E40 Pollution Solution? Suggested Identification and Possible Amelioration of a Potential Source of Contamination in Forensic Examinations

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After attending this presentation, attendees should be aware of the potential of attorneys as sources of contextual bias that can contaminate forensic examination, and also have some ideas to consider in terms of putting the Section's forensic house in order to prevent future pollution of the forensic environment.

This presentation will impact the forensic science community by raising awareness of the potential of attorneys as sources of contextual bias that can contaminate forensic examination, and also provide some ideas to prevent future pollution of the forensic environment.

The seventeenth century French innovation of using mercury nitrate in the felt making process led to poisoning among hat makers, a form of contamination that spread to England and America with the felting technique, causing symptoms bizarre enough to be used by Lewis Carroll in creating the Mad Hatter, and widespread enough in the industry's environment to be known as the Danbury Shakes around Connecticut's nineteenth century hat making center. French legislation dealt with this source of pollution in 1898, but a legislative remedy in the United States took until 1941. A more egregious (or at least more recent) case is the mid-twentieth century Japanese experience with Chisso-Minamata Disease that ended with a court case revealing years of corporate executives ignoring what they knew to be ongoing environmental contamination from methyl mercury in the waste water of their acetaldehyde plant. Other stories might come to mind (e.g., relating to asbestos or tobacco) where the individuals at the source of the contamination did not realize the consequences of their normal course of business actions, progressing through denial to cover-up, ending with correction through the courts, or legislation, or both. In the early twenty- first century those who knowingly contaminate are subject to substantial fines or lengthy terms of imprisonment under environmental protection laws or various anti-terrorism act, or even worse consequences as defendants in a civil suit.

In the twentieth century most public (or litigated) concerns about contamination compromising forensic examinations were focused on the physical side of the examinations: process induced issues (e.g., the collection and handling of material during scene processing or cross- contamination in a laboratory), or intrinsic problems (e.g., mixed DNA samples). While they have not been completely eliminated, awareness of the potential sources of contamination has certainly ameliorated them, and will hopefully reduce them to a negligible level.

In the first years of the twenty-first century the focus has shifted to the human side of the examinations and problems caused by the introduction of contextual bias. The symptoms of this form of contamination are said to affect the independence, the impartiality, and even the judgment of the forensic examiner, which in severe cases can result in erroneous results. The much more common perception of the source of contamination is that blatantly extraneous information given (or forced upon) the forensic examiner by a detective, or agent, or even a prosecutor.

The most popular current responses by those who consider contextual bias to be a real threat to forensic impartiality have taken the form of "target hardening" to swaddle the laboratory expert in layers of bureaucratic protection from direct access to potentially domain non- relevant information. As with terrorism, however, target hardening is expensive, inconvenient, and never as satisfactory or permanent a solution as elimination of the source of the problem.

There have been some recent studies (rigorously controlled and otherwise) that appear to suggest that forensic practitioners might have a certain level of acquired immunity to this kind of contamination. For the forensic document examiner this is not that surprising because the basic texts of their field have discussions and warnings against this very problem that are absorbed by fledgling examiners from the first days of their training. Furthermore, the awareness of the problem is enhanced by virtually every telephone inquiry from an attorney.

Attorneys, and especially trial lawyers, are trained to be persuasive, to lay out their facts (if they have any) and their arguments (which they always have) in a way to convince the listener, be that a judge, a jury, or the person sitting next to them in a bar. That is just what they do, and they do it when speaking to prospective expert witnesses. While this may have been excusable in the past as mere advocacy with no intention to introduce contextual bias, it is now moving into the realm of willful ignorance to deny the potential of such behavior to contaminate a forensic examination.

Certainly the members of the Jurisprudence Section of the American Academy of Forensic Sciences and other well informed lawyers are fully cognizant of this issue. Those section members that are law school professors are surely passing this information along to their classes, and it is hard to believe that everyone graduating from law school in 2020 and aiming for courtroom practice would not be aware of these issues.

If an over-confident detective or an over-eager prosecutor is the source of contextual bias, then she or he should be punished. However, what of the over-zealous defense attorney who can also be a source of contamination when retaining an expert for the defense. Some might argue about the duty of the defense attorney to the defendant, but surely there are limits; the location of those limits should certainly be left to the

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legal community to determine, but that community must consider if knowingly introducing contextual bias into a forensic examination is within or beyond acceptable behavior.

It must also be remembered that a great deal of forensic practice takes place in civil matters. Indeed, many more resources are deployed in a medium to large civil case than in most capital cases. Just consider the asbestos, Agent Orange, and tobacco litigation of the past generation, and also recall that all three cases in the *Daubert, Joiner, Kumho* trifecta were civil cases. It would be for the legal community to determine what limits, if any, should apply to the behavior of an attorney in a civil matter.

Some years ago a Code of Professionalism was proposed by the Jurisprudence Section for the guidance to the Section's members in their professional relationships with forensic experts. Item 6 of this code included a pledge to "not withhold nor suppress any relevant facts, evidence, documents or other material… that may be relevant to the expert's opinion." If the members of the Jurisprudence Section consider contextual bias to be a real and serious threat to the fair and impartial conduct of forensic examinations and the accuracy of the results of those examinations, then the members might consider adding a provision to the Code to "not inform an expert of any facts, evidence, documents or other material… that may not be relevant to the expert's opinion." The level of sanctions used to enforce such a code would, of course, reflect the level of concern of the members about contextual bias as a real problem that has real potential to distort forensic results.

Judges, attorneys (prosecutors and the defense bar as well as civil litigators), along with scientists and other scholars or experts whose work has addressed forensic science issues and who are actually concerned that contextual bias is some sort of clear and present danger to getting accurate results from impartial forensic examinations will show the level of that concern by urging their Bar Associations to consider attempts to cause contextual bias as serious ethical violations worthy of disbarment, and urge the legislatures to consider such behavior by attorneys or non-attorneys to be akin to obstruction of justice or subornation of perjury.

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