



F15 The Duty to Correct Erroneous or Inadvertently Misleading Forensic Science Testimony

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Learning Overview: After attending this presentation, attendees can expect to be better informed regarding circumstances in which testimony should be corrected and how it can be corrected.

Impact on the Forensic Science Community: Forensic science practitioners, service providers, and medical service providers have an active, rather than passive, duty to correct as scientists. This ethical duty requires scientists in the system to take proactive action when testimonial problems are identified, rather than await permission from legal actors of the system. This presentation will impact the forensic science community by providing examples of how this type of testimony may occur and provide support for solutions for addressing the problem.

Most post-conviction accountability schemes for correcting forensic science testimony problems and notifying the affected defendants are predicated on the issue rising to the level of: (1) negligence or misconduct, or (2) the misapplication of forensic science in which testimony exceeds the limits of the science. This presentation will discuss a third and less-frequently discussed category of forensic testimony problems—inadvertently or unintentionally misleading testimony.

Wrongful convictions can result from inadvertent mistakes—such as a sample switch—or from testimony that unintentionally becomes misleading based on proceedings of the trial that are beyond the forensic science practitioner’s control. It is acknowledged that forensic scientists routinely provide testimony in isolation, and attorneys will raise questions in their direct and cross examinations in pursuit of a trial theory that may not reflect ground truth or sound science. The forensic science practitioner, who may be the only party in the courtroom transactions who understands the scientific limitations of the forensic evidence at hand, may be offering expert testimony and providing honest and technically correct answers, but unknowingly imparting information that can mislead fact finders in a case. The impact of this inadvertently or unintentionally misleading testimony may be apparent to the forensic science practitioner during the case or may not be revealed until the hindsight of postconviction proceedings. When a forensic science practitioner’s testimony is misused, rendered misleading, or inadvertently mistaken, what can be done to support the expert in correcting the record?

Because there is currently no national oversight framework for Forensic Science Service Providers (FSSPs) and Forensic Medical Service Providers (FMSPs) in the United States, the criminal justice system relies on a patchwork of laboratory accreditation and state-level regulation to hold FSSPs accountable. Neither of these systems is comprehensive and complete as FSSPs and FMSPs continue to operate without accreditation and few states have a system in place to fully oversee the activities of FSSPs and FMSPs. Consequently, we rely on the forensic science community to self-regulate and we need it to have the capacity to correct problems regardless of the presence or absence of formal regulatory systems. Most existing accountability schemes for forensic science testimony, such as state forensic science commissions and Coverdell investigations, limit the scope of their duty to correct to cases where negligence or misconduct is ascertained. Categorizing problems in such a manner often requires a finding of fault or error that create barriers to comprehensively assessing testimonial problems and have no bearing on guilt or innocence. This study submits that the standard of care for forensic science systems to correct inadvertently or unintentionally misleading testimony is an ethical duty and is under-recognized because the most prominent cases of testimony correction are based on the identification of negligence, misconduct, or misapplication. The latter system is not a solution for addressing wrongful convictions as many forensic problems arise unintentionally. Forensic science accreditation guidance suggests that a forensic scientist try to prevent misleading testimony on the stand; both the guidance material and a change in science legislation facilitate methods of correction when a forensic science practitioner is made aware of problems arising from his/her testimony after the fact.

However, because forensic scientists may move on professionally or because they are typically removed from the litigation process, this presentation will demonstrate that requesting letters of correction from the institutional FSSP or FMSP when testimonial problems occur would be an additional method for fulfilling the forensic science practitioner’s duty to correct and notify. This presentation will use actual communications with FSSPs and an FMSP to illustrate how forensic science and medical practitioners and service providers approach the duty to correct problems with testimony. (This presentation will redact names of individuals from communications presented.)

Duty to Correct, Ethics, Testimony