NATIONAL COMMISSION ON FORENSIC SCIENCE

National Institute of Standards and Technology
U.S. Department of Commerce

Adjudication of Public Comments on the View of the Commission on Report and Case Record Contents

Type of Work Product:

Adjudication of Public Comments on the Report and Case Record Contents Views Document

Adjudication Process Used by Subcommittee:

Public comments were reviewed and discussed via email among the subcommittee's working group and a draft adjudication document along with a modified views document was prepared and disseminated to the entire subcommittee. All the documents were then discussed via a teleconference call on November 1, 2016. Final changes were then drafted and the documents were distributed for final consideration via a vote on November 17, 2016. The full subcommittee voted unanimously in favor of the Adjudication.

Itemized Issues and Adjudication Summary:

Overarching Concerns

1. Several public comments raised concerns about the quantity of information being sought. One anonymous commenter wrote that the current recommendation was not attentive to the fact that the target audience was laypeople who "simply want to know what was tested and what are the results." This commenter argued that judges, prosecutors, defense lawyers, and law enforcement officers did not need to know about "the methods, the observations, the instrumentation, deviations, problems, and everything else which goes on in the examination." Other comments expressed concern that the views document, given its assumption that the case record would be readily available to either party, called for too much information to be included in the report. This position was articulated by the Forensic Committee of the International Association of Chiefs of Police, Mr. Wyk, and Mr. Hunt.

Response
Most criminal cases are resolved early through plea bargaining to save the system resources. This means significant decisions are made by all those involved without the benefit of reviewing the case record. As a result, the report should contain sufficient information to allow each customer/stakeholder relying on the document to make informed decisions, including a decision not to seek a review of the case record. Because of the nature of the decisions being made, it is imperative that the report include information about "the methods, the instrumentation,

deviations, problems," and the other information identified in the views document. The subcommittee also believes that for many disciplines much of the information required, once assessed and addressed by the FSSP, will be standardized (e.g. definitions, identification of methods and processes used, statements of compliance with SOPs) and that more detailed information will typically be involved when there are deviations from SOPs, disagreements, environmental factors that could impact the results, inconclusive results, or observations that cannot be captured in quantitative statements and thus must be described.

2. Mr. Hunt suggested that the subcommittee should include justifications for each of the required items to better secure the buy-in of the forensic science community.

Response
Many of the items identified are self-explanatory (e.g. page numbers, title, author), others are required under current accreditation standards. For the remaining items the subcommittee, which included the perspectives of Forensic Science Service Providers, statistians, prosecutors, defense counsel, and post-conviction advocates, considered the following when selecting items that needed to be included in the report: accuracy and transparency; ease versus burden; information essential to specific decision-makers relying upon the report; and information that is central to understanding and evaluating the results, opinions, conclusions and interpretations being presented. For the sake of readability and usability that discussion is not part of the document. As was noted by several who commented, the proposal is in many respects similar to current ISO standards. The most significant changes made are to require some items that ISO deemed discretionary and to no longer allow FSSPs to opt out of items if they have "a valid reason" for not including the item in the report. As explained above, these changes were designed to enhance accuracy and transparency and to ensure all stakeholders/clients had the information needed to make informed decisions, in particular the presence of disagreements, deviations from test procedures, or test conditions that may affect the results or an interpretation of the results. While for now it may be impractical to include details about these issues in the report, the fact issues present in a case should be in the report.

3. In a variety of ways most of the comments raised some question or concern about reporting on uncertainty, errors and statistics. These concepts were also discussed at the Commission's September 2016 meeting.

Response
The subcommittee redrafted this portion to make clear that the information sought is specific to evaluating the result, conclusion or interpretation being presented e.g., empirical estimates of method and measurement uncertainty. And the revised draft made clear that this information is required for both objective methods and subjective methods.

<u>Specific Concerns</u>

The Forensic Committee of the IACP raised four other concerns.

1. The first concern raised was why require a list all of the items submitted to the FSSP even if the items were ultimately not tested or not deemed to be relevant to the investigation.

Response
A report of the FSSP must contain all of this information so that each customer/stakeholder can reassess the relevance of an item and the decision whether to test the item. If that information is not known to all of the customers/stakeholders, important perspectives can be missed in determining relevance. If a particular FSSP already captures all of this information on another report, that report can simply accompany the testing reports. The subcommittee does not require that an FSSP identify any items other than those which it receives. If items are collected by other entities the FSSP is not responsible for identifying those items.

2. The second concern asked what should be included in a glossary and for guidance on what terms are technical and require definition. For example, the IACP asks "is the term 'match' clear?"

Response
The views document leaves to the FSSP to identify which terms are technical because to do otherwise would require that the Commission identify the terms used by every FSSP in connection with every discipline. But when using terms such as "match" to suggest a relationship between two items as a result of a forensic comparison (as opposed to the conversational use of the term, e.g., "your shirt matches your earrings"), the FSSP should define the term.

3. The third concern was the presence of the phrase "their probative value" in a discussion of reporting statistical analysis and conclusions.

Response
The subcommittee agrees that this phrase is problematic as it has a meaning understood by statisticians and a slightly different and more varied meaning to those immersed in the legal system. As described above this portion has been redrafted.

4. The fourth concern was that disagreements between examiners occurring during verification and review had to be included in the report.

Response
The document only requires that the fact of a disagreement be noted and could be as simple as noting for example, "no disagreements", "disagreement resolved", "disagreement resolved after arbitration," or "unresolved disagreement over whether there are sufficient points of comparison of sufficient quality to allow for a comparison between the known and the latent print." The details can (and should) be documented in the case record. But the fact of the disagreement is a fact that the customers/stakeholders need to know before making case related decisions, including whether seek to review the case record.

ASCLD supported the views document but raised two concerns.

1. First, ASCLD stated that only disagreements rising to a "formal conflict resolution panel" should be documented in the case record.

Response
All disagreements should be noted in the case record, even those not rising to the level of a "formal conflict resolution panel". While these disagreements need not be detailed in the report documenting these disagreements is part of documenting the work performed and could be essential to a future root cause analysis or to identifying possible contextual bias or other issues.

2. Second, ASCLD was concerned that when documenting all communications with investigators or parties some information might be included that was sensitive or classified.

Response
This views document does not address discovery but rather documentation. We would note that in the discovery process there are remedies for addressing sensitive or classified information that are routinely applied by courts. We do not understand ASCLD to be suggesting that the communications should not be documented but that the organization is simply raising the issue here about disclosure of the communications.

Cecelia Crouse

Ms. Crouse raised eight points for the subcommittee's consideration.

1. The first point was that crime laboratories are ISO accredited and are already bound by the standards and that the additional requirements included in Appendix A were at times overlapping or needed of clarification.

Response
The subcommittee understands that many FSSPs are accredited and already produce reports and case records consistent with accreditation standards but there are those that are not accredited. This document is intended for all FSSPs. In addition, some accreditation requirements are discretionary where the subcommittee believed they should be required or lacked specificity. The subcommittee also reviewed the document and made changes to remove overlapping and duplicative language and to clarify what was being required.

2. The second point asks whether the defense is also bound by this is document.

Response
This views document reflects the views of the subcommittee with respect to the documentation that should be present in the reports and case record of all FSSPs irrespective of who is seeking the testing.

3. The third point asks us to identify what other source material was reviewed by the SOFS.

Response
We have modified the document to reflect that the 19 documents listed include both the standards and other source materials that were reviewed.

4. The fourth point asks what was meant by the phrase “at this juncture in time” and also asks if what was meant was that the balance between what should be in the report and what should be in the case record might change in the future.

Response
Yes. The subcommittee used the phrase “at this juncture in time” to acknowledge that standards may change particularly with improvements in technology that may allow for more fulsome reports without increasing the burden on FSSPs. We have added language to make this point clear.

5. The fifth point asks why a requirement is included that the “case record should contain an itemized list of items that were not compared/tested and why no comparison/testing was conducted” even though this is not required under the ISO standard.

Response
As explained above, the subcommittee felt it was essential that all stakeholders/customers know what items were received by the laboratory even if no testing was conducted. While much of what is contained in this views document mirrors the ISO standards, the subcommittee felt some changes and additions were critical to advancing the practice of forensic science and to ensuring accurate and transparent reporting to stakeholders/customers. The document does not require that the case record include why no testing was done. Instead, it requires that all requests for analysis be noted even if the analysis was not performed.

6. The sixth point asks that we note that, in addition to the glossary being included in the report and posted online, the definitions for technical terms can be found through a discovery request for manuals and procedures.

Response
As explained above this views document only addresses documentation for reports and the case record. We offer that the FSSP can post a link to a readily available glossary instead of including the glossary in the report. But it is our intention that the glossary be readily available and that one need not go through the discovery process to find the definitions for the technical terms used in a report.

7. The seventh point asks whether describing the condition of the items tested/compared could suggest that the analyst has introduced a bias into the report by, for example, reporting that a shirt was torn, had holes, and buttons missing. The concern was that this description would now suggest that a struggle had occurred when it might just in fact be an old shirt.

Response
It would seem that the description suggested is actually consistent with either theory. More importantly it is an accurate factual description of how the shirt appears and that is what this item seeks.

8. The eighth point suggests some editorial changes and asks for a definition of a result and whether a summary of the results requires that the report include the number of possible

matches or a list of candidate matches.

Response
The subcommittee agrees with the editorial changes. In addition, language has been added to better suggest what would satisfy a summary of results.

9. The ninth point asks that we use the phrase "uncertainty of measurement" instead of the phrase "possible sources of error".

Response
As described above, the subcommittee redrafted the portions addressing uncertainty and errors to make clear what was being sought and that the information being sought was more than just the estimated uncertainty of measurement.

Ted Hunt

Mr. Hunt submitted a number of general, editorial and specific concerns. The subcommittee has reviewed each. To the extent that the concerns were similar to those raised by others they have been addressed above. Below we try to summarize the remaining items and the subcommittee's response.

1. A number of Mr. Hunt's comments identified typos, incorrect cites or outdated cites in Appendix B.

Response
The subcommittee used Appendix B as a discussion item and will not include it in the final product. Where those also appeared in Appendix A, corrections were made.

2. Mr. Hunt was concerned that a number of the items the subcommittee included in Appendix A for inclusion in the report or inclusion in the case record had "opt out" clauses under the ISO standard that permitted an FSSP not to include the information if the FSSP had a valid reason or gave the FSSP the option of putting the documentation in the case record rather than in the report.

Response
This "opt out" option is not an ISO standard. The "opt out" option was identified by the ILAC G-19 document that seeks to provide information about how the ISO standard could best be utilized in the forensic context. The subcommittee has re-reviewed the items included in Appendix A, and Appendix A reflects the subcommittee's view of the minimum requirements for documentation attendant to any test and for report and case file contents to address the needs of all the stakeholders in the criminal justice system that receive and rely on the report. As described above, to the extent more is required than was thought appropriate by either the accrediting body or the ISO standard the purpose is to better inform stakeholders and to provide an accurate report of the testing and results.

3. Mr. Hunt also asks whether the report in Appendix A is duplicative of the testimonial

report under discussion in the Commission.

Response
This report is not necessarily co-extensive depending on the test, the results, and the basis of the conclusions, opinions and interpretations. But to the extent that it is co-extensive, less will need to be provided in the testifying report because it has previously been provided.

4. "Condition of the item(s) tested/compared." Mr. Hunt says the term 'condition" is too vague.

Response
This is the term used in the ISO standard and is generally understood within the community. In addition the language in Appendix A has been modified to give further direction. "A brief description of the condition of item(s) tested/compared (e.g. wet, dry, clumped, faded)", with a more detailed description of the condition to be maintained in the case record.

5. "A statement of compliance/non compliance with requirements and specifications." Mr. Hunt asserts that this requirement is too vague.

Response
The term a "statement of compliance" appears in ISO. In addition, the language in Appendix A has been redrafted as follows to give more instruction: "All deviations from, additions to, or exclusions from the test method should be noted or a statement of compliance should be made." In the event of deviations, etc. the details of those deviations, etc. are to be documented in the case record. But the fact that there were deviations, etc. must be conveyed to the stakeholders in the report, while the details of the nature of the deviation, etc. should be detailed in the case record.

6. "Information of specific test conditions, such as environmental conditions should be noted." The subcommittee agrees with Mr. Hunt's observation that this could be too much information in some instances to include in a report.

Response
Appendix A has been changed as follows: "Information of specific test conditions, such as environmental conditions that may affect the results or an interpretation of the results, should be noted." And the details of the test conditions are to be maintained in the case record.

7. Mr. Hunt also noted a number of other items (e.g., sampling plans, validated parameters) that he argues are best documented in the case record or elsewhere (e.g., SOPs, validation studies).

Response
Where the subcommittee agreed with Mr. Hunt, edits were made to make clear that what was being sought in the report was just a reference to the appropriate quality management document or a just a summary of the information being sought.