



**AMERICAN SOCIETY
OF
CRIME LABORATORY DIRECTORS, INC.**

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ASCLD Board Comments

Draft Policy Recommendation on Presentation of Expert Testimony

The currently proposed Draft on "*Presentation of Expert Testimony*" dated October 12, 2014 lists fourteen (14) policy recommendations on Expert Testimony. While the testimony of forensic experts is an important issue, many of the topics in this document have far reaching effects on the entire judicial system that should be examined through serious discussion and debate in the broader forensic and legal communities. The ASCLD Board has serious concerns about the document being wider in scope than the original intent of the National Commission on Forensic Science. Further, many of the terms in this document, such as "expert," "neutral," "invalid," "problematic," "misleading terms," and "discovery" must be more thoroughly defined in order to fully assess the impact this recommendation will have on the forensic and judicial communities. Nonetheless, despite broad reservations regarding the scope and definitions in the document, the following are specific concerns, explanations, and recommended wording, where possible, to help further the discussion:

Issue #1

Policy Recommendation 3: *"Experts should remain neutral, and attorneys should respect this neutrality."*

Problem: "Experts should remain neutral" is a very vague term and not appropriate for use here. When an expert has a strong opinion based on the data and their interpretation of it, does this mean they are no longer neutral? This point is problematic and could be substituted with "experts should be objective and base their opinion on data", versus remaining "neutral". Experts are not going to be neutral to a case, or they would not likely be in court.

Recommended Wording:

Policy Recommendation 3: "Experts should be objective and base their opinions on data"

Issue #2

Policy Recommendation 4: *“Experts should not testify beyond their expertise and should also appreciate the difference between testimony that the witness may give as an expert and testimony that the same witness may give as a lay/fact witness.”*

Problem: What does it mean that experts should “appreciate the difference” between lay/fact and expert testimony? Does that mean that experts should have training on this topic or merely recognize that they may fill each role during the testimony? What is the actionable item with this language in the recommendation?

Recommended Wording:

Policy Recommendation 4: *“Experts should not testify beyond their expertise.”*

Issue #3

Policy Recommendation 6: *“Experts should not testify concerning conclusions that are beyond the limits of a laboratory’s testing protocols.”*

Problem: This recommendation seems specific to witnesses called to support the prosecution’s theory. Often, the experts called to testify do not have laboratory protocols because they do not have laboratories or perform the actual testing themselves. Sometimes expert witnesses supporting the prosecution hypothesis are merely called to testify for their particular expertise and experience in a given field. For example, experts in breath alcohol testing are called to testify about the operation of the testing instrument, but they do not perform the actual breath testing, themselves, or author reports with conclusions. Alternatively, in the event that a defense expert was called to evaluate the conclusions of a prosecution’s witness, does this recommendation preclude their testimony if the defense witness did not perform any of the testing and, therefore, did not have laboratory protocols? The problematic wording in this recommendation is “beyond the limits of a laboratory’s testing protocols.” This wording needs to be critically evaluated.

Recommended Wording:

Policy Recommendation 6: None.

Issue #4

Policy Recommendation 7: *“Experts should not use invalid or problematic terms in their reports or when testifying.”*

Policy Recommendation 8: *“Experts should not use misleading terms that suggest that the methodology or the expert is infallible when testifying.”*

Policy Recommendation 9: *“Experts should not use potentially misleading terms in their reports or when testifying without a clear explanation of the term’s significance and limitations.”*

Policy Recommendation 10: *“Experts should not use the term “scientific” when testifying unless the basis for their opinions has been scientifically validated.”*

Problem: Policy recommendations 7 thru 10 are problematically interrelated. The language in recommendation #7 "Experts should not use invalid or problematic terms...", recommendation #8 "experts should not use misleading terms", recommendation #9 "Experts should not use potentially misleading terms", and recommendation #10 "Experts should not use the term “scientific”" all provide a lot of guidance regarding what terms should not be used, but do not give much direction as to what should be said in lieu of expressing those same concepts. The one example on the top of page 22 suggests that the term "more probable than not" should be used instead of "reasonable scientific certainty". However, this example is erroneous. Does "More probable than not" mean a weight of greater than 50% whereas "scientific certainty" means a weight approaching 100%? Perhaps a recommendation could be made to develop consistent terminology for various weights of opinion, instead of these very general points.

Recommended Wording:

Policy Recommendation 7 thru 10: None.

Issue #5

Policy Recommendation 12: *“Attorneys have an obligation to understand the discipline — including its strengths and limitations — underlying the expert testimony that is presented at trial and to appreciate the importance of consulting with experts prior to trial.”*

Problem: While it seems as if the intent of this recommendation is for the attorneys to understand if/when an expert is testifying outside of their scope of expertise, it is impossible for attorneys to

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understand all the facets, strengths, and limitations of each forensic discipline they may encounter. Even specialized prosecutors have a very difficult time keeping up with the technical advances in a single forensic discipline. This is an unrealistic expectation of attorneys. The wording that attorneys should “appreciate the importance of consulting with experts” should also be revised. An individual can understand the importance without doing anything. If the intent is to have the attorney consult with the expert prior to trial, the recommendation should be that “if possible, attorneys should consult with forensic experts before trial.”

Recommended Wording:

Policy Recommendation 12: None.

Issue #6

Policy Recommendation 13: *“The proponent of the expert testimony should not cause an expert to testify beyond the opinion submitted in discovery or beyond the limits of the laboratory’s testing protocols.”*

Problem: This recommendation has the same concerns as recommendation #6 with respect to testimony being beyond the limits of the laboratory’s testing protocols. The expert may not have a laboratory or laboratory protocols.

Recommended Wording:

Policy Recommendation 13: *“The proponent of the expert testimony should not cause an expert to testify beyond his/her opinion”*

ASCLD Board of Directors
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