opinion in all phases of court proceedings.

This presentation will impact the forensic science and legal community by distinguishing how and when forensic experts may rely upon or be confronted with written materials that substantiate or contradict their professional opinions.

Most forensic disciplines have reduced their general principles and methods to writings in textbooks and journal articles. The Federal Rules of Civil Procedure at Rule 26(b) and several state codes of procedure or evidence mandate that an expert written opinion shall contain, amongst other items:

1. A complete statement of all opinions rendered in the case before the court;
2. The basis and reasons for the opinion;
3. The data and information that form the basis of the opinion;
4. Any exhibits to include appended texts from treatises, journal articles and studies; and,
5. The expert's *curriculum vitae* and list of publications in the past ten years, etc.

Ideally, an expert witness report should cite to relevant journal articles or texts to substantiate an expert opinion. These reference materials may be reviewed by opposing attorneys and later, judges who are called upon to review an expert's opinion that is challenged pre-trial in a motion to suppress an opinion or dismiss a case, or at a *Daubert* or *Frye* hearing (or motion submitted on papers) to limit or preclude an expert opinion. In these pre-trial proceedings, the proponent of the expert opinion must lay bare the underlying rationale for the opinion.

Since the discovery process is more liberal than trial rules, inquiries as to the underlying basis for experts' opinions and their sources of such knowledge will invariably be made by trial attorneys. The foundation for the expert's source of knowledge will invariably be disclosed and experts should therefore be prepared to handle such inquiries when generating an opinion. While such disclosure may leave the judge with contradictory studies and journal articles, it is the role of the forensic expert to educate and convince the attorney and judge that the expert's opinion is reliable and therefore, admissible at trial. Whether the opinion is reliably based upon applying sound methodology and procedures that are generally accepted within the expert's field may be substantiated by the prior publication of a journal article or text that is peer reviewed. Whether the content of journal articles, textbooks or studies is ever disclosed to a jury is a different legal determination.

The Federal Rules of Evidence in Rules 703 and 705, and their corresponding state rules of evidence provide that while the expert may have reasonably relied upon some facts or data (found in written materials), those (hearsay/out of court) facts or data that are generally not admissible at trial may be disclosed to the jury if the judge rules that the probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect. However, on cross-examination, the expert must testify about the underlying facts or data if asked to disclose it.

Federal Rule of Evidence 803(18), known as the Learned Treatise exception to the Hearsay Rule (the rule that generally precludes the introduction of out of court written materials at trial), allows the use of a treatise (text, journal article, or study) either on direct examination of an expert to substantiate the basis for the expert's opinion, or on cross examination to impeach the expert's opinion.

In some states such as New York, written materials such as treatises, textbooks, journal articles or studies may not be used on direct examination, but may only be used on cross examination if the expert acknowledges that the written material is "authoritative." This gives expert witnesses the ability to stifle cross examination by merely stating that they do not recognize the written materials as authoritative. However, some clever techniques may be used to overcome this resistance to disclosure of the experts' basis of knowledge for their opinions.

Distinguishing between the use of written materials at trial and in a pre-trial setting, such as in a written expert report, a deposition, or an affidavit in support of or in opposition to a motion to suppress or dismiss, is a distinction forensic experts and attorneys must be aware of and prepared to handle.

Journal Articles, Pre-Trial/Trial Proceedings, Evidentiary Rules