



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

**139 A Technology Drive Garner, NC 27529**

**ASCLD Board Comments**

**Draft Policy Recommendation on Expert Testimony**

The ASCLD Board has determined that due to the lack of an appropriate review period and the number of significant concerns raised by Board members regarding the “Presentation of Expert Testimony” document, we are unable to provide a complete and total list of public comments at this time. The ASCLD Board recommends and requests that the comment period for this document be expanded to a period of no less than one month to allow for a thorough review by the forensic community. While the testimony of forensic experts is an important topic, 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 forensic and legal communities. The ASCLD Board has serious concerns about the document being wider in scope than merely the National Commission on Forensic Science. The ASCLD Board will continue to review this document and will provide comment if an appropriate review period is granted.

Nonetheless, the following is a list of concerns that have currently been identified:

- **Recommendation #3** - "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. Indeed, many of the terms in this document must be defined. The terms “expert,” “neutral,” “invalid,” “problematic,” “misleading terms,” and “discovery” are among the terms that should be defined or changed in the document.
- **Recommendation #4** - What does it mean that experts should “appreciate the difference” between fact and expert testimony. Does that mean that experts should have training in 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?

- **Recommendation #6** - This recommendation seems specific to witnesses called to support the prosecution theory. Often experts called to testify do not have laboratory protocols because they do not have laboratories or formal protocols. Sometimes expert witnesses supporting the prosecution hypothesis are merely called as experts for their expertise and experience. For example, experts in breath alcohol testing are called to testify about the operation of the instrument, but they do not perform the actual breath testing or author reports with conclusions. The problematic wording in this recommendation is “beyond the limits of a laboratory’s testing protocols.” This wording needs to be critically evaluated.
- **Recommendation #7** - "Experts should not use invalid or problematic terms..." and point #8 "experts should not use misleading terms", point #9 "Experts should not use potentially misleading terms" and point #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 to what should be said. The one example on the top of page 22 suggesting that the term "more probable than not" should be used instead of "reasonable scientific certainty" 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.
- **Recommendation #12** - While it seems as if the intent of this recommendation is for the attorney’s to understand if/when an expert is testifying outside of their scope of expertise, it is impossible for attorneys to 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 reworded. 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.”
- **Recommendation #13** - 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.