Dealing with Alternate Firearms Opinion Terminology

So far, no court has excluded the testimony of a firearms identification expert witness. The greater likelihood is that the court will attempt to compromise and craft some kind of language that weakens or neuters the expert's identification opinion, substituting that terminology for the examiner's identification opinion. Some courts have put in place so-called "limitations" to that testimony, which fundamentally alter the examiner's opinion. However, these are not true limitations because they make material and substantive changes to the expert's testimony. These are wholesale attempts to rewrite the firearm expert's testimony by a layman with no experience in forensic science. This practice is not supported by either science or the law.

In reviewing how examiners should deal with this issue, I gave some thought on how to deal with the terminology issue. After some thought, here is how I would handle it now:

I believe firearms examiners and prosecutors should address the terminology issue head-on during their direct examination at the admissibility hearing. Preempt this issue early. Don't wait for the judge or the defense counsel to bring it up.

On direct examination, have the prosecutor ask the following.

Prosecutor: *Can you testify truthfully that your opinion is that the cartridge cases and/or bullets in this case....*

- *"Could or may have been fired by this gun?"*
- *"Are consistent with having been fired by this gun?"*
- *"Are more likely than not having been fired by this gun?"*
- *"Cannot be excluded as having been fired by this gun?"*

Examiner: *No, I cannot testify truthfully to any of those statements or just the class characteristics alone.*

Prosecutor: *Why not?*"

Examiner: *For three reasons:*

First, there are no empirical studies or science to backup any of those statements or terminology.

Second, those statements are not endorsed nor approved by my laboratory, any nationally recognized forensic science organization, law enforcement, or the Department of Justice.

Third, those statements are false as they do not reflect my true opinion of identification. Such statements would mislead the jury about my opinion in this case. It would also constitute a substantive and material change to my opinion from one of Identification to Inconclusive. This would constitute perjury on my part for I would not be telling the jury the whole truth.

That will put the court on notice. It is now on the record and the judge can't un-ring that bell.

If the court insists on limiting the firearms expert testimony to GRC or class characteristics, I probably would not call the examiner at all. Instead, I would put on a lay witness such as the case agent or an armorer for the police department to testify about the similar class characteristics of the weapon and the bullets and/or cartridge cases. Having an expert testify only about class characteristics alone is demeaning to the profession of firearms examiners, especially when they have found sufficient agreement of individual characteristics to opine about identification. Testimony about class characteristics alone may falsely imply an examiner was unable to reach a conclusion of identification.

My chief concern is that if firearms examiners agree to testify to the terms of "*Could or may have fired*," or "*Consistent with*," "*More likely than not*," or "*Cannot be excluded*," they are ratifying these bogus statements and adopting this as their testimony, giving the judge a pass on the difficult decision to admit or exclude their testimony. They are also acquiescing to the judge's faulty terminology.

This is fatal. Why? Once you testify to these bogus terms, you are wedded to them for life. At subsequent trials, defense counsel will pull out the verbatim transcript of the examiner's previous testimony where they used these court-induced terms. On cross examination, they will confront the examiner with their previous testimony and contrast their opinion of "Identification" with those in previous cases, then claim the expert is merely making this stuff up. The examiner no longer has any credibility in the jury's eyes.

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