



Jurisprudence Section - 2014

E20 Plausible Deniability — The Ethics of Inconsistent Consistency

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After attending this presentation, attendees will have a better understanding of the nature of qualifiers and vague terminology in the process of overstating and understating opinions in court.

This presentation will impact the forensic science community by bringing to light common vague and/or unclear terms to provide a better understanding of the nature of such qualifiers and vague terminology in the process of overstating and understating opinions in court.

One of the singularly most critical components in science is often one of the most overlooked — effective communication. A fount of wisdom slakes no thirst if none can drink the waters of knowledge. The tipping point in forensic science, the 2009 National Academy of Sciences Report, specifically addressed the issue of understandable terminology

Certain terms are specifically criticized as being unclear means of conveying useful information. For example, the term “match” appears 38 times, usually associated with pattern evidence and specifically fingerprint identification. Yet in the entire report, the forensic catch phrase “consistent with” is mentioned in the same light only once: *The meaning of “exceeds the best agreement” and “consistent with” are not specified, and the examiner is expected to draw on his or her own experience.*¹

In that same NAS report, the term “consistent with” is specifically cited in the context of improving the science of forensic science — three times — without any mention of confusion or need for clarification. This apparent dichotomy of critique and application begs the questions of how truly effective is information exchange between the various parties and if a possible double standard exists. The result can be that in the highly partisan world of the justice system, witnesses sometimes become involved in the tautologies of law, when, in fact, the critic may be equally, if not more, culpable. Akin to this issue are the terms “reasonable certainty” and “reasonable probability” which are routinely encountered in both civil and criminal justice fora. Equally frustrating can be encounters with experts who intentionally or otherwise obfuscate the truth with qualifiers to the extent that one is left uncertain of specifics about an opinion in a case under discussion. This can ultimately lead to high-profile “battles of the experts” which may make for increased media ratings but does precious little to advance science, understanding, or the quest for justice.

Reasonable and ethical scientists can agree to disagree — no human holds the ultimate authority of absolute truth. Instead, cases often revolve around perspective issues — how findings are interpreted and challenges are presented. Condemnations may be made not only of specific observations but also of omissions. One party may criticize another’s “obvious” failure to give proper consideration of certain “key elements” of a case, in an attempt to bolster acceptance of an alternate opinion. The dangers lie in the fusion of observation and opinion. While still seeking a fundamental higher ground of seeking facts, the aspirant does so based in part on training and experience. Specialists in a particular endeavor might carry a subliminal bias based in part on the observational nature of the task — one “finds” what one “seeks.” Ultimately, disputes about cases may come down to opinions regarding factual observations and how those same assessments are received in court.

A multidisciplinary panel will utilize a case-study approach, discussing several cases where different expert opinions were in sharp contrast, yet ultimately only one was accepted by the court. A common theme encountered is overstating the general strength of opinions and the ability to reach certain conclusions. Fundamentally, a broad qualifier such as “consistent with” attempts to cover a broad swath of foundational information. The ethics of over-reliance of such vagueness at the expense of a systematic analysis will be debated, with examples of the eventual adverse impact of such techniques — both on individual cases and in the broader context of professionalism in forensic sciences.

Reference:

5. <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>

Testimony, Consistent With, Ethics