

Chapter 9

Creation of the Expert Report

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Use of a Report “Form”

Many expert witnesses use a basic form which is completed by them for each individual case. A standard format is certainly easier to follow when the expert is involved in frequent inspections. However, occasional expert inspections may not merit the time involved in creating a specific form to use. A standard form also may not “fit” every case’s needs.

Later Changes in the Report

It is not uncommon that an expert learns of new facts or evidence after having written their Report and, naturally, wants to correct or supplement the earlier Report or some opinion that was given in it. An expert witness who later changes an opinion which appears in an already-distributed Report, or wants to supplement some part of an earlier report, for any reason at all, must write a “Revision to Report” which explains what opinion has been changed and why, as soon as possible. If it is easier, the expert can simply make the correction in the earlier Report, retitle it as an “Amended Report”, and then reprint and redistribute the revised Report.

The Fundamentals of an Expert Report

Always remember that the fundamental purpose of an expert witness Report is to convey the expert’s analysis, thoughts, findings, and opinions. In many cases it will be reviewed by attorneys involved in a lawsuit over the product. The expert may be questioned about the contents of the Report in great detail later, so considerable caution must be paid to the accuracy and details in the Report itself. Even spelling errors can be used to discredit a competent expert.

The expert Report should give a well reasoned opinion and answer to any questions asked and should generally not merely state a simple “yes or no” opinion on anything. The expert need not, and should not, be verbose but too short an explanation can be a ground upon which a cross-examiner may later successfully debate the validity of an expert’s opinion. A careful balance should be struck between the “long” and the “short” of it.

Ten Fundamental Areas of an Expert Report

There are ten fundamental areas to cover in the normal expert witness Report.

1. Introductory Identification:

Identify who is preparing the Report and who it is prepared for. Typically the Report is prepared for the owner of the product and not the attorney who represents the owner (if an attorney is involved) no matter who is paying the expert's bill. State the scope of the inspection and/or Report that has been requested along with any specific instructions that were given in advance.

Identify the year, make, and model of the product. If possible, provide any identification of the manufacturing date of the product. If the product has the ability to record any usage statistics (such as mileage or hours on an engine, etc.), identify the statistic at the beginning of the inspection and what that same statistic is at the end of the inspection, if the statistic has changed.

Identify any serial number for the product. The "in service date" (sometimes stated as the "date of sale" or "warranty effective date") should be stated. Also state the details of any particular relevant equipment that is part of or manufactured with the product (such as engine size or type of transmission, etc.).

Finally, identify the place where the inspection occurred, by name and address, and the date and time it started and the date and time it ended, and the names of all persons present. This shows the expert's attention to detail and can help the expert recall the details of it later.

2. Complaint and Repair History:

The purpose of this section is to show the reader of the Report that the expert reviewed the repair/complaint history of the product and was familiar with it. Knowledge of that history may be part of the foundation of the opinions that an expert witness may give in a case. It should consist of separate entries, listed in chronological order, briefly reviewing what occurred and commenting (where appropriate) on each repair event.

List the date and any usage statistic information (mileage or hours on the engine, etc.), followed by an itemized list of each complaint or repair task that appears to have occurred at each particular repair event. Identification of the particular repair shop involved is optional. The expert should feel free to

comment upon any unusual diagnostic or repair notations that are observed in the records or disclosed by any witness to the repair event. Always conclude each entry with the total numbers of days the product was out of service (sometimes referred to as “down time”).

“Days of out of Service” Calculations

Note: “Days of out of service” calculations can be confusing. Normally, only time in a factory authorized repair shop counts against the manufacturer. It can normally be calculated using several rules of thumb or industry standards, if they exist.

1. If the product comes in the shop and goes out on the same day, regardless of the amount of time involved, it is technically one day out of service.

2. If the product is dropped off at the shop the night before, when the shop is closed, and work is started the next day and finished on the same day, then it is one day out of service.

3. If the product comes in on one day, but work is not actually started until the second day, the first day is countered toward the days out of service total.

4. If the product is returned to the customer, but the repair order is kept “opened” and the product comes back later for the rest of the work to be done on the same repair order, it is treated as two separate repair trips; in some states it is illegal to keep a repair order “open” when the product is not actually at the repairing dealership or under a dealership employee control for off-site testing purposes.

5. When the product is sitting at the shop and nothing is being done to it because the shop is waiting for parts to arrive, that period of time is counted toward the days of out of service total.

6. When no customer complaint is duplicated and no repair work at all is done, the days involved in attempted duplication of the problem or attempting to diagnosis the problem is counted toward the days out of service total.

7. At the end of the job, the time the product sits at the dealership before the customer is notified that it is available for pick up, is countered toward the days out of service total.

8. If the customer is notified on one day that the product is ready to be

picked up, but the customer is out of town and not able to pick the unit up, the ending date for the days out of service calculation is the date the customer is notified of the repair completion.

9. If the customer is notified of repair completion at the end of a business day and an adequate amount of time is not available for the customer to pick the unit up that same day (perhaps because the shop is about to close), the repair is treated as though it is completed on the next day. If the next day falls on a day the shop is closed (such as a Holiday or weekend), those days count toward the days out of service total, until the next normal business day arrives.

10. Holidays and weekend days, are always counted as days out of service.

11. When the unit is “sublet” to a different repair facility, those are counted as days out of service. The unit is treated as if it still were at the receiving repair shop for repair purposes. As an example, if a glass window on the unit is being replaced under warranty and the shop sends the unit to a “glass repair shop” for it to be installed, the unit is still technically under the control of the receiving the repair shop. The time spent going to the “glass shop”, sitting at the repair shop waiting to be working on, actually being repaired at the “glass shop”, and the time spent returning the unit to the receiving repair shop, are all counting toward the days out of service total.

In short, when the customer drops the unit off at the repair shop, the days out of service start to run and the first day is normally included in the calculations. Until the unit is returned to the customer (or the customer is given a reasonable time to pick up the unit after being notified of completion) all of the days continue to count toward the days out of service total. Exceptions exist and the best rule is just one’s common sense and what is reasonable.

3. Inspection and Testing:

This Report section is normally several paragraphs long and may be as much as several pages long. This is where the expert explains, in a step by step fashion, what was done throughout the inspection process. The explanation should be chronological (starting with the beginning of the inspection and concluding with the last thing done in the inspection process). It should be as detailed or general as the expert thinks is appropriate.

It is acceptable to write this section in a “talking” approach, much as if the expert were simply dictating it (“I started the engine and put it in gear....,” “I felt excessive vibrations coming from the engine”, “I observed the RPM gauge fluctuating between 1,500 and 7,000 for no apparent reason”, etc.).

Be sure to include observations of malfunctions or evidence of defects that occurred in the course of the inspection. Also, the expert can include relevant statements made by participants or observers of the inspection, where appropriate.

This section should be relatively detailed but does not need to cover every minor aspect of the inspection process. It is intended to be thorough but in a summary format. The basic idea is to tell the reader what was done, in the order it occurred.

4. Service Bulletins:

This section may or may not be included in the Report, depending on whether or not manufacturer service bulletins or other repair documents exist which are relevant to any complaints or defects that have been noted or alleged.

If any relevant service bulletins exist, the Report should state words to the effect of “the service bulletins which appear relevant to this unit include...”). Using this language assures the reader that the expert identified some specific manufacturer documents that are related, but it does not state that the ones which are listed are the “only ones” that may exist. This is because the expert may not have in his possession, or available for his review, all of the relevant documents from the manufacturer or other sources (for a variety of reasons).

If the expert wishes, he may discuss the basics of any particular manufacturer document or service bulletin that seems particularly important to his analysis.

5. Outside Sources:

Professional databases sometimes exist independently or outside of the manufacturer repair/defect databases. Sometimes they contain information which comes from a manufacturer and sometimes the information comes independently. Either way, the information may be useful to the expert’s review and Report. The purpose of this section is to identify any such review and any relevant information learned from such review.

Examples would include the database of public complaints maintain by the National Highway Traffic Safety Administration (NHTSA) on motor vehicles of all makes and models. This information can be researched on the internet at www.nhtsa.dot.gov and double checked at www.internetautoguide.com and www.alldata.com. NHTSA also maintains a database of Technical Service Bulletins, defect inspections, programs and investigations, and recalls. Each of

the databases are maintained apart from the other databases by NHTSA.

The U.S. Coast Guard maintains a database of boat recalls that can be researched on the internet at www.uscgboating.org and double checked at www.boatamerica.org.

Similar databases are available for other products, such as www.recalls.org. Any such relevant database information should always be consulted in preparation of any Report. Whether or not to include information gleaned from such database review depends on the facts of the particular case and the relevance of the reviewed results.

Where relevant information is obtained from a database, the expert should identify the database by the name used for it, the source of the database (such as a website or publication, or the name of the organization that maintains the database), as well as the type of information contained in the database itself (such as customer complaints, etc.), and provide a brief statement of the relevant results of the review of it. The reliability or acceptability of the outside source should be noted with a general remark such as “This database is widely used in the industry because of its known and accepted reliability.”

6. General Conclusions:

This may be the most important section of the expert witness Report. The purpose is to provide general statements on the opinions and conclusions which the expert has arrived at, as a result of all of the above.

This section essentially has three areas being discussed.

First, it starts with a statement such as “see the attached Problem Analysis Chart”, if it is used in the case. This way, the much more detailed “Problem Analysis Chart” is incorporated in the more general conclusion statements that are going to be made in this section of the Report. The “Problem Analysis Chart” is a chart which the expert completes and attaches at the end of the Report and will be discussed in more detailed after this section.

The second area is a list of each and every source of material used in developing the expert witness’s opinions (such as discussions with the owner, review of all available repair records, review of service bulletins, documents produced by the repair shops, review of manufacturer documents produced, review of independent databases [such as NHTSA, service bulletins, complaint records, etc.], personal inspection of the product, review of photographs taken, and review of any specific trade publications that may be relevant). The idea is to

list in one place everything that goes into the process of formulating the opinions and conclusions that have been reached as an expert, but to only mention them (with no detailed explanation of what they said or where to find them, etc.).

The final area is simply a paragraph-by-paragraph listing of each conclusion and opinion arrived at as an expert witness. These may be stated in broadly worded statements with as much (or as little) explanation as appropriate. The purpose is not to fully explain the conclusions, but only to list them with a very brief comment or explanation on each.

This “general conclusions” section of the Report should state the ultimate conclusion which has been reached, in an overall sense of the product. It should deal with the safety, use, and value aspects of the product in light of the complaints and defects and the expert’s opinions about those.

If the expert arrives at any provisional or preliminary opinions that are not fully researched or concluded at the time of the Report, identify it as such and explain why it is only a provisional or preliminary opinion.

At the end of the Report, the expert should state that he has made all inquiries that he desires and thinks appropriate (i.e., “I have made all the inquiries that I believe are desirable and appropriate.”)

As a common example (which comes from a case where defects in the product have been reviewed in the expert Report), the expert should state something like “I believe, within a reasonable degree of mechanical certain, the defects in this product have substantially impaired and effected its value, use, and safety. The value is effected by the substantial number and type of problems that have existed and which still exist. The safety is effected by the risk of accident or injury because of the defective electrical system. The use has been effected because of the substantial number of days out of service to accomplish the repairs and the effect it had on the ability to use the product even when it was not in the repair shop being worked on.”

The reason that the phrase “within a reasonable degree of mechanical certainly” is used in this concluding paragraph, is because that is often the required “legal standard” for an expert witness opinion.

A “reasonable degree” has been interpreted as merely meaning that it is “more likely than not” that a circumstance or a condition exists. In other words, the expert should use this phrase to describe the certainty of his/her conclusion on a particular issue in those situations where the expert believes that it is at least “51%” likely that the conclusion is accurate. Some experts prefer a higher

percentage of certainty; there is no “magical” number which is a minimum to use in order to be “reasonably certain”, but if the expert is not at least 51% convinced of something, then it should not be an expert conclusion or opinion.

However, the expert Report should avoid using any percentage of likelihood. This entire “percentage explanation” is only provided so that the expert may have a general understanding of the legal requirement necessary. What matters far more than that, is the expert’s own “comfort level” with his opinion.

A final word on “substantial impairment” may be useful. Some laws require that the product be “substantially impaired” from the defects that exist. An example would be virtually all motor vehicle lemon laws. Most other consumer products are not covered by any “substantially impaired” requirement. Still, using that phrase makes it easier for people to understand the seriousness of the issues.

“Impair” means “to weaken, make worse, lessen, or otherwise hurt” or “having an effect upon”, according to an everyday dictionary definition.

“Substantial” means “valuable, real, worthwhile”. It can also mean “significant” or “something that matters” or “not merely nominal”, according to an everyday dictionary definition.

In doing the “use, value, and safety” analysis, each of those three aspects must be considered completely separate from the other two aspects.

7. Signature Page:

Finally, the expert’s signature should appear on the very last page of the Report (probably at the end of the general conclusions and before the “Problem Analysis Chart” and resume are attached.

The expert’s signature verifies that everything written in the Report is accurate, whether or not those words are stated directly above the signature line. For that reason, once the entire Report is finished and the expert is satisfied with it, many experts find it wise to put the Report aside and ignore it for a few days, and then return to look it over again later, in order to be more certain it is accurate with a “fresh review”.

The expert should adopt his own style and practice in all respects of completing the Report. Working with the consumer and retaining attorney can help assure the expert is fully informed, creates an accurate and professional

Report, and helps everyone arrive at the truth.

In every case the expert's first job is to find the truth of the matter. The expert's second job is to explain it, when the time comes. That time first comes in preparing the expert report. The adequacy and thoroughness of that report forms the foundation for everything the expert will do in a case.

8. Photographs:

This section of the Report should include only the photographs which help illustrate or explain some aspect of the Report or the complaints or defects at issue. Near each photograph should be placed a "text box" or a sentence or two which explains essentially what the photograph illustrates.

Among the photographs in the Report, should always be one over-all shot of the product as a whole which should be the first photograph, for orientation purposes. The second photograph should be of the serial number of the product, which clearly identifies it as the product which is the subject of the Report. The third photograph should be of the usage meter for the product (such as the odometer or hour meter, etc.), if one exists. All other photographs should follow in some logical order.

Never discard any photos, whether they are used in the Report or not. Always give a complete set of the photos to the consumer or the consumer's attorney. The expert should always keep the photo negatives in his control.

9. Problem Analysis Chart:

Many experts find it convenient to use a standard "problem analysis chart" to systematically analyze defects and complaints that are made about a product and to help understand whether the repair efforts have been reasonable or excessive. If the expert has developed a chart already then he may want to review it for thoroughness and adequacy. If the expert has not developed a chart, then most attorneys can provide one which can be used or adapted. An example appears at the end of this paper.

The Problem Analysis Chart typically should have eight categories.

The first category is "owner complaints and problems". Under this category is listed each of the separate issues that have been complained about or which have been problems with the product involved in the Report. Typically this is listed on the left side of the chart with each of the other categories representing

a column to the right of each one of these complaints/defects that are going to be listed by the owner.

Other columns, in no particular order, include:

1. Is it fixed now? (Yes or no)
2. How many repair attempts is reasonable to fix this? (Put the number that is thought to be the right answer.)
3. Does this problem substantially impair the use, safety, or value of the product? (List each of those which are felt to be is substantially impaired by this particular complaint/defect).
4. Is this problem likely to cause an accident or someone to get seriously hurt? (Yes or no)
5. Should this problem be covered by the warranty? (Yes or no)
6. Test/examine performed to verify the complaint (List what was done to determine if the problem still existed or to analysis the problem)
7. Other comments. (List here any other remarks that are relevant for each particular complaint/defect on the list.)

10. The Expert's Resume:

Attached at the end of the expert Report should be the expert's current resume (sometimes referred to as "CV"). This should be a professional resume of the expert's qualifications and which supports the fact that the expert is truly an "expert" who is capable and experienced at performing the analysis that has been done, and which supports the fact that he is an "expert" in field involved with the opinions being given.

It does not need to list everything the expert has done in his lifetime of employment. It should list those occupations and job experiences which are directly relevant to the field in which he is an expert. It should also list significant employers related to the expert's field of expertise.

It is not necessary to list previous cases that the expert has worked on. If those are needed, they will be requested later. You should maintain an ongoing list so it can be easily provided when needed.

As a Professional, the expert's resume should reflect the expert's level of professionalism. Neatness counts.

The expert should be sure to include any professional awards received and professional publications that relate to the field of experience and which may be relevant. Of course, not all awards and publications are relevant to the particular case at hand, so use discretion in determining what ones to include.