



ACTUARIAL STANDARDS BOARD

• **EXPOSURE DRAFT** •

**Proposed
Actuarial Standard
of Practice
No. 17**

Expert Testimony by Actuaries

**Comment Deadline:
June 30, 2017**

**Developed by the
Expert Testimony Task Force of the
General Committee of the
Actuarial Standards Board**

**Approved for Exposure by the
Actuarial Standards Board
March 2017**

TABLE OF CONTENTS

Transmittal Memorandum	iii
STANDARD OF PRACTICE	
Section 1. Purpose, Scope, Cross References, and Effective Date	1
1.1 Purpose	1
1.2 Scope	1
1.3 Cross References	2
1.4 Effective	2
Section 2. Definitions	2
2.1 Actuarial Assumption	2
2.2 Actuarial Method	2
2.3 Data	2
2.4 Expert	2
2.5 Principal	2
2.6 Testimony	2
Section 3. Analysis of Issues and Recommended Practices	2
3.1 Overview	2
3.2 Reliance Upon Attorney or Other Representative of the Principal	3
3.3 Review and Compliance	3
3.4 Conflict with Laws and Regulations	3
3.5 Conflict of Interest	3
3.6 Advocacy	3
3.7 Actuarial Assumptions or Actuarial Methods Prescribed by Law or Selected by Others	3
3.8 Hypothetical Questions	4
3.9 Testifying Concerning Other Relevant Testimony	4
3.10 Cross Examination	4
3.11 Consistency with Prior Statements	4
3.12 Discovery of Error	4
3.13 Limitation of Expert Testimony	4
Section 4. Communications and Disclosures	4
4.1 Written Testimony	4
4.2 Oral Testimony	5
4.3 Communication and Disclosure	5
4.4 Additional Disclosures	5
<u>APPENDIX</u>	
Appendix—Background and Current Practices	6

EXPOSURE DRAFT—March 2017

March 2017

TO: Members of Actuarial Organizations Governed by the Standards of Practice of the Actuarial Standards Board and Other Persons Interested in Expert Testimony by Actuaries

FROM: Actuarial Standards Board (ASB)

SUBJ: Proposed Revision of Actuarial Standard of Practice (ASOP) No. 17

This document contains an exposure draft of a proposed revision of ASOP No. 17, *Expert Testimony by Actuaries*. Please review this exposure draft and give the ASB the benefit of your comments and suggestions. Each written response and each response sent by e-mail to the address below will be acknowledged, and all responses will receive appropriate consideration by the drafting committee in preparing the final document for approval by the ASB.

The ASB accepts comments by either electronic or conventional mail. The preferred form is email, as it eases the task of grouping comments by section. If you wish to use e-mail, please send a message to **comments@actuary.org**. You may include your comments either in the body of the message or as an attachment prepared in any commonly used word processing format. **Please do not password-protect any attachments. If the attachment is in the form of a PDF, please do not “copy protect” the PDF.** Include the phrase “ASB COMMENTS” in the subject line of your message. Please note: Any message not containing this exact phrase in the subject line will be deleted by our system’s spam filter.

If you wish to use conventional mail, please send comments to the following address:

ASOP No. 17 Revision
Actuarial Standards Board
1850 M Street, NW, Suite 300
Washington, DC 20036

The ASB posts all signed comments received to its website to encourage transparency and dialogue. Anonymous comments will not be considered by the ASB nor posted to the website. The comments will not be edited, amended, or truncated in any way. Comments will be posted in the order that they are received. Comments will be removed when final action on a proposed standard is taken. The ASB website is a public website, and all comments will be available to the general public. The ASB disclaims any responsibility for the content of the comments, which are solely the responsibility of those who submit them.

Deadline for receipt of responses in the ASB office: **June 30, 2017**

EXPOSURE DRAFT—March 2017

Background

The ASB originally adopted ASOP No. 17, *Expert Testimony by Actuaries*, in 1991. Since that time, actuarial practice in this area has evolved. Under the direction of the ASB, the Expert Witness Task Force revised ASOP No. 17 in 2002 to be consistent with the then current ASOP format and to reflect current practices in the area of expert testimony. ASOP No. 17 was further updated for deviation language, effective May 1, 2011. In 2015, the ASB concluded that this ASOP should be reviewed. This revision is the result of that review.

Key Changes

Key changes reflected in this exposure draft include the following:

1. addressing 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;
2. clarifying 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; and
3. clarifying the scope.

Request for Comments

The task force appreciates comments on all areas of this proposed revision and would like to draw the reader's attention to the following questions in particular:

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?

The ASB voted in March 2017 to approve this exposure draft.

EXPOSURE DRAFT—March 2017

ASOP No. 17 Task Force

David R. Godofsky, Chairperson

James P. Galasso

Lawrence J. Sher

Carl M. Harris

Margaret Tiller Sherwood

Adam Reese

General Committee of the ASB

Margaret Tiller Sherwood, Chairperson

Shawna S. Ackerman

Susan E. Pantely

Ralph S. Blanchard III

Hal Tepfer

Dale S. Hagstrom

Christian J. Wolfe

Actuarial Standards Board

Maryellen J. Coggins, Chairperson

Christopher S. Carlson

Barbara L. Snyder

Beth E. Fitzgerald

Kathleen A. Riley

Darrell D. Knapp

Frank Todisco

Cande J. Olsen

Ross A. Winkelman

The ASB establishes and improves standards of actuarial practice. These ASOPs identify what the actuary should consider, document, and disclose when performing an actuarial assignment.

The ASB's goal is to set standards for appropriate practice for the U.S.

**PROPOSED REVISION OF
ACTUARIAL STANDARD OF PRACTICE NO. 17**

EXPERT TESTIMONY BY ACTUARIES

STANDARD OF PRACTICE

Section 1. Purpose, Scope, Cross References, and Effective Date

- 1.1 Purpose—This actuarial standard of practice (ASOP) provides guidance to actuaries providing **expert testimony**.
- 1.2 Scope—This standard 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, depositions, or other adversarial proceedings, and in rate hearings. 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.

This standard supplements the *Code of Professional Conduct* (Code) and is intended to provide specific guidance with respect to the actuary providing **expert testimony**. Reference should also be made to other actuarial standards of practice concerned with the actuarial substance of the assignment.

Nothing in this standard is intended to discourage reasonable differences of actuarial opinion, or to inhibit innovation in advancing the practice of actuarial science. Further, this standard is not intended to restrain the selection of **actuarial assumptions** or **actuarial methods**, the communication of actuarial opinions, or the relationship between the actuary and a **principal**. Nothing in this standard is intended to prevent the actuary from challenging the application or a particular interpretation of existing precedent, law, or regulation where such application or interpretation would, in the opinion of the actuary, be inconsistent with otherwise appropriate actuarial practice.

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.

If the actuary departs from the guidance set forth in this standard in order to comply with applicable law (statutes, regulations, and other legally binding authority), or for any other reason the actuary deems appropriate, the actuary should refer to section 4.

EXPOSURE DRAFT—March 2017

- 1.3 Cross References—When this standard refers to the provisions of other documents, the reference includes the referenced documents as they may be amended or restated in the future, and any successor to them, by whatever name called. If any amended or restated document differs materially from the originally referenced document, the actuary should consider the guidance in this standard to the extent it is applicable and appropriate.
- 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.

Section 2. Definitions

The terms below are defined for use in this actuarial standard of practice.

- 2.1 Actuarial Assumption—The value of a parameter or other actuarial choice having an impact on an estimate of a future cost or other actuarial item under evaluation.
- 2.2 Actuarial Method—A procedure by which **data** are analyzed and utilized for the purpose of estimating a future cost or other actuarial item.
- 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**.
- 2.4 Expert—One who is qualified under the evidentiary rules applicable in the forum to testify as an **expert**.
- 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.
- 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.

Section 3. Analysis of Issues and Recommended Practices

- 3.1 Overview—An actuary providing **expert testimony** performs an important service to the forum, the finder of fact in the forum, and the public by providing information that can be critical to resolution of disputes. This may include explaining complex technical concepts so they can be understood by the audience to whom the **testimony** is directed. Actuaries may differ in their conclusions even when applying reasonable **actuarial assumptions** and appropriate **actuarial methods**, and a mere difference of opinion between actuaries does not suggest that an actuary has failed to meet professional standards. 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 requirements of the Code. In particular,

EXPOSURE DRAFT—March 2017

the actuary should act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public, and should take reasonable steps to ensure that the **expert testimony** is not used to mislead other parties.

- 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.
- 3.3 Review and Compliance—In offering **expert testimony**, the actuary should comply with all rules of evidence and procedure and any other rules applicable in the forum. In addition, the **testimony** should comply with this standard, and the actuary should review and comply with any other applicable actuarial standards of practice, the Qualification Standards for Actuaries Issuing Statements of Actuarial Opinion in the United States and the Code.
- 3.4 Conflict with Laws and Regulations—If the actuary believes that a relevant law or regulation contains a material conflict with appropriate actuarial practices, the actuary should disclose the conflict, subject to the requirements of the forum, including without limitation all rules of evidence and procedure.
- 3.5 Conflict of Interest—The actuary should be aware of the possibility of conflict of interest, and should address any real or apparent conflict of interest in accordance with Precept 7 of the Code.
- 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).
- 3.7 Actuarial Assumptions or Actuarial Methods Prescribed by Law or Selected by Others—If the actuary performs calculations using **actuarial assumptions** or **actuarial methods** prescribed by law or selected by others, 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.

EXPOSURE DRAFT—March 2017

- 3.8 Hypothetical Questions—The actuary may be asked to answer hypothetical questions. Hypothetical questions may fairly reflect facts in evidence, may include only a part of the facts in evidence, or may include **actuarial assumptions** the actuary believes to be untrue or unreasonable. Subject to the 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**.
- 3.9 Testifying Concerning Other Relevant Testimony—Subject to the rules of evidence and procedure of the forum, when the actuary provides **expert testimony** concerning other relevant **testimony**, including opposing **testimony**, the actuary should testify objectively, focusing on the reasonableness of the other **testimony** and not solely on whether it agrees or disagrees with the actuary’s own opinion.
- 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.
- 3.11 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 **actuarial assumptions** or **actuarial methods** in the current situation, the actuary should be prepared to explain why.
- 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.
- 3.13 Limitation of Expert Testimony—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. If any constraints are imposed or expected to be imposed on the actuary’s ability to comply with the Code or other professional standards, the actuary should consider whether it is appropriate to serve or continue to serve as an **expert**.

Section 4. Communications and Disclosures

- 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.

EXPOSURE DRAFT—March 2017

- 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**.
- 4.3 **Communication 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.
- 4.4 **Additional Disclosures**—The actuary should also include the following, as applicable, in an actuarial communication:
- a. the disclosure in ASOP No. 41, section 4.2, if any material assumption or method was prescribed by applicable law (statutes, regulations, and other legally binding authority);
 - b. the disclosure in ASOP No. 41, section 4.3, if the actuary states reliance on other sources and thereby disclaims responsibility for any material assumption or method selected by a party other than the actuary; and
 - c. the disclosure in ASOP No. 41, section 4.4, if, in the actuary’s professional judgment, the actuary has otherwise deviated materially from the guidance of this ASOP.

Appendix

Background and Current Practices

Note: The following appendix is provided for informational purposes, but is not part of the standard of practice.

Background

Since the standard was first adopted, actuaries have become increasingly active as expert witnesses, appearing in a greater variety of venues and addressing an expanding range of topics. As actuaries have become more knowledgeable about providing expert testimony, the need for educational material has lessened to some degree.

Current Practices

Actuaries may be called upon to give expert testimony concerning a broad range of issues. These include, without limitation, matters such as the following:

- a. actuarial present values of retirement or other benefits;
- b. actuarial values incident to a divorce;
- c. adequacy or appropriateness of reserves, premium rates, pricing or underwriting procedures, or provision for administrative costs;
- d. cost impact of claims-made or claims-paid financing;
- e. cost impact of risk classification systems, tort liability decisions, or legislative/regulatory proposals;
- f. actuarial reviews of provider reimbursement amounts, provider network adequacy, provider comparison studies, provider quality reviews, and contractual provisions for various health care services;
- g. lost earnings of a decedent or injured person and the actuarial present value of such lost earnings;
- h. malpractice alleged of an actuary;
- i. relationships between risk and return on investments;
- j. value of an insurance company or other entity; and
- k. withdrawal liability assessments under multiemployer benefit plans.