



## Breakfast Seminars – 2019

### BS1 Checklists and the Scientific Method: Will Lawyers Make You Eat Your Checklists for Breakfast?

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**Learning Overview:** The purpose of this presentation is to stimulate thought and discussion among attendees regarding the pros and cons for experts who use checklists to help them investigate or analyze issues that may end up in court. Attendees will learn some of the benefits for those experts who develop and utilize checklists as an aid in applying the scientific method. Attendees will also be introduced to some of the risks to such experts from litigation strategies employed by opposing lawyers who obtain access to these checklists. The goal of this presentation is to demonstrate that the benefits of checklists can outweigh the litigation risks, which can be managed and may be inevitable in any event.

**Impact on the Forensic Science Community:** This presentation will impact the forensic science community by helping those involved with civil or criminal cases develop strategies for dealing with checklists in litigation. This presentation will explain why checklist development by trial lawyers for the purposes of challenging forensic experts is to be expected, using examples from the field of fire investigation. With this perspective, members of each forensic science discipline are encouraged to take steps to begin the thoughtful development and implementation of checklists based on their industry standards. In this way, they can begin obtaining the benefits of such checklists while implementing measures to manage the litigation risks.

In 2017, the National Commission on Forensic Science approved a Views Document on the *Use of Checklists in Forensic Science*, indicating that it may be beneficial to pursue scientific studies into the employment of checklists in various aspects of the forensic sciences.<sup>1</sup> This Views Document cites examples of the successful use of checklists in the fields of health care and aviation, as well as in the criminal justice system. It also hypothesizes that when properly structured, checklists can help certain forensic science applications by reducing human error and bias.

While scientific studies into the pros and cons of using checklists, as suggested by the Commission, is a sound idea, the issue is whether forensic experts should hold off on utilizing checklists until the results of any such scientific studies are published. Alternatively, should experts consider immediately exploring the use of checklists in their fields? Why? Because lawyers are already developing and using checklists to challenge expert witnesses.

The proliferation of consensus standards in each forensic discipline empowers lawyers (with the help of their own experts) to develop checklists based on these standards. These checklists can simplify an attorney's task of finding shortcomings or bias in the work of forensic experts. Therefore, in this world of increasing standardization, the strategy of failing or refusing to develop or use checklists will not shield experts from having competent counsel use checklists to test the expert on his or her competence, thoroughness, or bias. By being checklist-adverse, experts cannot avoid the associated litigation risks. Conversely, they may fail to experience the benefits checklists have to offer.<sup>1,2</sup> It is reasonable for experts to be concerned about criticisms that can arise from items on checklists that go unaddressed. However, by planning ahead, strategies are available to counter such attacks.

Experts and their organizations will ultimately have to conduct their own risk-benefit analysis concerning the use of checklists. Assuming checklist development by trial attorneys is likely, members of each forensic science discipline can get ahead of this curve in three ways. First, by taking steps to determine the best application of checklists in their practice. Next, by getting plans underway to develop and revise checklists based on industry standards. Finally, by being mindful of litigation challenges that can be based on these checklists, with a view to including risk management training and tactics for the experts who use them.

#### Reference(s):

- <sup>1</sup> National Commission on Forensic Science, Views of the Commission: Use of Checklists in Forensic Science. (Adopted January 9, 2017). Washington, DC. Accessed July 30, 2017. <https://www.justice.gov/archives/ncfs/page/file/934416/download>.
- <sup>2</sup> Gawande, Atul. *The Checklist Manifesto: How to Get Things Right*. Reprint edition. New York, NY: Picador, 2011.

#### Checklists, Fire Investigation, Consensus Standards