As a member of the Texas Division of the International Association for Identification, and being actively engaged in the profession of scientific identification and investigation, I dedicate myself to the efficient and scientific administration thereof in the interest of justice and the betterment of law enforcement, to cooperate with others of the profession, promote improvement through research, and disseminate such advancement in my effort to make more effective the analysis of the expert, to employ my technical knowledge factually, with zeal and determination, to protect the ethical standards of the profession of scientific identification and investigation.

I humbly accept my responsibility to public trust and seek divine guidance that I may keep inviolate the profession of law enforcement.

---

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INSIDE THIS ISSUE:

TD-IAI Board of Directors & Officers, 2017 - 2018 4
TD-IAI Committees Appointments, 2017 - 2018 5
Tech News: New Software Improves Rigor of Latent Print Examination 7
National Institute of Justice

Uncertainty Ahead: A Shift in How Federal Scientific Experts Testify 10
Danielle Weiss, Gerald LaPorte, US Department of Justice, Office of Justice Programs, National Institute of Justice

IAI 2018 Conference Schedule At a Glance 15
Upcoming Training 16

Instructions for Submissions to the Lone Star Forensic Journal/Advertising Information 17

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New Software Improves Rigor of Latent Fingerprint Examination

There is currently no standard method of detailed documentation of the latent print examination process, but NIJ-supported researchers have developed software that improves the standardization and quantifiability of the process, implemented as part of the FBI’s Universal Latent Workstation, the existing latent print system.

January 22, 2018

One of the central issues in the field of latent fingerprint examinations is that the current methods used by law enforcement agencies vary widely and, in part because of the lack of uniform training, lack standardization and quantifiability. In response, the researchers on this NIJ-supported project, from the scientific company Noblis, developed ACEware, software intended to provide a platform for “standards-based detailed annotation of the latent print examination process for use in training new latent print examiners in standard, reproducible documentation . . . as well as for use by experienced case-working latent print examiners in documenting actual case work.”

The researchers, William Chapman and R. Austin Hicklin, said their ACEware application builds upon the pre-existing Universal Latent Workstation (ULW) application from the FBI Criminal Justice Information Services Division. ULW provides latent print examiners with tools to mark up latent print images, do comparisons of latent prints, and conduct latent print searches on the Automated Fingerprint Identification Systems (AFIS). ACEware builds on the ULW system, the researchers said, and adds new capabilities, including:

- Dataset-based training by either an instructor, or “self-led” by the student.
- Creation and management of datasets that can set relationships between all files contained within a dataset, which allows establishment of a “standard specification for friction ridge datasets.”
- Comparison or consolidation of the markups of a single latent print by multiple examiners.
- The ability to perform blind or non-blind verifications from within the ULW software.

The project involved collaborations with the Fairfax County Police Department (Virginia), the New York State Division of Criminal Justice Services, and the Arizona Department of Public Safety Crime Laboratory. Several other agencies, including the FBI Laboratory, participated in testing the software.
“The reactions to the ACEware functionality have been positive,” the researchers said, with several users saying the software, “would either improve current processes or introduce new processes that would be beneficial for past, current, and future work.” They noted that ACEware, “will help increase the rigor applied to the examination process in an effort to decrease the risk of false or missed identifications.”

“Over the past ten to fifteen years . . . the latent print examination discipline has been undergoing a sea-change, reevaluating its basic tenets with the goal of improving the scientific basis for latent print examination,” the researchers said. ACEware was developed to be part of that process, they said, by putting “software tools in the hands of examiners in order to improve the rigor of the latent print examination process.”

The ULW Software with ACEware has not been approved for release by the FBI.

About This Article
The research described in this article was funded by NIJ award 2013-R2-CX-K011, awarded to Noblis.

This article is based on the grantee report “ACEware Latent Fingerprint Identification Research and Software Development” (pdf, 56 pages), by William J. Chapman, R. Austin Hicklin, Noblis.

Reference:
Uncertainty Ahead: A Shift in How Federal Scientific Experts Can Testify

A new directive instructs Department of Justice forensic scientists working in federal laboratories and United States Attorneys to refrain from using the phrase “reasonable degree of scientific certainty” when testifying — how will state and local forensic scientists and other attorneys alter their testimonial practice?

By Danielle Weiss and Gerald LaPorte

When scientific experts express their opinions (or conclusions) in court, they are often asked if their opinion is to a “reasonable degree of scientific certainty,” “reasonable degree of medical certainty,” or some variation of this terminology. This phrase has been used in courts throughout the nation for decades and signals that the expert’s testimony is based on sound scientific or technical analysis rather than conjecture.

Forensic scientists working in federal laboratories have been instructed to no longer use the phrase “reasonable degree of scientific certainty” in court testimony. On September 6, 2016, the Department of Justice’s Office of the Attorney General issued a memorandum[1] and directed forensic laboratories to review their policies and procedures to ensure that forensic examiners do not use “reasonable degree of scientific certainty” or “reasonable degree of [forensic discipline] certainty.” Department prosecutors were also asked to abstain from using these expressions when presenting forensic reports or questioning forensic experts in court unless required by a judge or applicable law.

Undoubtedly, the new policy to refrain from using the phrase “reasonable degree of scientific certainty” represents a significant change to the testimonial language that attorneys and scientific experts have routinely used. While the directive issued by the attorney general was issued to federal laboratories and prosecutors, there is some question as to if or how state and local courts, attorneys, and nonfederal forensic science service providers’ experts will alter their testimonial practices. Two important questions have since emerged: (1) Why not use “reasonable degree of scientific certainty” in testimony and (2) How will courts proceed?[2]

Why Not Use “Reasonable Degree of Scientific Certainty”?

One of the first and most important concepts introduced to aspiring scientists is the scientific method. This method can vary because not all questions can be answered using controlled experiments, but it has some basic tenets:

1. Posing a question or hypothesis based on the appropriate background facts, knowledge, and information.
2. Collecting and analyzing information.
3. Evaluating and synthesizing that information.
4. Reaching a final conclusion.

During their education and training, scientists are neither taught nor required to state that the conclusion they reach in the final step is to a “reasonable degree of scientific certainty.”

See “The History of ‘Reasonable Degree of Certainty’”

Although the scientific community has not defined this phrase or any of its variations, it has been offered in an attempt to demonstrate that the expert’s conclusion is not based on mere speculation, but rather scientific principles, education, training, experience, or specialized knowledge. Even though the phrase is commonly used, it has no definition from a scientific perspective outside of the courtroom. It is not a standard applied to scholarly publications or peer review, nor is it taught, defined, or generally accepted in scientific practice. Consequently, one could argue that if the terminology is not generally used in scientific practice, then scientists should not be expected to express their conclusions to a “reasonable degree of certainty.” Additionally, the Federal Rules of Evidence 702-705 do not require its use[4] and while very few states require an obligatory recitation of this
phrase contemporaneous with the admission of an expert’s testimonial conclusions, many states still ask for the recitation.

Does this phrase really bolster a jury’s assessment of forensic evidence? No scientific study has determined whether an expert who uses a statement like “reasonable degree of scientific certainty” either misleads fact-finders or changes the actual meaning of the testimony. Scientific testimony can be quite extensive and complex, possibly taking several hours or even days to explain results and conclusions. Without having evidence through comprehensive research, it is impossible to truly assess the impact of using “reasonable degree of scientific certainty.” But it is incumbent upon scientists to always communicate their findings accurately, especially in a courtroom setting when they are testifying to nonscientists and where certain words or phrases may be misunderstood or misconstrued. In that setting, there is a valid concern that inexact terminology could be misunderstood or taken out of context by the jury. As such, technical terms of art, including those used in the expert’s conclusions, should be defined — in reports and during testimonial presentations — particularly when a layperson could reasonably understand the expert’s conclusions to imply certainty.

In a recent NJ-sponsored study, Nicholas Schweitzer of Arizona State University conducted three experiments involving jury simulations and mock trials to assess how jurors respond to certain types of forensic testimony.[2] Schweitzer concluded that a forensic science expert’s experience and display of confidence while testifying were the most powerful factors that caused jurors to perceive his or her testimony as credible. The intangible aspects of a testimonial presentation (expert’s credentials, influence, and confidence) seem to substantiate an expert’s conclusions. Interestingly, civil fact-finders were more likely to find a defendant liable when testimonial evidence was presented than when records and data alone were placed into evidence. Even when the jury was already aware of the underlying information, the evidence became more persuasive when offered through expert testimony.[3] Accordingly, it may be the case that, rather than being overwhelmed by the impact of scientific evidence, jurors are more influenced by a combination of factors, including the expert’s demeanor, his or her background and experience, and the overall persuasiveness of the testimonial presentation. Taking all of these factors into account, it is imperative that the jury not also be influenced by words implying certainty when that level of assurance cannot be substantiated, regardless of the discipline.

See "Study of Juror Judgments"

Additionally, the phrase has never received a cross-disciplinary definition and continues to evoke differing interpretations. For example, Black’s Law Dictionary defines “reasonable degree of ‘medical’ certainty” as “a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought.”[4] However, some have argued that when used by expert witnesses in criminal cases, the term “reasonable scientific certainty” conveys a stronger degree of probability or level of certainty and may be interpreted by jurors as equivalent to the government’s burden of proving all the elements of a crime beyond a reasonable doubt.[5] And while neither the courts nor published research cite a definition with such a high standard, researchers Dawn McQuiston-Sarrett and Michael J. Saks note that “forensic expert witnesses cannot simply adopt a term, define for themselves what they wish it to mean, and expect judges and juries to understand what they meant by it.”[6] Nevertheless, the intent for using the phrase has meaning and purpose to courts and legal practitioners, which is to summarily demonstrate that the expert’s opinion rises above the level of speculation and conjecture. This leads us to the next logical question: How will courts proceed?

Moving Forward: Exploring Options on How to Proceed

One alternative is to discontinue using “reasonable degree of scientific certainty” and not replace this “summary” term with another. That is, let the conclusions and statements expressed by an expert stand on their own. But if there is an option to replace the term, how do we move forward?
Bridging the fields of science and law creates challenges for forensic scientists. The intended meaning of a particular word or phrase may not be what criminal justice stakeholders — investigators, lawyers, and fact-finders — understand it to mean.

Scientists regularly share theories, analyses, and conclusions with each other, and peers often challenge or reproduce their conclusions. Yet when they share the same information externally with nonscientists, intended meanings can get lost in translation or the information may be misconstrued. For example, forensic scientists have used phrases like “consistent with” or “similar to” to qualitatively conclude that two items cannot be differentiated based on the examinations performed. When these terms are used without any further explanation and qualification, a layperson may interpret these phrases to mean that the items being compared share a common source, which may not, in fact, be how the expert intended to convey their findings since they are qualifying terms. These phrases are not intended to convey the forensic examiner’s belief that the two items examined are identical in every respect. In those instances, the examiner will typically assert that he or she has “identified” a questioned item as originating from a known source.

An expert’s clear and complete explanation of his or her findings, including the limitations of the method employed, is critical to a juror’s accurate understanding of an expert’s scientific conclusions. Scientists and laypersons involved in the criminal justice system share common language, but they speak with very different dialects. A linguistic bridge needs to be identified and implemented that will enable scientists to accurately communicate their opinions and conclusions to interested parties while neither overstating nor understating their significance and intended meaning. The desire to build a linguistic bridge may have originally led to the use of phrases like “reasonable degree of scientific certainty” as a way for the legal and scientific communities to express to the fact-finder in a more concise manner the degree of confidence that an expert held in his or her opinions and conclusions.[18] There is no indication that the phrase was intended to confuse or obfuscate scientific findings. Instead, it seems that its purpose was to convey the expert’s degree of confidence in his or her conclusions and to clarify that they are not based upon mere speculation.

One misconception about the field of forensic science is that it consists of a single discipline. In reality, forensic science comprises various scientific disciplines that use a diverse range of applied methods and techniques to help answer questions of legal significance. So there is an immense challenge to develop and define an appropriate phrase that can be used by all scientific disciplines. The National Institute of Standards and Technology’s Organization of Scientific Area Committees, which has the primary responsibility to coordinate development of a quality infrastructure for forensic science standards, has established 23 subcommittees representing various forensic disciplines that range from computer forensics to DNA to forensic pathology. Hence, it will be quite a daunting task to identify a single phrase that all forensic disciplines can use to accurately distinguish between speculation and the relative degree of confidence that a scientist has in his or her findings and opinions. One likely approach will be that each discipline develops and defines its own terminology — through a formalized standards development process — during which the unique aspects of each discipline and the needs of those who will use this information will be taken into account.

Research has shown that jurors struggle with complex testimony and statistical information, which puts them at risk for misinterpreting evidence or dismissing information that they do not understand.[11] Some research has provided insight into the impact that scientific testimony can have on juror decision-making. However, this information is currently limited. Generally, the available research has shown that confident testimony by an experienced forensic expert has a positive influence on juries. Conversely, the use of highly technical methods, validation studies, cross-examination, exculpatory evidence,[12] concessions of error, explanations of the limitations of a methodology, and jury instructions had little overall impact on juror decision-making in the research setting.[13] The research appears to reinforce the hypothesis that the perceived experience[14] and
capabilities of a forensic expert may, in fact, outweigh the probative value of the evidence. However, in some cases, the scenarios offered to a mock jury in a research setting do not reflect, in totality, the overall deliberative process of a real trial.

In any case, jurors are noticeably influenced by confirmatory statements and an expert’s ability to explicitly connect evidence to aspects or issues in a case. It is clear that the language used by forensic experts while testifying can have a substantial impact on a fact-finder’s comprehension of the subject matter and decision-making. However, additional research is still needed to determine whether a direct correlation exists between specific words or phrases and the decisions made by jurors. Further research is also needed to determine which factors may directly affect how jurors react to and interpret the information provided by expert witnesses. Case type, factual context, jury composition, evidentiary complexities, and legal issues all play a role in the process of evaluating the evidence and deliberating on a verdict.

Moreover, the nature and design of studies will affect how mock jurors will evaluate the variables to which they are exposed. For example, will test subjects be exposed solely to mock testimony, or will they also be provided with instructions to guide their deliberations? Will test subjects be exposed to expert testimony in isolation, or will they participate with other mock jurors in a more realistic deliberative process? When studying how jurors evaluate expert testimony, it is critical not only to understand and control the variables that form component parts of the experimental hypothesis but also to understand the broader factors at play that may affect a juror’s perception of the entire trial process.

Conclusion

There is no evidence to show that abstaining from the use of the phrase “reasonable degree of scientific certainty” will affect the inferences that jurors might draw from an expert’s testimony or whether its omission will influence the outcome of a trial. However, we do know that jurors will continue to make decisions that will be based, in part, on expert testimony. Accordingly, we must bridge the linguistic divide that separates scientists and laypersons. Informed by studies of juror comprehension, scientists must continue to develop and define terminology that accurately conveys both their opinions and the limitations of their methodology, cognizant of the risk that nonscientists may misunderstand their intended meaning. Each discipline in the forensic science community must standardize and define its terminology — with the comprehension of stakeholders and fact-finders in mind — and eliminate vague and ambiguous words and phrases. This will be the challenge for nonfederal forensic science service providers and lawyers — will they effectively eliminate the use of “reasonable degree of scientific certainty” and, if so, is an alternative necessary?

In the meantime, “reasonable degree of scientific certainty” continues to be a phrase that is still taught in some law schools and used in state and local courts on a daily basis. It is incumbent upon testifying scientists to identify and define appropriate terminology to help bridge the communication gap while enhancing juror comprehension of statements that convey scientific conclusions. In the absence of a clear alternative phrase, many legal professionals may be apprehensive about its disuse. However, the ultimate responsibility remains with the testifying expert to clearly explain his or her opinions and conclusions within the limitations of science and with words and phrases whose meaning is clearly understood by all.

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About the Authors
Danielle Weiss, J.D., M.F.S., is a Booz Allen Hamilton consultant and senior forensic analyst consulting with NJ’s Office of Investigative and Forensic Sciences. Gerald LaPorte, B.S., B. Commerce, M.S.F.S., is the director of NJ’s Office of Investigative and Forensic Sciences.

This article discusses the following grant:

NIJ Journal No. 279, posted February 2018
NCJ 250699
Back to the top.

Notes

[see 1] U.S. Department of Justice, Office of Attorney General, Memorandum for Heads of Department Components (Recommendations of the National Commission on Forensic Science), September 6, 2016.
[see 2] Although expert witness testimony related to medicine, engineering, and a host of other non-forensic-science disciplines is regularly presented in courts, the focus of this discussion is on the forensic sciences.
[see 3] See “Principles of Scientific Inquiry.”
[see 6] Ibid.
[see 11] Some research has shown that, in some cases, judges are more capable than jurors at understanding complex testimony.
[see 12] Escapulatory evidence seemed to be more influential on jurors during the deliberation phase of the trial. See Nicholas J. Schweitzer, “Communicating Forensic Science,” Final report to the National Institute of Justice, grant number 2008-DN-BX-0003, May 2016, NCJ 249804.

Date Created: January 18, 2018
<table>
<thead>
<tr>
<th>Monday July 30</th>
<th>Tuesday July 31</th>
<th>Wednesday August 1</th>
<th>Thursday August 2</th>
<th>Friday August 3</th>
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</thead>
<tbody>
<tr>
<td><strong>Opening Ceremonies</strong> 8:00 - 10:30</td>
<td><strong>Lectures and Workshops</strong> 8:00 - 9:30</td>
<td><strong>Breakfast and Keynote Speaker</strong> 7:45 - 9:00</td>
<td><strong>Lectures and Workshops</strong> 8:00 - 9:30</td>
<td><strong>Membership Meeting</strong> 8:00 - 10:00</td>
</tr>
<tr>
<td><strong>Break 9:30 - 10:30</strong></td>
<td></td>
<td><strong>Exhibit Area Time</strong> 9:00 - 10:30</td>
<td><strong>Break 9:30 - 10:00</strong></td>
<td></td>
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<tr>
<td><strong>All Conference Panel Discussion</strong> 11:00 - 12:00</td>
<td><strong>Lectures and Workshops</strong> 10:00 - 12:00</td>
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<tr>
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<td><strong>Lectures and Workshops</strong> 1:00 - 2:30</td>
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<td><strong>Break 2:30 - 3:00</strong></td>
</tr>
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<td><strong>Lectures and Workshops</strong> 3:00 - 4:00</td>
<td><strong>Refreshments in Exhibit Area</strong></td>
<td><strong>Lectures and Workshops</strong> 3:00 - 5:00</td>
<td><strong>Lectures and Workshops</strong> 3:00 - 5:00</td>
<td><strong>Lectures and Workshops</strong> 3:00 - 4:00</td>
</tr>
<tr>
<td><strong>Exhibit Opening and Reception</strong> 4:00 - 5:30</td>
<td><strong>Poster Presentations and Photo Contest Exhibit Area</strong> 5:00 - 5:30</td>
<td><strong>Science and Practice Discipline Event</strong> 5:00 - 6:00</td>
<td></td>
<td>Program ends at 4:00 Banquet Tonight!</td>
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<td>Course Title</td>
<td>Instructor(s)</td>
<td>Location</td>
<td>Tuition</td>
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<td>February 26 - February 28, 2018</td>
<td>Palm Print Recognition and Identification</td>
<td>Dan Reigstad</td>
<td>Irving Police Department, 2603 Esters Road, Irving, Texas</td>
<td>$345 ($395 after February 10, 2018)</td>
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<td>March 20 - March 22, 2018</td>
<td>Digital Police Photography</td>
<td>William &quot;Rudy&quot; Flores, Nick Webb</td>
<td>Southlake Police Department, 100 East Dove Road, Southlake, Texas</td>
<td>$345 ($395 after March 10, 2018)</td>
</tr>
<tr>
<td>April 09 - April 13, 2018</td>
<td>Basic Criminal Investigation</td>
<td>William &quot;Rudy&quot; Flores, Nick Webb</td>
<td>Frisco Police Department, 7200 Stonebrook Pkwy., Frisco, Texas</td>
<td>$545 ($645 after April 01, 2018)</td>
</tr>
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<td>April 16 – April 20, 2018</td>
<td>Basic Fingerprint Identification</td>
<td>Walter Henson</td>
<td>Galveston Police Department, 601 54th Street, Galveston, Texas</td>
<td>$495 ($595 after March 25, 2018)</td>
</tr>
<tr>
<td>February 26 - March 02, 2018</td>
<td>IAI Crime Scene Certification Test Preparation Course</td>
<td>Jan Johnson, Owen McDonnell</td>
<td>Round Rock Police Department, 2701 N. Mays Street, Round Rock, TX</td>
<td>$375</td>
</tr>
<tr>
<td>March 19 - March 23, 2018</td>
<td>Shooting Reconstruction</td>
<td>Jan Johnson</td>
<td>Travis County Sheriff’s Office Training Academy, 3614 Bill Price Rd., #50, Del Valley, Texas</td>
<td>$595</td>
</tr>
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</table>

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For advertising information, contact:

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