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FURTHER DEFINING LEGALLY DEFENSIBLE

Laboratories in Court

FURTHER REVIEWING LEGALLY DEFENSIBLE

This Talk Will

- ⦿ Define Fact and Evidence
- ⦿ Ask the question, “What if you don’t follow the rules?”
- ⦿ What might go wrong even if you follow the rules
- ⦿ How might cases go differently than expected

Facts and Evidence

- ⦿ A Fact is what has happened or what is still happening
- ⦿ A Fact is usually the subject of a trial
- ⦿ A Fact is not suspicion, innuendo, or supposition
- ⦿ Evidence is a thing, document, or testimony that assists a judge or jury to understand what the Fact(s) is/are.

Facts

- *Incident, act, event, or circumstance. A fact is something that has already been done or an action in process. It is an event that has definitely and actually taken place, and is distinguishable from a suspicion, innuendo, or supposition. It is a truth as opposed to fiction or mistake. It must be proved at trial by presentation of evidence which is evaluated by a jury or by the judge if he/she sits without a jury.*
- Legal definitions taken from <http://definitions.uslegal.com>

Evidence

- *A thing, a document, or the testimony of a person that bears on the truth or falsity of an assertion made in litigation; the totality of such items introduced in a trial; the legal doctrines pertaining to the admission, use, and evaluation of such items.*

Types of Evidence

- **character evidence**
- **competent evidence**
- **cumulative evidence**
- **demonstrative evidence**
- **direct evidence**
- **documentary evidence**
- **evidence in chief**
- **extrinsic evidence**
- **opinion evidence**
- **real evidence**
- **rebuttal evidence**

So What are The Evidence Rules

- Federal Courts Apply Rule 702 – Based on Frye v United States and expanded on by Daubert v Merrell-Dow
- States apply Frye v US but Daubert is not uniformly applied
- Example - California Courts apply Frye, Daubert and People v Kelly

Rule 702

● Testimony by Experts

- *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Important Parts of 702

- ⦿ (1) the testimony is based upon sufficient facts or data
- ⦿ (2) the testimony is the product of reliable principles and methods
- ⦿ (3) the witness has applied the principles and methods reliably to the facts of the case

Is data as evidence useful even if the rules are not
followed?

RULES ARE FOR SISSIES

Three Cases

- ⦿ Deviations from SW-846 method, No sampling plan, Wrong method, Samples frozen, 14-day hold time exceeded.
- ⦿ Lab not certified
- ⦿ Failed to calibrate device per regulations

Appeals Court Findings

- ⦿ Data cannot be thrown out based on some failure to follow a law or regulation unless that law or regulation says so
- ⦿ The weight or “quality” of the evidence to prove the point can be challenged based on a failure to follow law or regulation

Cases

- ⦿ People v Hale, 1994
 - Illegal dumping of 1,1,1-trichloroethane
- ⦿ People v Sangani, 1994
 - Dumping of hazardous waste into sewer
- ⦿ People v Adams, 1976
 - Instrument calibration

Appeals Court Said

“SW-846 is not the name of some new gasoline additive marketed by an oil company. It is the title of a manual compiled by the United States Protection Agency (EPA) dealing with the collection and testing of hazardous wastes.”

“We discern no per se rule which does automatically precludes the introduction of evidence of disposal of hazardous waste just because the gathering of the sample does not follow very jot and tittle of the EPA manual.”

Appeals Court Said

“Failure to follow precise regulatory or statutory requirements for laboratory tests generally does not render the test results inadmissible. Providing the foundational requirements for establishing the reliability of the tests are met. The necessary foundational requirements are:

- 1)The testing apparatus is in proper working order;*
- 2)The test was properly administered; and*
- 3)The operator was competent and qualified.”*

Appeals Court Said

“Where a statute... does not specifically provide that evidence shall be excluded for failure to comply with said statute...such evidence is not inadmissible. Statutory compliance or noncompliance goes to the weight of the evidence.”

Data can be useless even if the rules are followed

**BUT IT SAYS IN THE
RULEBOOK!**

Factors used by Courts

- ⦿ Scientific theory or technique can or has been tested.
- ⦿ Scientific theory or technique subjected to peer review and publication.
- ⦿ Known or potential rate of error.
- ⦿ Existence or maintenance of standards controlling technique.
- ⦿ General acceptance in relevant scientific community

Rules do Not Guaranty Quality

- ⦿ Data generated by an approved but inferior method vs. data from an unapproved but superior method
- ⦿ Data qualifiers without comprehension of impact – overuse of the “J” Flag
- ⦿ Improper use of statistical tools - use of substitution

Cases that might go the other way

ESCAPING JUSTICE

Changing the Outcome

- ⦿ Not writing it down just means there is no written record
- ⦿ Jurors may not understand or mistrust the science
- ⦿ Who is a criminal and who is a bystander
- ⦿ Lawyers make mistakes in prosecuting cases

Things to Remember

- ⦿ Decisions are made by judges and juries who may not comprehend the science
- ⦿ Know what is on trial – i.e., what Fact is under debate
- ⦿ Know who the law defines as responsible parties
- ⦿ Many times neither you nor your data is the subject of a trial – just evidence

Your Data as Evidence

- Be prepared to support the weight of evidence your data brings to the case
- Keep things simple – Complex systems may overwhelm the message
- Explain why something is done and results if not
- Link the process with the outcome

Some Useful References

- *“Quality Science in the Courtroom: U.S. EPA Data Quality and Peer Review Policies and Procedures Compared to the Daubert Factors”*, George M. Brilis, Jeffrey C. Worthington, and A. Dallas Wait, *Environmental Forensics* (2000) 1, 197±203
- *“Using Field Methods – Experiences and Lessons: Defensibility of Field Data”*, Barton P. Simmons
- *“Criminalization of Environmental Quality Assurance”*, E. Tomko, P. Wahl, and A. Gump, *Environmental Enforcement and Crimes Committee*, Vol. 2, No. 2, April 2002.

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