

Chicago Daily Law Bulletin

Chicago Daily Law Bulletin

June 21, 2010 Volume: 156 Issue: 120

5Rethinking to a reasonable degreeJeffrey J. KrollBy Jeffrey J. Kroll

"Dr. Smith, does this court and jury have your assurances that all of your opinions will be based upon a reasonable degree of medical certainty in your area of expertise?"

When was the last time you actually gave thought to the phrase "to a reasonable degree of medical certainty?" You probably feel compelled to ask whether or not a doctor's opinions are held "to a reasonable degree of medical certainty." The phrase has become so rote that its significance is rarely questioned. We beat this phrase into expert's heads like we beat multiplication tables into our children's heads.

Aside from attorneys, do juries even understand the phrase? Since many lawyers do not understand its significance, I would venture to guess that juries cannot comprehend its intent.

Citing a 2009 report on forensic science by the National Academy of Science, Edward J. Imwinkelried recently wrote an article titled "Reassessing How Experts Vouch for Opinions," published in *The National Law Journal*, March 15, 2010.

There, Imwinkelried recognized that the National Academy of Science has urged forensic experts to "develop phrasing that is as standardized and accurate as possible," since the "phrase 'to a reasonable degree of scientific certainty' can often be inaccurate, misleading and confusing."

There is no codified requirement that an expert's opinion contain the words "to a reasonable degree of scientific certainty." Likewise, Federal Rule of Evidence 702, as well as the proposed Illinois Rule of Evidence 702, only require that the expert's opinions "assist the trier of fact."

Interestingly enough, "The Genesis & Evolution of Legal Uncertainty about 'Reasonable Medical Certainty,'" 57 *Md. L. Rev.* 380, 430 (1998), traced the origin of the phrase back to Chicago prior to 1930. There, the author, noted:

"Although its precise origins cannot be determined, the phrase appears to have been generated by the efforts of Illinois attorneys to accommodate two inconsistent rules of evidence that were adopted almost simultaneously by the Illinois Supreme Court in the early years of this century: the 'reasonable-certainty rule,' which prohibited experts from expressing speculative opinions about damages, and the 'ultimate-issue rule,' which prohibited experts from 'invading the province of the jury' by expressing definitive opinions on disputed issues. ... It is possible that once attorneys had developed the practice of using the phrase ... they became so habituated to its use that they began to include the phrase in all hypothetical questions posed to physicians — including those addressing the issue of causation — without any conscious awareness that the phrase was not appropriate in this particular context." 57 *Md. L. Rev.* 380, 407, 416 (1998).

Illinois courts have acknowledged there is "no magic to this phrase." When an expert testifies to "a reasonable degree of certainty" within a certain field, it has come to mean that others in the field would agree with the expert's opinion. If an expert testifies that his or her opinions are based upon specialized knowledge and experience and grounded in recognized medical thought, "it is of no consequence that the witness has failed to preface the opinions 'within a reasonable degree of medical certainty.'" *Dominguez v. St. John's Hospital*, 260 Ill. App. 3d 591, 595 (1st Dist. 1993) (finding a doctor's explanation for his level of certainty to be a relevant and competent synonym for "within a reasonable degree of medical certainty"). Yet, the phrase lives on in Illinois.

In fact, no Illinois rule specifically requires the use of the language. Even with the potential codification of the Illinois Rules of Evidence modeled after the Federal Rules of Evidence, the phrase is nowhere to be found. The proposed Illinois Rule of Evidence regarding expert testimony states:

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."

See Illinois Supreme Court's website at

http://www.state.il.us/court/SupremeCourt/Public_Hearings/2010/Ill_Evidence/Prop_ILEvidence_Rules.pdf.

No doubt intentionally, the proposed rule does not completely mimic Federal Rule of Evidence 702, as adopted in 2000, which included specific *Daubert* language, including that a qualified expert may testify to assist the trier of fact 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. Fed. R. Evid. 702.

Since Illinois has been one of the few states without codified rules of evidence, we still follow the standard set forth in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). The use of the *Frye* test as the Illinois standard was reaffirmed by the Illinois Supreme Court in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63 (2002).

The *Frye* standard, or "general acceptance" test, states: "scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *Donaldson*, 199 Ill.2d at 77.

Thus, while in federal court the trial judge serves as gatekeeper when it comes to expert testimony, Illinois has rejected that position for judges. *Id.* at 78-79.

Instead, the Illinois state court trial judge's role is more limited, applying *Frye* only if the scientific principle, technique or test offered by the expert to support his or her conclusion is "new" or "novel." *Id.* As a consequence, judges liberally allow the admission of "pure opinion testimony" based upon an expert's personal experience and training developed via clinical experiences. *Noakes v. AMTRAK*, 363 Ill. App.3d 851, 858 (1st Dist. 2006).

With the potential adoption of an evidence rule similar to Federal Rule 702 in Illinois, it will be interesting to see if and how the manner in which expert testimony is admitted will be affected. I am more curious, however, to know what it will take for Illinois lawyers to abandon the phrase altogether.

Do I feel comfortable advising experts in my cases that they no longer need to use the meaningless phrase, so long as their testimony is based upon specialized knowledge and experience or generally accepted science? Personally, I do not know if I am "brave enough" to avoid asking the meaningless phrase. I *can* state that with "a reasonable degree of legal certainty."

Ultimately, it is the cross-examiner's function to probe the basis for the expert's opinion testimony. A successful trial lawyer is never satisfied with "a reasonable degree of medical certainty" as a basis for an opinion. Generally, lawyers and judges are not experts in the area of forensic science. The forensic science community's steps toward presenting a unified manner to "analyze evidence and coherently report their findings in the courts" will ultimately make our jobs easier in the long run, providing us with time and energy to instead focus on winning cases. *See*, "Strengthening Forensic Science in the United States: A Path Forward," National Academy of Science, 2009, p. 110. Trial lawyers should all embrace the forensic

community's efforts.

[Jeffrey J. Kroll](#) is the principal at the Law Offices of [Jeffrey J. Kroll](#) in Chicago. He founded his firm with 17 years' experience representing victims and their families, and he has achieved settlements and verdicts in a wide range of cases, from trucking accidents to medical malpractice to sports safety cases. He can be reached at jeff@kroll-lawfirm.com.

©2010 by Law Bulletin Publishing Company. Content on this site is protected by the copyright laws of the United States. The copyright laws prohibit any copying, redistributing, or retransmitting of any copyright-protected material. The content is NOT WARRANTED as to quality, accuracy or completeness, but is believed to be accurate at the time of compilation. Web sites for other organizations are referenced at this site, however the Law Bulletin does not endorse or imply endorsement as to the content of these web sites. By using this site you agree to the [Terms, Conditions and Disclaimer](#) and [Privacy Policy](#).