E33 Disingenuous Testimony in the Forensic Toxicology Community

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After attending this presentation, attendees will be able to: (1) define disingenuous testimony; (2) summarize the forensic expert's duties under the testimonial oath; and, (3) recognize why laws on *per se* levels of drugs are oppressive.

This presentation will impact the forensic science community by providing examples of disingenuous expert testimony and prosecutorial misconduct and how it impacts all stakeholders in the administration of criminal justice.

Disingenuous is defined in the dictionary, as "lacking in candor; giving a false appearance of simple frankness." It resembles a lawyer's or police officer's use of subterfuge (claiming the existence of evidence that does not really exist). An appropriate definition of candor, from the same source is "freedom from prejudice or malice, i.e., fairness." When an expert witness testifies regarding his or her opinions about the significance of the scientific evidence, the rules of evidence provide a framework to ensure that such testimony is relevant and reliable. Matters not covered by the rules of evidence may be addressed by the case law or may be left up to the judge's discretion. According to FRE 702, the purpose of expert testimony is to help the jurors understand scientific matters that would typically be beyond their ken. Pursuant to FRE403, even relevant evidence may be suppressed or limited, when such evidence confuses the issues, misleads the jury or is substantially prejudicial.

The Oath: Before testifying, every witness takes the oath. The oath asks witnesses to testify to "the truth, the whole truth and nothing but the truth..." In breaking down these three portions of the oath, "the truth" means, the truth as opposed to a lie. "The whole truth" means, the whole truth as opposed to a half-truth. And, "nothing but the truth" instructs us not to add or subtract any disingenuous statements that might cause the truth to be misperceived by the jury (Gutheil et al 2003). Not adulterating your testimony pursuant to FRE 403 is what you have sworn not to do, under the last part of the oath.

Why Laws Regarding *per se* Drug Levels Contradict Criminal Jurisprudence: In a Driving Under The Influence of Drugs (DUIDs) the prosecution's evidence of impairment usually consists of: an admission made by the driver, the appearance of the driver, and the way the driver performs standardized field sobriety tests (sFSTs). In an attempt to increase DUID enforcements, many states have taken to passing *per se* laws, developing numeric concentrations for drugs in the blood plasma, or urine above which a citizen is automatically assumed to be the DUID. In these instances, impairment does not have to be proven. The analogy is a *per se* level of 0.08% for blood alcohol. The scientific problems are: the blood levels of drugs and the onset and duration of impairment are not precisely related; people metabolize drugs at different rates casing blood levels to vary widely; people have individual sensitivities to drugs; people develop tolerance to drugs; urine concentrations do not correlate with current impairment; only prior ingestion; and, people produce anywhere from 1200 to 2500 ml of urine a day. Ultimately two identical twins could take the same 25 mg dose of diphenhydramine, if one drank an extra quart of fluid, that person's urine would be twice as dilute as his twin's, meaning that the other twin could be arrested for DUID, because his urine concentration was twice as high as his sibling, even though they both took the same dose. Inter-subject variability is so great that the error rate of offering an opinion is merely speculation and the degree of certainty less than reasonable certainty. If such a "zero tolerance" policy stands, many sober people will be prosecuted oppressively. Impairment must be proven beyond a reasonable doubt, not inferred merely from the presence of a drug.

Prosecutorial Misconduct: Recently, public attention was focused on the "Duke rape cases" where the prosecutor knew he was moving against innocent defendants, and also withheld exculpatory evidence to that fact from the defense, despite a duty to comply with the Brady Doctrine. That man has lost his license to practice law in North Carolina, and will always be remembered as the part of the horse that went over the fence last! The judiciary must take a harder look at prosecutorial misconduct and not permit oppressive prosecution to continue, under the guise of zealous representation. Perpetrating a fraud on the court, suborning perjury, and deliberately withholding exculpatory evidence are unethical and illegal, not zealous advocacy.

Drug Laws, Disingenuous Testimony, Prosecutorial Misconduct

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