

OFFICE OF LEGAL POLICY PRESENTATION TO THE NATIONAL COMMISSION ON FORENSIC SCIENCE



Office of Legal Policy
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Office of Legal Policy

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Outline of Presentation

Part I: Department's Forensic Efforts

Part II: FSDR Draft Methodology Issues and Responses

Part III: Uniform Language for Testimony and Reports

Part IV: Concluding Remarks



PART I: Department's Forensic Science Efforts



Overview

- The Department has undertaken unprecedented efforts to examine and strengthen forensic science and its use in the courtroom.
 - Committed to improving the science so that evidence collected from a crime scene can be compared to a known subject or item with increasingly sensitive and precise means.
 - Committed to ensuring our use of forensic science in the courtroom is supported by the available research, data, and science.



Research and Funding

- Department is developing a forensic science research agenda in coordination with OSTP.
- Department has devoted substantial funding to improve forensic science.
 - NIJ funds more than \$100M of forensic science and DNA focused programming in forensic science research, forensic science practice improvement, and reduction of backlog of untested sexual assault kits.
 - NIJ also supports fellowships to improve the dialogue between researchers and practitioners, and other components of the Office of Justice Programs support forensic practitioners.



Support of NCFS

- By the start of this meeting, the NCFS had passed 14 recommendations to the Attorney General (2 in June 2016).
 - Department committed to responding to each NCFS recommendation within two meetings from the date of passage (when possible) and we have met this goal.
- We have adopted many of the recommendations including the critically important recommendation on universal accreditation.



ULTR and FSDR

- ULTRs are being developed to help ensure that Department forensic experts testify consistent with available science, research, and data, and do not exaggerate statements of relationship.
 - Embody the first agency-wide effort *ever* to establish standards for testimony of forensic experts.
 - Proposed ULTRs have been published to ensure Department hears different perspectives.
- FSDR is being taken to ensure past testimony stayed within supportable research and data.
 - Transparent and coordinated effort to work with stakeholders (including NCFS) to develop methodology.



PART II: FSDR DRAFT METHODOLOGY ISSUES AND RESPONSES



FSDR Methodology Development Process

- Framework introduction (03/21/2016)
- Methodology development (03/2016-TBD)
- Initial methodology presentation with NCFS (06/20/2016)
- Draft methodology comment period (06/2016)
- Statistician roundtable (07/2016)
- Revised methodology review with NCFS (09/2016)
- Begin FSDR implementation (following finalized methodology)



Research Question

- How closely do FBI examiner Statements of Relationship from 2008-2012 in select disciplines conform to FSDR adopted testimonial standards?



Topic: FSDR Goal

- **Proposal:** Advance the use of forensic science in the courtroom by understanding its use in recent cases and to facilitate any necessary steps to ensure that expert forensic testimony is consistent with scientific principles and just outcomes.
- **Issue:** Commenters and Roundtable participants urged the Department to clearly identify the FSDR purpose, even if that was a narrow purpose, to prevent misperceptions.



Topic: FSDR Goal

- **Outcome:** The Department will be cautious to clearly state the purpose of the FSDR and its methodology to avoid drawing any unwarranted conclusions from the data and accompanying analysis.



Topic: FSDR Structure

- **Proposal:** The FSDR draft methodology proposed adopting a validated protocol for reviewing transcripts and training raters to use that protocol to identify and categorize statements of relationship in each transcript.
- **Issue:** Commenters sought more clarity on who might be used as raters and sought additional information on how the FSDR would be structured.



Topic: FSDR Structure

- **Outcome:** The FSDR will
 - Be housed institutionally in the Department and overseen by a non-political employee of the Department.
 - Be conducted by an independent research firm (likely through contract) with expertise in social science research.
 - Include a small group of non-Department experts to consult on issues such as study design, protocol creation and validation, and data analysis.



Topic: FSDR Timeframe

- **Proposal:** The FSDR draft methodology identified 2008-2012 as an appropriate timeframe for analysis of recent testimony.
- **Issue:** The proposed five-year timeframe captures several significant events that make the timeframe useful for study but complicates any analysis of trend data that might be derived.



Topic: FSDR Timeframe

- **Outcome:** The FSDR will draw a small sample from testimony in periods earlier than 2008-12. The sampling will stratify by year and forensic discipline, with the intent of drawing more testimony from more recent years than earlier years.



Topic: Pilot Study

- **Proposal:** The FSDR draft methodology proposed a pilot study of transcripts.
- **Issue:** The focus of the comments has been not about how to pilot, but rather the importance of doing a pilot study and using the results of that study to help structure the full FSDR.



Topic: Pilot Study

- **Outcome:** The pilot study will begin with reading transcripts in order to determine what data can and should be collected. Once a protocol for coding testimony is developed, it can be tested on an additional pilot data source.



Topic: Notification

- **Proposal:** The FSDR draft methodology does not mention a specific notification method when nonconforming testimony is found.
- **Issue:** Possible approaches range from:
 - notifying all parties to all cases, to
 - notifying only parties to cases in which the defendant was convicted, remain imprisoned, and whose conviction was determined to have been materially impacted by nonconforming testimony.



Topic: Notification

- **Outcome:** The FSDR will notify prosecutors, defense attorneys, and defendants of nonconformities in cases where there was a conviction.
 - Such notification would indicate that an FSDR finding is not dispositive to any legal or professional outcome, including a determination of whether the examiner violated employment standards, whether an attorney complied with professional responsibility standards, or to any subsequent materiality review.



Topic: Data Analysis

- **Proposal:** The FSDR draft methodology proposes collecting data on statements of relationship, threads, and testimonies, then performing exploratory data analysis to determine the appropriate characterization of the data collected.
- **Issue:** Concerns were raised about sufficient focus on the proper unit of analysis and reporting (statement of relationship, thread, or testimony), the ability to identify limiting or bolstering language, and the possibility that there may be one statement of relationship that outweighs other statements (i.e., one positive association that shapes the entire testimony).



Topic: Data Analysis

- **Outcome:** Consistent with the advice presented at the Roundtable, the FSDR will focus on the testimony as the unit of analysis for reporting purposes. Data collected on statements of relationship and/or threads may be useful for identifying patterns, but the primary focus will be on the testimony as a whole.
 - The FSDR will analyze the data to evaluate the role of limiting or bolstering language.



Topic: Reporting

- **Proposal:** The FSDR draft methodology proposes to make the outcome of any implementation of the FSDR of testimony available to the public.
- **Outcome:** The FSDR will publicly report whether testimony conforms to the standard. As noted above, prosecutors and defense counsel in individual cases reviewed will receive an assessment of whether testimony contained any nonconformities.



Topic: Standard for Review

- **Proposal:** The FSDR draft methodology proposed using a modified version of the Department's proposed ULTR that reflects the retrospective nature of the testimony review.



Topic: Standard for Review

- **Issue 1:** ULTRs may accurately reflect the consensus of the forensic examiner community but there is disagreement with other stakeholder communities.
- **Issue 2:** Whether the examiners' testimony is consistent with community standards (compliance) and whether their testimony is consistent with the current state of the science (correctness) may be distinct questions.
- **Issue 3:** Failing to review corresponding forensic reports – together with the testimony – would be a serious flaw.
- **Issue 4:** The Department was strongly discouraged from beginning to review cases until at least some ULTRs had been revised and adopted.



Topic: Standard for Review

- There is significant disagreement over not just what the correct standard was *in the past*, but what the correct standard is for *current testimony*.
 - Over 175 comments on proposed ULTRs
 - Some argue that there should be no statement of relationship made in some disciplines.
 - Some argue that any statement of relationship must be accompanied by an error rate
- The ULTR process is proceeding but this uncertainty makes the ULTR a less attractive starting point for a retrospective analysis.
- Any benefit of attempting to compare past testimony against a current scientific “correctness” metric became less apparent.



Topic: Standard for Review

- Outcome: The FSDR will evaluate the testimony to assess whether it is consistent with the underlying report completed by the FBI laboratory for the case in which the testimony was given.
 - FSDR will collect information on many variables and additional analysis may occur later.



Next Steps

- Hire an executive director
- Develop a contract proposal
- Finalize methodology



PART III: UNIFORM LANGUAGE FOR TESTIMONY AND REPORTS (ULTRs)



ULTR Development Process

- 1st round of ULTRs published for comment (06/10/2016)
 - Comment closed (07/08/2016)
 - 127 comments received
- 2nd round of ULTRs published for comment (07/25/2016)
 - Comment closed (08/26/2016)
 - 46 comments received
- Department working group reviewed comments and developed a revised ULTR format (07/2016-08/2016)
- OLP presents the ULTR 2.0 for discussion (09/13/2016)
- ULTR 2.0 published for comment (fall 2016)



ULTR Comments

- Comments are largely supportive of the endeavor to adopt uniform language, but many are critical of the proposed language as published.
- Four broad categories of comments:
 - **Nature of ULTRs:** address scope of the project or procedural aspects
 - **Underlying Science:** address some aspect of the science underlying the document or question the scientific validity of the conclusions.
 - **Statistical Validity:** address the underlying statistical validity of a document or statements of probability
 - **Language:** address the choice of words and phrases in a document.



ULTR 2.0



PART IV: CONCLUSION AND QUESTIONS

