



Engineering Sciences Section – 2011

C14 Litigation and Attempts to Pierce the Peer-Review Process

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The goal of this presentation is to discuss the problems encountered when a manuscript is involved in the peer-review process and attorneys attempt to interfere with its publication. The responses of the respective parties, including the plaintiff and defense attorneys and the journal editorial board and legal team, are described.

This presentation will impact the forensic science community by serving as a cautionary tale for experts who also find themselves involved in original research. It will also make the argument for establishing the peer-review process as work product in the legal sense, at least from a scientist's perspective.

An original study, replicating an unpublished investigation done by another scientist for a litigation matter was undertaken and results were reported at a scientific conference and published in the proceedings. When the results were used in reports written for plaintiffs, railroad defense attorneys focused on the fact that the proceedings publication

was not the same level of peer-review as a refereed journal article. They also subpoenaed the raw data, which was turned over in response to a court order at the urging of the plaintiff's attorney, who did not want to lose his expert in the case. When the principal investigator finally found time, the results were put in manuscript form and submitted to a refereed journal.

The ensuing legal maneuvers went far beyond what most scientists experience during the publication process. Subpoenas were served on the Associate Editor of the journal demanding the original manuscript and the confidential reviews. The Associate Editor had to consult his legal department, who then referred the matter to the corporate legal people outside the United States. The journal turned over both the original manuscript and the confidential reviews to the defense attorneys without ever informing the principal investigator (who learned about it when he was being deposed). The ensuing back-and-forth will be described in lay terms, and the potential chilling effect on those agreeing to review manuscripts on an ad hoc basis will be discussed.

After revisions, the article was finally published in the refereed journal and a second more extensive study on the same general topic was proposed to all of the Class 1 railroads, the railroad trade association (Association of American Railroads, AAR) and the Federal Railroad Administration (FRA). The FRA eventually funded the study, but not before railroad defense attorneys contacted the general counsel at the FRA and attempted to prevent the study from being funded. The AAR then tried to insert adversarial experts of its choosing into any peer-review done of the study by the FRA, at which point the FRA and investigators decided to go directly to a refereed journal with any manuscripts instead of providing a report to the funding agency. The second study was completed and the first manuscript was submitted to a refereed journal. Railroad defense attorneys issued more than 30 subpoenas to co-authors and their institutions to obtain the original manuscript and reviews. However, lessons learned the first time around prevented them from interfering with the peer-review process again. The second article is now in press.

Peer-Review, Litigation, Expert