

ASOP 17

"Expert Testimony by Actuaries" and Proposed Revisions

Casualty Loss Reserve Seminar

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Disclaimers

- All statements are the views of the individual presenters and are not official positions of the Actuarial Standards Board or the American Academy of Actuaries.
- The following selected and simplified highlights from ASOP 17 should not substitute for a reading of the actual ASOP.
- Reading ASOPs counts towards the 3 required professionalism CE credits

ASOP 17 - Expert Testimony by Actuaries

- Originally adopted in 1991.
- Revised in 2002 to be consistent with the then current ASOP format and to reflect current practices in the area of expert testimony.
- Updated in 2011 to reflect deviation language changes.
- In 2015 the ASB concluded that this ASOP needed to be reviewed and created a Task Force chaired by David Godofsky to do so.
- Exposure draft was issued in April 2017.
- Comment deadline was June 30, 2017.

ASOP 17 – Key Changes in the Exposure Draft

- Addresses some provisions of existing ASOP No. 17 that might be construed as inconsistent with the rules of evidence or procedure or any other rules that may be applicable in any particular forum.
- Clarifies that an actuary does not violate the standard if the actuary reasonably relies on the advice or instruction of an attorney or other representative of the principal about the proper application of the rules of evidence or procedure or any other rule applicable in the forum.
- Clarifies the scope.

ASOP 17 – Purpose

- *No change* to Section 1.1 - Purpose - Provides guidance to actuaries providing expert testimony.

ASOP 17 –Scope 1

- *Current* Section 1.2 – Scope – Applies to actuaries when they testify as actuarial experts at trial, in hearing or arbitration, in deposition, or by declaration or affidavit.
- *Proposed* Section 1.2 – Scope – Applies to actuaries who are qualified as **experts** under the evidentiary rules applicable in a forum when they provide testimony in court hearings, dispute resolutions, or other adversarial proceedings, and in rate hearings.

ASOP 17 –Scope 2

- *Current* - Does not apply to actuaries providing litigation support other than the expert testimony itself. However, actuaries providing litigation support may consider the guidance in this standard to the extent that it is applicable and appropriate.
- *Proposed* – *Litigation support is not mentioned.*

ASOP 17 – Scope 3

- *Current* – *Not addressed.*
- *Proposed* – This standard does not apply to an individual whose **testimony** and qualification as an **expert** is unrelated to the individual's education, training, experience, or employment as an actuary.

ASOP 17 – Scope 4

- Supplements the *Code of Professional Conduct*.
- Not intended to discourage reasonable differences of actuarial opinion, inhibit ~~responsible creativity~~ innovation in advancing the practice, ~~unreasonably~~ restrain the selection of actuarial assumptions or methods, etc. – *Key changes in red.*
- Instructions for when actuary departs from the guidance in this standard to comply with applicable law.

ASOP 17 – Scope 5

- *Current* – not addressed.
- *Proposed* - Nothing in this standard is intended to require any communication or action that is inconsistent with the rules of evidence or procedure of any court or other judicial body, legislative forum, administrative forum, arbitral forum or other forum in which the actuary testifies. To the extent that the standard is inconsistent with the evidentiary and procedural rules applicable in the forum in which the actuary offers **expert testimony**, the actuary should follow the forum's rules of evidence and procedure and any other applicable rules in the forum.

ASOP 17 – Scope 6

- *No change* to paragraph regarding departure from standards to comply with applicable law, etc.

ASOP 17 – Cross References and Effective Date

- *No change* to Section 1.3 – Cross References.
- *Proposed* Section 1.4 – Effective Date – This standard will be effective for all expert testimony provided by the actuary on or after four months following adoption by the Actuarial Standards Board.

ASOP 17 – Definitions 1

- *Removed* definitions of **Actuarial opinion** and **Material**.
- *Current* Section 2.4 – Data – Statistical or other information that is generally numerical in nature or susceptible in quantification.
- *Proposed* Section 2.3 – Data – Numerical, census, or classification information but not general or qualitative information. Assumptions are not **data**, but **data** are commonly used in the development of **actuarial assumptions**.

ASOP 17 – Definitions 2

- *Current* Section 2.3 – Expert – One who is qualified by knowledge, skill, experience, training, or education to render an opinion or otherwise testify concerning the matter at hand.
- *Proposed* Section 2.4 – Expert – One who is qualified under the evidentiary rules applicable in the forum to testify as an **expert**.

ASOP 17 – Definitions 3

- *Current* Section 2.7 – Principal – A client or employer of an actuary.
- *Proposed* Section 2.5 – Principal – Subject to the rules of evidence and procedure and any other rules applicable in the forum, the client or employer of the actuary with regard to the **expert testimony**, depending on the facts and circumstances surrounding the engagement.

ASOP 17 – Definitions 4

- *Current* Section 2.8 – Testimony – Communication presented in the capacity of an expert witness at trial, in hearing or arbitration, in deposition, or by declaration or affidavit. Such testimony may be oral or written, direct or responsive, formal or informal.
- *Proposed* Section 2.6 – Testimony – Communication of opinions or findings presented in the capacity of an **expert** witness at trial, in hearing or dispute resolution, in deposition, by declaration or affidavit or by any other means through which **testimony** may be received. Such **testimony** may be oral or written.

ASOP 17 – Analysis of Issues and Recommended Practices 1

- *Proposed* Section 3.1 – Overview replaces prior introductory paragraph.
- *Changed from* “An actuary providing **expert testimony** performs an important service to the **actuary’s principal**, the forum, and the public...”
to “An actuary providing expert testimony performs an important service to the forum, **the finder of fact in the forum**, and the public...”
Removed “actuary’s principal” and *added* “the finder of fact in the forum.”

ASOP 17 – Analysis of Issues and Recommended Practices 2

- *Added* words - “However, an actuary providing **expert testimony** should, **subject to the rules of evidence and procedure and any other rules applicable in the forum**, comply with the Code [of Professional Conduct].”
- Other, minor changes

ASOP 17 – Analysis of Issues and Recommended Practices 3

- *Added proposed* Section 3.2 - Reliance Upon Attorney or Other Representative of the Principal—An **expert** will ordinarily work closely with the attorney or other representative of the **principal**. An actuary may reasonably rely upon the advice, information, or instruction provided by an attorney or other representative of the **principal** concerning the meaning and requirements of the rules of evidence or procedure and any other rules applicable in the forum. An actuary relying on such advice, information, or instruction is not responsible for having complied with the advice or instruction, or used the information, even if a judge, arbitrator, hearing examiner, or other authority of the forum charged with ruling on procedural, evidentiary, or other matters determines that the advice, information, or instruction is inconsistent with or violates the rules of evidence, procedure, or any other rules applicable in the forum.

ASOP 17 – Analysis of Issues and Recommended Practices 4

- *Proposed Section 3.3 (Current 3.1) – Review and Compliance – Added “In offering expert testimony, the actuary should comply with all rules of evidence and procedure and any other rules applicable in the forum.”*
- Other, minor changes.

ASOP 17 – Analysis of Issues and Recommended Practices 5

- *Proposed Section 3.4 (Current 3.2) – Conflict with Laws and Regulations – *Changed* “...subject to the constraints of the forum.” to “...subject to the requirements of the forum, including without limitation all rules of evidence and procedure.”*

ASOP 17 – Analysis of Issues and Recommended Practices 6

- *Proposed* Section 3.5 (*Current* 3.3)– Conflict of Interest – Minor changes.

ASOP 17 – Analysis of Issues and Recommended Practices 7

- *Current Section 3.4 - Advocacy* – There may be occasions when an actuary acts as an advocate for a principal when giving expert testimony. Nothing in this standard prohibits the actuary from acting as an advocate. However, acting as an advocate does not relieve the actuary of the responsibility to comply with the *Code of Professional Conduct* and to use reasonable assumptions and appropriate methods (unless using prescribed or alternative methods or assumptions and so disclosing in accordance with section 3.6).

ASOP 17 – Analysis of Issues and Recommended Practices 8

- *Proposed Section 3.6 - Advocacy* – In those circumstances where it is consistent with the rules of evidence and procedure, and any other rules applicable in the forum, an actuary may act as an advocate for a **principal** when giving **expert testimony**. Acting as an advocate does not relieve the actuary of the responsibility to comply with the Code and to use reasonable **actuarial assumptions** and appropriate **actuarial methods** (unless using **actuarial assumptions** or **actuarial methods** prescribed by law or selected by others that may not be reasonable and appropriate, and so disclosing in accordance with section 3.7).

ASOP 17 – Analysis of Issues and Recommended Practices 9

- Proposed Section 3.6 - Advocacy – ~~There may be occasions when~~ In those circumstances where it is consistent with the rules of evidence and procedure, and any other rules applicable in the forum, an actuary ~~acts~~may act as an advocate for a **principal** when giving **expert testimony**. ~~Nothing in this standard prohibits the actuary from acting as an advocate. However,~~ acting**Acting** as an advocate does not relieve the actuary of the responsibility to comply with the ~~Code of Professional Conduct,~~ and to use reasonable **actuarial assumptions** and appropriate **actuarial methods** (unless using **actuarial assumptions or actuarial methods** ~~prescribed or alternative methods by law or assumptions selected by others that may not be reasonable and appropriate,~~ and so disclosing in accordance with section 3.67).*

ASOP 17 – Analysis of Issues and Recommended Practices 10

- *Removed Current Section 3.5 – Identity of Principal* – The actuary should identify the principal on whose behalf the actuary is to give expert testimony. This principal usually names a representative, such as an attorney or manager, to whom the actuary reports during the course of the assignment. Even though that representative may retain or pay the actuary, the actuary's ultimate obligation is to the principal and not to the principal's representative. However, in the absence of evidence to the contrary, the actuary may rely upon information and instructions from the representative as though they came directly from the principal.

ASOP 17 – Analysis of Issues and Recommended Practices 11

- *Current Section 3.6 – Prescribed or Alternative Methods and Assumptions changed to Proposed Section 3.7 – Actuarial Assumptions or Actuarial Methods Prescribed by Law or Selected by Others*
- *Key change is the added wording “... the actuary should disclose, subject to the rules of the forum, **and to the extent material and relevant**, whether the results are consistent with the actuary’s own **expert** opinion.”*
- Other, minor changes.

ASOP 17 – Analysis of Issues and Recommended Practices 12

- *Proposed Section 3.8 (Current Section 3.7) – Hypothetical Questions – Added wording “Subject to rules of evidence and procedure and any other rules applicable in the forum, and to the rulings of a judge or other official charged with overseeing the forum, the actuary may refuse to answer hypothetical questions based upon unreasonable actuarial assumptions.”*
- Other, minor changes.

ASOP 17 – Analysis of Issues and Recommended Practices 13

- *Proposed* Section 3.9 (*Current* Section 3.8) – Testifying Concerning Other Relevant Testimony – *Added wording* “**Subject to rules of evidence and procedure of the forum,**” at the beginning.
- Other, minor changes.

ASOP 17 – Analysis of Issues and Recommended Practices 14

- *Current* Section 3.9 – Cross-Examination – Although the actuary must respond truthfully to questions posed during cross-examinations, the actuary need not volunteer information that may be adverse to the interest of the principal.
- *Proposed* Section 3.10 – Cross-Examination – During cross-examinations, subject to the rules of the forum, the actuary need not volunteer information that is not fairly encompassed within the scope of the question.

ASOP 17 – Analysis of Issues and Recommended Practices 15

- *Proposed* Section 3.11 (*Current* Section 3.10) – Consistency with Prior Statements – When giving **expert testimony**, the actuary should be mindful of statements the actuary may have made on the same subject. If the actuary employs different ~~methods or~~ **actuarial assumptions or actuarial methods** in the current situation, the actuary should be prepared to explain why. – *Changes in red.*

ASOP 17 – Analysis of Issues and Recommended Practices 16

- *Current* Section 3.11 – Discovery of Error – If, after giving expert testimony, the actuary discovers that a material error was made, the actuary should make appropriate disclosure of the error to the principal or the principal’s representative as soon as practicable.
- *Proposed* Section 3.12 – Discovery of Error - If, after giving **expert testimony**, the actuary discovers that a material error was made, the actuary should make appropriate disclosure of the error to the forum or to the **principal** or the **principal’s** representative as soon as practicable. Any such disclosure should be made in accordance with the rules of evidence and procedure and any other rules applicable in the forum. – *Changes in red.*

ASOP 17 – Analysis of Issues and Recommended Practices 17

- *Proposed Section 3.13 (Current Section 3.12) – Limitation of Expert Testimony – Added wording*
“The actuary’s expert testimony should be presented in a manner appropriate to the nature of the forum **and consistent with the rules of evidence and procedure and any other rules applicable in the forum.**”
- Other, minor changes.

ASOP 17 – Communications and Disclosures 1

- *Current* Section 4.1 – Written Reports – Expert testimony delivered by means of a written report should describe the scope of the assignment, including any limitations or constraints. The written report should include descriptions and sources of the data, actuarial methods, and actuarial assumptions used in the analysis in a manner appropriate to the intended audience.
- *Proposed* Section 4.1 – Written Testimony – In delivering **expert testimony** in writing, the actuary should be consistent with the rules of evidence and procedure and any other rules applicable in the forum and describe the scope of the assignment, including any limitations or constraints. The written **testimony** should, to the extent appropriate to the forum and intended audience, include descriptions and sources of the **data**, **actuarial assumptions**, and **actuarial methods** used in the analysis.

ASOP 17 – Communications and Disclosures 2

- *Current* Section 4.2 – Oral Testimony – In delivering expert testimony orally, the actuary should express opinions in a manner appropriate to the intended audience. In addition, the actuary should, to the extent practicable, be prepared to document oral testimony.
- *Proposed* Section 4.2 – Oral Testimony – In delivering **expert testimony** orally, the actuary should express opinions in accordance with the rules of the forum and in a manner appropriate to the intended audience. In addition, the actuary should, to the extent practicable and subject to the rules of evidence and procedure and any other rules applicable in the forum, be prepared to provide documentation supporting the oral **testimony**.

ASOP 17 – Communications and Disclosures 3

- *Added* Section 4.3 – Communications and Disclosure – When providing **expert testimony**, the actuary should disclose the following, as applicable, and as permitted by the rules of evidence and procedure and any other rules applicable in the forum, and to the extent material to the **testimony**. The actuary also should comply with ASOP No. 41, *Actuarial Communications*, and, in addition, disclose the following items:
 - a. material conflicts between laws and regulations and appropriate actuarial practices, as described in section 3.4;
 - b. whether the actuary performed calculations using prescribed **actuarial assumptions** or **actuarial methods** selected by others and whether the results are consistent with the actuary's own **expert** opinion, as described in section 3.7; and
 - c. any material errors discovered after giving **expert testimony**, as described in section 3.12.

ASOP 17 – Communications and Disclosures 4

- *Proposed Section 4.4 (Current Section 4.3) – Additional Disclosures – Minor changes.*

ASOP 17 – Comments Requested

1. Does the proposed revision appropriately reflect guidance for all areas of actuarial practice?
2. Are there changes in current practice since the existing ASOP was adopted that are not reflected in this proposed revision?
3. Is the scope clear and appropriate, including the specific addition of rate hearings?
4. Is this ASOP's proposed effective date of four months following the ASB's adoption sufficient?

ASOP 17 – Comments Received

- 11 comment letters received.
- Posted on ASB Website – Go to Past Exposure Drafts, Click on View (not pdf) for ASOP 17, scroll down in the Table of Contents box on the left and click on “Comments”
- Currently being evaluated by the ASOP 17 Task Force.

ASOP 17 – Next Steps

- ASOP 17 Task Force will make any changes they think necessary and present them to the ASB General Committee for review.
- The ASB General Committee can send them back to the Task Force for further work or make additional changes (or not) and send it to the ASB for approval either as another exposure draft or as a final.
- The ASB is scheduled to see this again at its December 2017 meeting. The ASB can send it back to the Task Force for more work, issue it as an exposure draft or as a final, or decide not to change the current standard (unlikely).

ASOP 17 – Discussion Topics

1. Definition of Expert
2. Litigation Support
3. Reasonable Differences
4. Effective Date
5. Definition and Identity of Principal
6. Consistency with Prior Statements
7. Cross-Examination
8. Reliance Upon Attorney or Other Representative of the Principal
9. Discovery of Error
10. Advocacy

ASOP 17 – Discussion Topic 1 – Definition of Expert

- *Current* Section 1.2 – Scope – Applies to actuaries when they testify as actuarial experts at trial, in hearing or arbitration, in deposition, or by declaration or affidavit.
- *Current* Definition 2.5 - Expert - One who is qualified by knowledge, skill, experience, training, or education to render an opinion or otherwise testify concerning the matter at hand.
- *Proposed* Section 1.2 – Scope – Applies to actuaries who are qualified as **experts** under the evidentiary rules applicable in a forum when they provide testimony in court hearings, dispute resolutions, or other adversarial proceedings, and in rate hearings
- *Proposed* Definition 2.4 - Expert – One who is qualified under the evidentiary rules applicable in the forum to testify as an expert.

ASOP 17 – Discussion Topic 2 – Litigation Support

In Section 1.2 - Scope

- *Current* - Does not apply to actuaries providing litigation support other than the expert testimony itself. However, actuaries providing litigation support may consider the guidance in this standard to the extent that it is applicable and appropriate.
- *Proposed* – *Litigation support is not mentioned.*

ASOP 17 – Discussion Topic 3 – Reasonable Differences

In Section 1.2 - Scope

Not intended to discourage reasonable differences of actuarial opinion, inhibit ~~responsible creativity~~ innovation in advancing the practice, ~~unreasonably~~ restrain the selection of actuarial assumptions or methods, etc. – *Key changes in red.*

ASOP 17 – Discussion Topic 4 – Effective Date

Proposed Section 1.4 – Effective Date - This standard will be effective for all expert testimony provided by the actuary on or after four months following adoption by the Actuarial Standards Board.

ASOP 17 – Discussion Topic 5 – Definition and Identity of Principal

- *Current* Section 2.7 – Principal – A client or employer of an actuary.
- *Current* Section 3.5 – Identity of Principal – The actuary should identify the principal on whose behalf the actuary is to give expert testimony. This principal usually names a representative, such as an attorney or manager, to whom the actuary reports during the course of the assignment. Even though that representative may retain or pay the actuary, the actuary's ultimate obligation is to the principal and not to the principal's representative. However, in the absence of evidence to the contrary, the actuary may rely upon information and instructions from the representative as though they came directly from the principal.
- *Proposed* Section 2.5 – Principal – Subject to the rules of evidence and procedure and any other rules applicable in the forum, the client or employer of the actuary with regard to the **expert testimony**, depending on the facts and circumstances surrounding the engagement.

ASOP 17 – Discussion Topic 6 – Consistency with Prior Statements

*Proposed Section 3.11 (Current Section 3.10) – Consistency with Prior Statements – When giving **expert testimony**, the actuary should be mindful of statements the actuary may have made on the same subject. If the actuary employs different ~~methods or~~ **actuarial assumptions or actuarial methods** in the current situation, the actuary should be prepared to explain why. – *Changes in red.**

ASOP 17 – Discussion Topic 7 – Cross-Examination

- *Current* Section 3.9 – Cross-Examination – Although the actuary must respond truthfully to questions posed during cross-examinations, the actuary need not volunteer information that may be adverse to the interest of the principal.
- *Proposed* Section 3.10 – Cross-Examination – During cross-examinations, subject to the rules of the forum, the actuary need not volunteer information that is not fairly encompassed within the scope of the question.

ASOP 17 – Discussion Topic 8 – Reliance Upon Attorney or Other Representative of the Principal

*Added proposed Section 3.2 - Reliance Upon Attorney or Other Representative of the Principal - An **expert** will ordinarily work closely with the attorney or other representative of the **principal**. An actuary may reasonably rely upon the advice, information, or instruction provided by an attorney or other representative of the **principal** concerning the meaning and requirements of the rules of evidence or procedure and any other rules applicable in the forum. An actuary relying on such advice, information, or instruction is not responsible for having complied with the advice or instruction, or used the information, even if a judge, arbitrator, hearing examiner, or other authority of the forum charged with ruling on procedural, evidentiary, or other matters determines that the advice, information, or instruction is inconsistent with or violates the rules of evidence, procedure, or any other rules applicable in the forum.*

ASOP 17 – Discussion Topic 9 – Discovery of Error

Current Section 3.11 – Discovery of Error – If, after giving expert testimony, the actuary discovers that a material error was made, the actuary should make appropriate disclosure of the error to the principal or the principal's representative as soon as practicable.

Proposed Section 3.12 – Discovery of Error - If, after giving **expert testimony**, the actuary discovers that a material error was made, the actuary should make appropriate disclosure of the error to the forum or to the **principal** or the **principal's** representative as soon as practicable. Any such disclosure should be made in accordance with the rules of evidence and procedure and any other rules applicable in the forum. – *Changes in red.*

ASOP 17 – Discussion Topic 10 – Advocacy

*Proposed Section 3.6 - Advocacy – ~~There may be occasions when~~ In those circumstances where it is consistent with the rules of evidence and procedure, and any other rules applicable in the forum, an actuary ~~acts~~may act as an advocate for a **principal** when giving **expert testimony**. ~~Nothing in this standard prohibits the actuary from acting as an advocate. However, acting~~Acting as an advocate does not relieve the actuary of the responsibility to comply with the ~~Code of Professional Conduct,~~ and to use reasonable **actuarial assumptions** and appropriate **actuarial methods** (unless using **actuarial assumptions or actuarial methods** prescribed ~~or alternative methods by law~~ or ~~assumptions selected by others that may not be reasonable and appropriate,~~ and so disclosing in accordance with section 3.67).*