

Comment #9 – 6/20/17 – 1:15 p.m.

My comments regarding the Exposure Draft are as follows. I provide these based on personal experiences testifying as an actuarial expert in various litigations (mostly class action lawsuits) over the past 10 years.

I am not sure under which of the four questions raised I would categorize these comments.

1. Typically, an actuary is retained to provide expert testimony when there are actuarial matters in question and another actuary is testifying on the other side. More and more frequently, counsel includes specific reference to ASOPs and what they may or may not require in situations relevant to the legal matters in question in a lawsuit. That is, a prescriptive interpretation of an ASOP tends to be advocated in legal arguments. As we know, ASOPs are not intended to be definitive nor prescriptive but, rather, are designed to provide broad guidance on their subject matter. Therefore, often an actuarial expert may sometimes be expected to offer an opinion on the meaning or application of an ASOP.

Section 3.1 contains the phrase: "... a mere difference of opinion between actuaries does not suggest that an actuary has failed to meet professional standards." There is a further admonition to "comply with the requirements of the Code."

It would seem helpful for ASOP #17 to address compliance with professional standards more directly and to address the basis upon which ASOPs are written – i.e., as broad statements of practice rather than as prescriptive requirements. Therefore, when an ASOP is relied on in an actuarial expert opinion, ASOP #17 ought to require that such reliance be based on a reasonable interpretation of the ASOP and an explanation must be provided as to why it is appropriately applied in the way expressed.

In particular, with respect to whether or not an "difference of opinion between actuaries" implies a failure of one to meet professional standards, ASOP #17 should be written to indicate that an actuarial expert opinion is an inappropriate place for one actuary to state with certainty or even merely claim in an expert opinion that another actuary has violated the Code. This has happened to me (although, I suspect, in an opinion actually written by opposing counsel and merely signed by the opposing actuary). It also should be noted that the actuary who did this, in effect, violated Precept 13 himself since he never reported what was claimed to be a material violation to the ABCD. In fact, there wasn't. The claim of a Code violation was, apparently, only a legal tactic to discredit the testimony of an opposing expert.

Section 3.9 also touches on this subject matter. While actuaries may differ, the difference should never be allowed to go so far in the testimony, for one to accuse the other actuary of violating the Code. If one actuary believes another has violated the Code he should make that charge to the ABCD, not the court. An accusation is not fact. The ABCD and the member organizations through the disciplinary process determines whether or not a violation has actually occurred.

2. With respect to hypothetical questions (Section 3.8), counsel by whom I have been retained will almost always object to hypotheticals and I will typically, not answer them. However, hypotheticals may arise from more than just "unreasonable actuarial assumptions." Therefore,

the presence of unreasonable assumptions should not be the only reason for refusing to answer a hypothetical question which seems to be what is stated in the Draft ASOP #17. An actuary should be allowed to refuse to answer any question based on hypothetical facts.

3. Often when objecting to hypotheticals, an actuarial expert may be asked by opposing counsel (in oral testimony) to, in effect, correct his question by suggesting more appropriate actuarial assumptions or circumstances. I believe the Draft ASOP #17 ought to give an actuary permission to not respond to such a request. This addition might be placed in Section 3.10, Cross Examination. This goes a step beyond not “volunteering” information and, if required or expected, puts the actuary in a difficult position to address subject matter that ordinarily would require research and considerations that are unfairly expected to be addressed in the moment.
4. Some procedure for handling incomprehensible or confusing questions might be included. An actuarial expert's questioner is an attorney, typically, not well versed on actuarial subject matter. They, particularly in a deposition, are seeking sound bites to use to their advantage. Therefore, if an expert answers a question without a clear understanding of opposing counsel's knowledge or intent, the expert's answer may give a wrong answer to opposing counsel's intended question. Allowance to restate questions being answered to make the question answered clear is something that ought to be included in the Draft ASOP. This may address the concerns addressed in Section 3.1, Overview.
5. I also think that the ASOP ought to very clearly instruct actuaries providing expert testimony to provide their own opinions. Attorneys I have worked with have never expected otherwise but, I believe, this may not always be the case so, I believe, it should not be assumed but be expressly stated in the ASOP.
6. It might also be pertinent to address the fact that some actuaries providing expert testimony are experienced doing so having been involved in many expert situations. Other actuaries may be providing expert testimony for the first time, e.g., as employees providing testimony on behalf of their employers in lawsuits against their employer. The influence of an employer together with lack of prior experience testifying could be problematic.
7. Usually an actuarial expert is expressing an opinion on something. The ASOP ought to directly state that the expert should have a reasonable amount of data on the question at issue to express an opinion. An actuary may be qualified as an expert, in general, but still not have adequate data to express an opinion on a specific situation.

I hope that you find this useful.

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