



F5 Putting Words in the Mouth of the Expert: Using Rules of Evidence to Script Expert Testimony Based on the President’s Council of Advisors on Science and Technology (PCAST) Principles

Michael Chamberlain, JD, California Department of Justice, San Francisco, CA 94102*

Learning Overview: The goal of this presentation is to inform and inspire discussion about efforts to implement forensic science “reform” by amending rules of evidence to require judges to dictate the wording that may be used by experts to express their opinions.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by making attendees aware of the effect rules of evidence can have on how expert opinions are structured and phrased. This presentation will also ensure that the community is aware of the continuing influence the PCAST Report is exerting in a context that is, perhaps, unexpected.¹

What if there were a rule of evidence that required judges to instruct expert witnesses what words they could and could not use in conveying their opinions to the jury? And what if the guidance provided to judges on how to dictate expert witness rhetoric was informed by principles set forth in the 2016 PCAST report?¹ Who, exactly, would be testifying? The expert? The judge? The PCAST authors? These are questions that may well become relevant in the federal trial courts.

The past decade has seen a healthy and productive discussion about how to enhance the reliability of forensic science evidence received in criminal trials. Some prominent products of that discussion have been national publications such as the 2009 National Academy of Sciences (NAS) Report on forensic science, the National Commission on Forensic Science, the 2016 PCAST Report, and the creation of the OSACs, not to mention scores of AAFS talks.^{1,2} There has been a simultaneous push by some for a mechanism by which to “regulate” forensic science according to the principles articulated in national publications such as PCAST. This has proved difficult to implement. So, a new tactic is being pursued: turn trial court judges into regulators by amending rules of evidence to require that judges shape expert testimony consistent with PCAST principles.

As of late 2020, the federal Advisory Committee on Rules of Evidence continues to consider amending Federal Rule of Evidence 702, which governs the admissibility of expert witness testimony. The stated objective of the amendment is to prohibit “overstatement” by experts when providing their opinions and conclusions. The means by which this would be accomplished is by providing judges with a “note” about how to implement the amended rule. This proposed note, in its current draft iteration, would be informed and animated by the views expressed in the PCAST Report.¹

This presentation will discuss efforts at both the state and national levels to affect forensic science reform through rules of evidence. It will pose questions about the merits and drawbacks to using rules of evidence in that manner. For example, established procedures typically require judges to screen proffered scientific evidence by assessing the fundamental validity of the methods relied upon and whether the resulting opinion is logically derived from those methods. Could a rule requiring more myopic focus on the wording of the opinion deprive the jury of evidence that may otherwise survive that screening process? And, would restricting an expert’s language choices be equally applicable to all forensic science disciplines in all factual settings, or would a “one-size-fits-all” rule unnecessarily restrict judicial discretion to issue rulings in the context of unique case facts?

Reference(s):

1. President’s Council of Advisors on Science and Technology (PCAST). *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity Of Feature-Comparison Methods*. (2016). Washington, DC: Executive Office of the President of the United States.
2. National Research Council (NRC), Committee on Identifying the Needs of the Forensic Science Community. (2009). *Strengthening Forensic Science in the United States: A Path Forward*. Washington, DC: The National Academies Press.

PCAST, Rules of Evidence, Experts