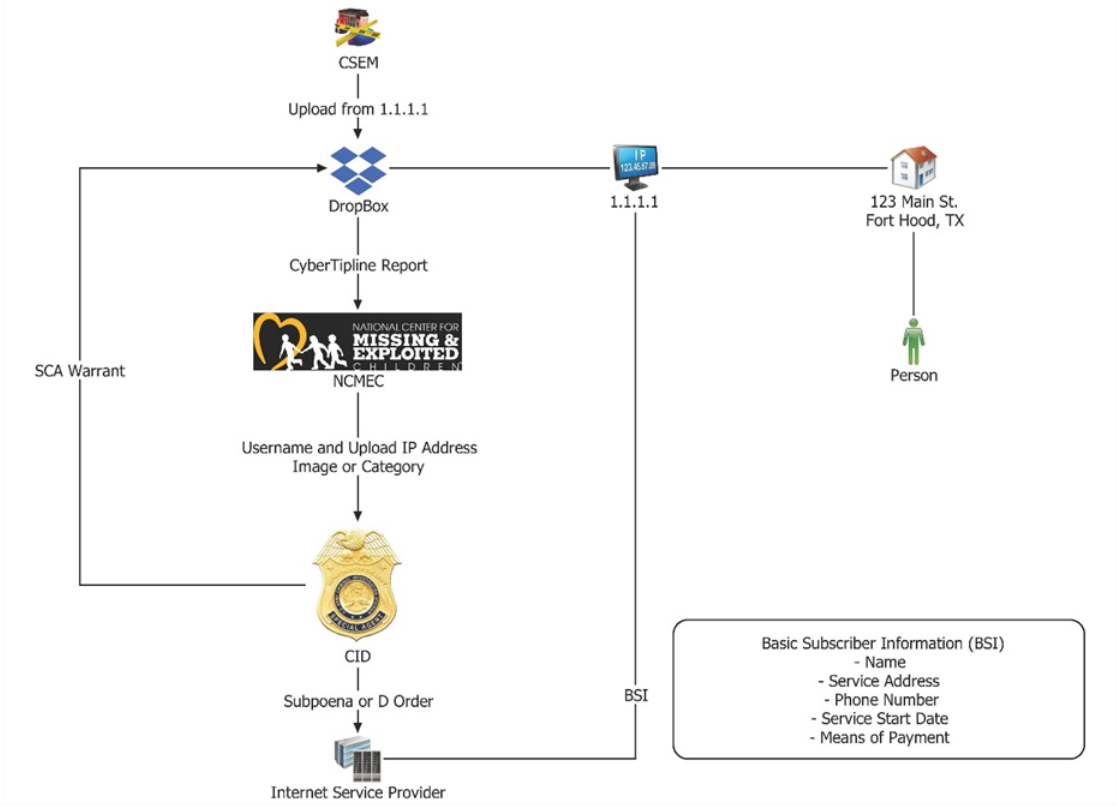
**Obtaining and Examining Digital Evidence**
**CAAF CLE**
**May 2023**

## Probable Cause:

Probable cause means "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." M.R.E. 315(f)(2). Probable cause exists "when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location." *United States v. Rogers*, 67 M.J. 162, 165 (C.A.A.F. 2009), citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983) and *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007).

"[P]robable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself," and are "founded . . . upon the overall effect or weight of all factors presented to the magistrate." *Leedy*, 65 M.J. at 213 (emphasis in original).

**Connecting the dots on probable cause in a digital context**




## Warrant Requirement: Scope and particularity

*The nature of the crime matters in considering the scope of the search*
***United States v. Reichling*, 781 F.3d 883 (7th Cir.), *cert. denied*, 136 S. Ct. 174 (2015)**. Based in part on the sharing of some 300 naked images by a teenage girl, the 7th Circuit affirmed the collection and search of all electronic devices from the home of a defendant's parents, as well as

from an adjacent trailer. Specifically, "'[a]ll computers and computer hardware devices,' including desktops, laptops, cell phones, and any type of camera; and '[i]nternal and peripheral digital/electronic storage devices,' including 'hard drives,' 'thumb or flash drives,' and 'video tapes.'" In affirming this broad warrant to seize and search all electronic devices, the 7th Circuit wrote:

> "[I]n a case involving possible evidence of child pornography or sexual exploitation of a child, the probable cause inquiry 'must be grounded in an understanding of both the behavior of child pornography collectors and of modern technology.' ... [W]hile the law requires judges to be neutral, the law does not require judges to pretend to be babes in the woods. ... When the warrants were issued in August 2013, it was or should have been common knowledge to judges (like other members of the public) that images [on cell phones] may be readily transferred to other storage devices. ... Given the large number of images at issue, the duration [of the defendant's] interest in the victim, and the way various storage media work together ... it was reasonable for the issuing judge to authorize the police to ... search any computers and other storage devices 'in which the [images] might be found.'"

***United States v. Laurezo*, 2019 U.S. Dist. LEXIS 98367 (D.N.M. 2019)**. Three (3) child pornography images traced to a specific premises. Federal district court judge upheld a warrant authorizing a search of the premises for "All electronic data processing and storage devices, computers and computer systems including central processing units; internal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, memory cards, USB thumb drives, optical storage devices or other memory storage devices; peripheral input/output devices such as keyboards, cameras, printers, video display monitors, optical readers and related communication devices such as modems; together with system documentation operating logs and documentation, software and instruction manuals, handwritten notes, logs, user names and lists. All images, video cassette tapes and/or motion pictures, which may contain any, unclothed and/or partially unclothed male and/or female children under the age of eighteen. All images, videocassette tapes and/or motion pictures portraying children under the age of eighteen engaged in sexual conduct or involved in lewd exhibition of the genitals. All images, photographs, film or negatives, which may contain unclothed and/or partially unclothed male and/or female children under the age of eighteen. All images, photographs, film or negatives which may contain children under the age of eighteen engaged in sexual conduct or involved in lewd exhibition of the genitals. All books, magazines, documents, advertisements portraying children under the age of eighteen engaged in sexual conduct, posed in sexually explicit positions or that contains unclothed or partially unclothed children under the age of eighteen. All documents tending to show occupancy and/or ownership for the home, including personal identification, bills, receipts, canceled mail, utility bills, rent receipts and bank statements. Photographs of the interior/exterior of the residence."

***United States v. Miller*, 78 M.J. 835 (Army Ct. Crim. App. 2019), rev. denied, 79 M.J. 242 (C.A.A.F. 2019)**, the search of a subject's room for all digital devices within was upheld based upon probable cause that eleven (11) child pornography images were transmitted from the room. The concurring opinion in *Miller* distinguished *United States v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017), stating:

> "*Nieto*, a non-child pornography case, does nothing to limit or undermine the inferences a magistrate may draw regarding where evidence of child pornography may be found," and that "crimes involved suspected child pornography allow for a common-sense judgment that, 'collectors and distributors of child pornography value their sexually explicit materials highly, rarely if ever dispose of such material, and store it for long periods in a secure place, typically their homes'" (citations omitted).

*Geofences*
***United States v. Rhine*, 2023 U.S. Dist. LEXIS 12308 (D.D.C. 2023)**. "At a basic level, a geofence warrant seeks cell phone location data stored by third-party companies like Google, which offers the Android operating system on which millions of smart phones run and offers other applications commonly used on phones running on other operating systems. The scope of location data captured by a geofence is limited by geographic and temporal parameters, so geofence warrants identify the physical area and the time range in which there is probable cause to believe that criminal activity occurred." (internal citation omitted).

The *Rhine* opinion also provides an overview of federal cases dealing with geofence warrants, as of the date of its release.

***In re Search of Info. That is Stored at the Premises Controlled by Google, LLC*, 542 F.Supp. 3d 1153 (D. Kan. 2021)**. "Applications for geofence warrants are becoming more commonplace and have drawn scrutiny because of the possibility that they will reveal the identities of potentially numerous individuals who happened to be in the vicinity when a crime was committed but who were not involved in and did not witness the crime. 'As a result, it is easy for a geofence warrant, if cast too broadly, to cross the threshold into unconstitutionality because of a lack of probable cause and particularity, and overbreadth concerns under Fourth Amendment jurisprudence.'" (citing I*n re Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F. Supp.3d 345, 353 (N.D. Ill. 2020) (internal citation omitted)).

## Evidence Preservation

*Preservation of evidence in the cloud*
**18 U.S.C. § 2703(f) [Stored Communications Act]**. "A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process."

*Preservation of evidence in devices*
***Illinois v McArthur*, 531 U.S. 326 (2001)**. "[T]here are exceptions to the warrant requirement. When faced with special law enforcement needs . . . the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. *See, e.g.*, . . . *United States v. Place* [462 U.S. 696 (1983)] at 706 (**temporary seizure** of luggage based on reasonable suspicion)." (Bold font added).

***Riley v. California*, 573 U.S. 373, 443, 445 (2014)**. "[O]fficers could have seized and secured [the defendants'] cell phones to prevent destruction of evidence while seeking a warrant. That is a sensible concession. *See Illinois v. McArthur*, 531 U. S. 326 (2001) . . . . And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone."

"Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. . . . Such a preventive measure could be analyzed under the principles set forth in our decision in *McArthur*, 531 U. S. 326, which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant."

**Warrant Exceptions**

*Exigent Circumstances*
***Riley v. California*, 573 U.S. 373, 445 (2014)**. "If 'the police are truly confronted with a 'now or never' situation'— for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt — they may be able to rely on exigent circumstances to search the phone immediately. *Missouri v. McNeely*, 569 U. S. 141 (2013) (quoting *Roaden v. Kentucky*, 413 U.S. 496 (1973)."

*Plain view*
***United States v. Cobb*, 970 F.3d 319, 332 (4th Cir. 2020), *cert. denied*, 2021 U.S. LEXIS 1720 (2021)**. "'Once it is accepted that a computer search [for evidence related to a murder investigation] must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.' The officer 'has a lawful right of access to all files, albeit only momentarily,' and 'when the officer then comes upon child pornography, it becomes immediately apparent that its possession by the computer's owner is illegal and incriminating.'" (citations omitted).

*Good Faith*
M.R.E. 311(c)(3)
*See generally*, *United States v. Blackburn* 80 M.J. 205 (C.A.A.F. 2020)
***United States v. Leon*, 468 U.S. 897 (1984)** "[W]hen an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. '[Once] the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (citation omitted).

***United States v. Thomas*, 908 F.3d 68, 72 (4th Cir. 2018)**. "[E]vidence obtained by an officer who acts in objectively reasonable reliance on a search warrant will not be suppressed, even if the warrant is later deemed invalid." (citing *Leon*, 468 U.S. at 922).

***United States v. Chatrie*, 590 F. Supp.3d 901 (E.D. Va. 2022)**. (appeal pending): Notwithstanding that Stored Communications Act geofence warrant lacked particularized probable cause, neither the law enforcement agent who sought the warrant (as he had done so successfully several times in the past), nor the federal magistrate judge who issued it, were objectively unreasonable. Accordingly, "[d]espite the warrant failing under Fourth Amendment scrutiny, the *Leon* good faith exception shields the resulting evidence from suppression."

*Consent – common authority*
***United States v. Black*, 82 M.J. 447 (C.A.A.F. 2022)**. In an Article 62 appeal, CAAF held the military judge did not abuse their discretion in suppressing evidence found on a phone loaned to another soldier. Relying on its decision in *United States v. Rader*, 65 M.J. 30 (C.A.A.F. 2007), CAAF held the guidance from the Supreme Court is "that the key consideration in assessing Fourth Amendment consent cases is reasonableness, rather than technical property interests. Thus the appropriate question is 'what would the typical reasonable person have understood by the exchange' between Appellant and [the person to whom he loaned his phone]."

**Mechanics of Searching Digital Evidence**

*Opening Devices: Biometrics (fingerprint, face scan, etc.)*
***In re search of A White Google Pixel 3 XI Cellphone in a Black Incipio Case*, 398 F. Supp. 3d 785 (D. Id. 2019)**. "Where, as here, the Government agents will pick the fingers to be pressed on the Touch ID sensor, there is no need to engage the thought process of the subject at all in effectuating the seizure. The application of the fingerprint to the sensor is simply the seizure of a physical characteristic, and the fingerprint by itself does not communicate anything. It is less intrusive than a forced blood draw. Both can be done while the individual sleeps or is unconscious. **Accordingly, the Court determines—in accordance with a majority of Courts that have weighed in on this issue—that the requested warrant would not violate the Fifth Amendment because it does not require the suspect to provide any testimonial evidence**." (Bold font added).

*Opening Devices: Passcodes*
***United States v. Morales*, 2022 U.S. Dist. LEXIS 104053 (E.D. Mo. 2022)** (Defendant restricted to his living room – but free to leave his home if he chose – was not in custody during search of his home. No Fifth Amendment violation when an Agent – not knowing that Defendant had invoked his right to an attorney to another Agent -- asked Defendant to voluntarily provide his passcode so that his phone could be cleared and returned to him).

Bottom line: biometrics are generally found to be non-testimonial, while passcodes are testimonial and can be volunteered, but not compelled. *But see*, *United States v. Nelson*, 82 M.J. 251 (C.A.A.F. 2022); *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017).

## Extracting Data

*Mobile Phones*
Common mobile device extractions: (1) logical and (2) file system. A logical extraction is a limited extraction of files and folders from a device, often restricted by application developers and operating system capabilities. A file system extraction is a more comprehensive extraction of files and folders on a device, often bypassing restrictions put in place by application developers and operating systems. A file system extraction may produce a more complete picture of what happened (e.g., text messages that have been deleted often will not appear in a logical extraction, but they may appear in a file system extraction).

*Computers and other storage media (e.g. external hard drives)*
Common computer and storage media extractions: (1) logical and (2) physical. A logical extraction is limited to a specified area on a device, such as an individual drive, or specifically identified files and folders, such as a user profile folder. A physical extraction generally is used to acquire all of the data storage a device has, including deleted and unallocated space on the device. Physical extraction may produce a more complete picture of what happened (e.g., deleted information may appear in unallocated disk space; and user attribution information may appear outside of what a logical extraction can obtain).

*Searching the extraction*
A wide variety of software tools are available to assist in the processing, analyzing, and reporting of extracted data. These tools are able to parse, decode, and decrypt information into a more human-readable format, and often provide the ability to search, sort, filter, bookmark, and report identified information.

## Additional Resources / References

Stored Communications Act, 18 U.S.C. § 2701, *et seq*.
Manual for Courts-Martial, Rule for Courts-Martial 703A

# Scientific Working Group on Digital Evidence

## Introduction to Testimony in Digital and Multimedia Forensics

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# Scientific Working Group on Digital Evidence

## Introduction to Testimony in Digital and Multimedia Forensics

## Table of Contents

# Introduction to Testimony in Digital and Multimedia Forensics

## 1. Purpose

The purpose of this document is to provide guidance and best practices for digital and multimedia examiners and legal professionals in preparing, providing, and reviewing testimony in legal proceedings (e.g., administrative bodies, courts, tribunals) whether testifying for the plaintiff or the defense.

## 2. Scope

This document addresses both fact witnesses and expert witness testimony for digital and multimedia forensic examiners and considers testimony in the US legal system. This document is intended to be part of a series addressing testimony. Future documents may address topics such as:

- Legal considerations and challenges
- Overview of key legislation and rulings

## 3. Limitations

This document is not intended to be legal advice. Legal issues change rapidly and are subject to interpretation. Therefore, always consult with your appropriate legal counsel regarding all legal matters before acting.

This document is not intended to be a training manual, nor to replace organizational policy or standard operating procedures. This document is not all inclusive and does not contain information regarding specific commercial products. This document may not be applicable in all circumstances. If examiners encounter situations warranting deviation from best practices, they should thoroughly document the specifics of the situation and actions taken.

## 4. Definitions of Lay Witness (Fact Witness) and Expert Witness Testimony

- Digital and Multimedia Examiners provide valuable evidence in legal proceedings in the form of testimony. This testimony primarily falls into two main categories--expert and fact--as defined by the Federal Rules of Evidence 701 and 702 (2021 version) and corollary state counterparts. In general, if an examiner is not testifying as an expert, then they are limited to being a lay witness (fact witness). The terms lay and fact witness are synonymous. A lay witness (fact witness) cannot provide opinions. An expert witness is one who has been qualified by the court for a specific case as an expert. Whether expert testimony is needed is generally made by legal counsel who ultimately will seek qualification of the witness as an expert or tender the witness as an expert. The qualification is based on knowledge, skill, experience, training, and education. As stated in 702, an expert may testify in the form of an opinion or otherwise if:

    - the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
    - the testimony is based on sufficient facts or data;
    - the testimony is the product of reliable principles and methods; and
    - the expert has reliably applied the principles and methods to the facts of the case.

## 5. Expectations of Witnesses

### 5.1 General Expectations

The primary responsibilities for all witnesses involve courtroom etiquette, preparation, and awareness of their testimony. The following are expectations for all witnesses:

- Tell the Truth.
- Make the court and counsel aware of potential scheduling conflicts early and whenever a prospective conflict arises.
- Prepare both with and without legal counsel.
- Professional conduct is essential.
- A witness shall punctually appear at court hearings. Arrive on time.
    - Check traffic and parking
    - Know where the courtroom is located or have adequate time upon arrival to locate the courtroom
- A witness shall appear in court properly attired. Dress appropriately. If uncertain of attire, ask the attorney.
- Be patient and prepared to wait.
- Do not discuss testimony with other witnesses , jury members or other persons while waiting to testify.
- Listen to the question in its entirety and answer only the question asked.
- Do not hesitate to ask the counsel to repeat the question or clarify if multiple questions are being asked.
- Do not be afraid to pause to answer a question thoughtfully and accurately, and to allow counsel to object if needed.
- If the answer to a question is unknown or not remembered, say so. It is important to limit testimony to the scope of knowledge.
- Answer the questions avoiding technical language as much as possible. Be able to explain technical terms and concepts to the average person.
- Be mindful of vocal tone and speed.
- Do not become argumentative on the stand.
- Barring a question that skews facts, misinterprets analysis, ask to further explain or allow counsel to intervene. If a question is encountered that skews facts, correct the error, but do so as respectfully as possible.
- When answering questions during direct or cross examination, make eye contact with the trier of fact.
- Know the process
    - Provide curriculum vitae (CV), report, any notes, etc., to attorney(s) ahead of time
    - Courthouse security requirements and restrictions
    - Bring a proper form of identification
    - Have a means of communicating with the legal team in the event of delays, etc.

### 5.2 Expectations of Fact Witnesses

There are two primary ways that forensic examiners testify: fact witness and expert witness. The court determines which type of witness is appropriate.

Forensic examiners testify in the capacity of a fact witness when their involvement is limited to using forensic software and providing output in the form of a report. Per Federal Rule of Evidence 701 (2021), a fact witness's testimony is based on their rational perception and assists in a matter before a court or tribunal. A fact witness is the preferred term used when a digital forensics examiner testifies in a capacity that is not an expert witness. This is also called a lay witness, but the term fact witness is used to highlight the skills and work done by the examiner. The primary responsibility for fact witnesses is to be aware of the limited scope required of their testimony. Fact witnesses should not offer opinions or make judgements. The following are expectations for fact witnesses:

- Know the forensic techniques, policies and procedures, and science underpinning the work which will be the subject of your testimony.
- Testimony should be limited to tangible data points and not rely on experience or draw conclusions.
- For fact witnesses, avoid the use of phrases such as “I think…” or “In my experience...” This implies that you may be giving an opinion.

### 5.3 Expectations of Expert Witnesses

The expert witness serves to educate and, at times, render an opinion, to assist the trier of fact in understanding matters outside the education and experience of the average person. As the expert witness is given wider latitude in their testimony, they are subject to a wider set of queries during both direct and cross-examination. A witness is qualified as an expert based on their knowledge, skill, experience, training, or education. The scope of testimony for an expert is not limited to their work. Experts can be cross examined on the entire discipline and can provide conclusions based on their knowledge and experience. Experts, however, should exercise appropriate restraint in their testimony by limiting their opinions to their training and experience.

Be aware that experts are paid for their time, not their opinion, nor should the amount of compensation affect a forensic examination or the results of the analysis. As an expert, this is a potential line of questioning regarding compensation and bias which will be covered at a later point in this document. Be aware that as an expert witness you are held to a higher standard and be cognisant of your digital footprint (e.g., social media, professional online presence, posts, adverse action, criminal activity) as this is potential fodder for opposing counsel.

### 5.4 General Considerations for Trial Preparation

- Be aware of the use of technical jargon. Explain technical concepts using common language a lay person can understand.
- Do not use the phrase “reasonable degree of scientific certainty” or similar phrases. They do not have an established meaning and may be subject to admissibility rules.

- Do not use the phrase "to the exclusion of all others" or similar. These phrases imply a level of certainty that is generally unmeetable.
- Do not allow testimony to exceed the facts established through examination. (i.e. ascribing "intent," evidence found in user profile vs. "this person did this," etc.)
- Be prepared to explain the general functions performed by the tool rather than the programming of the tool. In other words, the examiner should be able to say what the tool does rather than how it works.
- Be clear on who was responsible for the work. If testimony pertains to tasks performed by other individuals (e.g., sequential assembly-line forensic process, retired or ill analyst, etc.), explain how the information was received, how an assessment of the work performed, and how the reliability of the work was determined.
- Be prepared to describe training and experience associated with the tool(s)/method(s) used in analysis
- Be prepared to describe succinctly and in lay terms how the examination and analysis were performed.

### 5.4.1 Expert Witness Trial Preparation

It is highly recommended that attorneys conduct a thorough pretrial discussion which should include witness qualification, tools/methods used and any limitations, findings/reports, and trial strategy. Be aware, not all attorneys consult with expert witnesses prior to trial. The areas below should be inclusive in the pretrial discussion:

- Qualifying questions
    - provide/discuss CV
    - particularly relevant training/certifications
        - related to this case
        - are they current
    - professional organizations
    - challenges to expert training, certifications and qualifications
    - publications or research - peer reviewed?
    - previous experience in court as an expert
    - character issues

- Quality
    - Be prepared to describe the testing performed on tool(s)/method(s) used in analysis and any applicable limitations. See SWGDE Minimum Requirements for Testing Tools Used in Digital and Multimedia Forensics.
    - Be prepared to discuss any results verification, such as those done for comparative analysis, if applicable.

- Findings
    - Has counsel reviewed results/written report(s) including any supplemental materials to support findings and opinions?

- Scope of opinion is defined
- Opinions or conclusions included in exam results
- Opinions or conclusion supported by data in report
- Correlating opinions and limitations, results, or conclusions
  - e.g., if opinion leads to A and B, it may not lead to C
- What results are they wanting to discuss in direct?
- Are the findings repeatable?
- Are the findings reproducible?

- Trial Approach
  - Are there any pretrial rulings that could impact testimony?
  - What is being accomplished by the testimony?
    - What key points should be shown?
    - What information needs to be emphasized?
  - Are there complex issues that may behoove a prepared response/explanation (e.g., timestamps)?
    - Acknowledge the limitations of the evidence
  - Potential challenges:
    - report
    - methods
    - tools
    - chain of custody
    - data and interpretations of data
    - alternate interpretations and opinions
    - authentication to original evidence
    - previous issues within the examiner's organization
    - previous testimony
    - the laboratory's quality system, if applicable
    - verification of findings and opinions
    - peer review
    - potential bias

    - There may be other sources, digital or other, that corroborate data referred to in the examiner's testimony. Be aware that testimony may be corroborated or questioned based on other witnesses' testimony. It may be helpful to work with the trial attorney so the scope of expected testimony is understood and how it may be connected to or associated with testimony from other witnesses.

- Trial Exhibits/Demonstratives and Presentation
  - Has the examiner presented this before in court? How was it previously presented? What worked well and what did not work well?
  - Is the format of your exhibits in the appropriate format to be displayed in the jury deliberation room? (like mp4, jpeg, etc)?

### 5.5 Post-Proceeding Testimony

Being a witness, lay or expert, in the area of digital and multimedia forensics, is an ongoing learning process. Following testimony, a witness should not hesitate to meet with counsel and learn of any issues with their testimony to refine the delivery of facts and results derived from training and experience.

**Appendix: General Guidelines for Witness Testimony Handout**

PRE-TESTIMONY POINTERS:

- ☐ Have I reviewed my report and underlying data and engaged in an honest assessment of the situation, admitting any potential issues that may result from my testimony, and maintaining my integrity as a person providing testimony in a court or tribunal?
- ☐ Am I prepared to give an honest and fair assessment of what I observed, even if I don't agree with it personally?
- ☐ Have I reviewed any paperwork and transcripts of prior judicial proceedings? Are they correct? If they aren't correct, the matter could be due to a recording error by a court reporter. It may not be the case that: "If it says it in there, it must be right."
- ☐ Have I engaged in a prep session with counsel?
    - ☐ Do I know the layout of the courtroom or place where I will testify?
    - ☐ Do I know the physical set-up of the courtroom? Do I know where the judge, jury and audience will be seated?
    - ☐ Do I know the sequence of questioning and the form (Direct v. Cross) the questioning will take?
    - ☐ Do I understand objections, what "sustained" and "overruled" mean and to wait for a judge's ruling on an objection before answering?
    - ☐ Do I have a basic understanding about hearsay so I know what I can and cannot testify about?
    - ☐ Do I understand any pre-trial rulings that might affect my testimony?
    - ☐ Have I informed counsel of any potential date and time obligations that may conflict with my testimony?
    - ☐ Have I reviewed all maps, photographs and diagrams for use in trial?
- ☐ Do I know where the courtroom is located?
- ☐ Have I left enough time to leave my house/office to get to the courtroom or place where I will provide testimony in time?
- ☐ Where is parking? How much is parking? Can I pay by credit/debit card? How long is my parking good for?
- ☐ Did I provide my CV/resume, report, notes, and all underlying data to the attorney?

- ☐ Do I have contact information for the Court and/or Attorney if I am delayed or have an unforeseen circumstance?
- ☐ Am I dressed professionally? Do I have my credentials? Do I have a copy of my report and CV with me?
- ☐ What are the security requirements for entry into the courthouse or place where I will provide testimony?
- ☐ Am I sitting in an area that is separated from jury members and other witnesses who may be called?
- ☐ Do I know not to discuss testimony with another potential witness, or in the hallways or elevator such that a juror may overhear my comments during a recess? A mistrial caused by a juror overhearing a witness outside of Court is a distinct possibility.
- ☐ Do I have something to occupy my time if I have to wait to be called as a witness?

THE TESTIMONY:

- ☐ Always be honest. Tell the truth. If you do not remember something, you can ask to review any document that may refresh your memory. If you are estimating, you should make that clear to the jury.
- ☐ Always act calm and natural. Do not be baited into being argumentative. Be professional.
- ☐ Am I speaking in a loud, clear voice, making eye contact with the jury when testifying?
- ☐ Am I being factual in my testimony, avoiding any personal opinion or feelings that may affect my observations and/or opinion?
- ☐ Am I listening carefully to the questions asked? Does the question incorporate disputed facts or facts not in evidence?
- ☐ Do I understand the question? If not, ask for clarification. If you don't know the answer, you should say so.
- ☐ Am I avoiding technical language? Am I able to explain technical terms and concepts to the average person?
- ☐ Am I answering the question asked and only the question asked?
- ☐ During cross-examination, am I looking at the attorney who is asking questions or the jury? Remember, you must be honest and fair. The "correct" response is the honest response. Nothing more. Nothing less.

- Am I prepared to admit my faults or any limitations to my testimony?
- Do I know where to go if the Court adjourns my testimony for a break, lunch, or for the day?

**History**

| Revision | Issue Date | History |
|---|---|---|
| 1.0 DRAFT | 1/13/2022 | Initial draft created and voted by SWGDE for release as a Draft for Public Comment. |
| 1.1 DRAFT | 6/9/2022 | Draft revised and re-released for Public Comment. |
| 1.1 FINAL | 9/22/2022 | No comments received. Moved forward for vote with no changes as Final Approved Document. |