

Comment #3 – 4/26/17 – 12:10 p.m.

Comments on ASOP No. 17 Revision, March 2017 Exposure Draft

Submitted by J. Patrick Kinney III, FSA, MAAA

April 24, 2017

These comments are submitted solely on my own behalf. General comments are followed by my specific reactions to certain sections of the Exposure Draft.

Comments on 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;

This exposure draft bends over backwards, through constant references to the rules of the forum, to remedy this perceived issue. It reads as if written by lawyers to remind actuaries that we are playing in their sandbox. It would be helpful if the Background section could be expanded to include an explanation for the addition of substantial legalese.

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

A need may have arisen for such protective language in Actuarial Standards of Practice, but the particular paragraph reads strangely and is not clear. See further comments below.

3. clarifying the scope.

The Scope section is insufficiently clear, for reasons I explain below.

Responses to Specific 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?

The "follow the rules of the forum" language throughout seems sufficiently general across practice areas.

2. Are there changes in current practice since the existing ASOP was adopted that are not reflected in this proposed revision?

Unknown. I can only assume that practice has been affected by legal issues in certain cases, based on the legalistic bent of this revision.

3. Is the scope clear and appropriate, including the specific addition of rate hearings?

No. The concatenation of “and in rate hearings” at the end of a long sentence in the Scope paragraph is awkward and confusing. Rate hearings are best covered by other Standards.

4. Is this ASOP’s proposed effective date of four months following the ASB’s adoption sufficient?

Sure. Unless there would be any issue with ongoing hearings that may be continuing across the effective date.

Comments on Specific Sections

Section 1.2 Scope

A) First of all, I applaud replacing the phrase “responsible creativity” with “innovation” in the third paragraph. Good call.

B) The first paragraph, quoted below, needs improvement. (Lest you think I am being overly picky, Google “oxford comma” and “court” for recent specific examples where ambiguous drafting led to trouble.)

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.

Ambiguity arises from the presence of too many clauses in this sentence. In particular, it is not clear whether the addition of the “and in rate hearings” after the preceding “or” list, refers the “and” back to “actuaries” or “actuaries who are qualified ... when they provide testimony.”

If it is the intent to include rate hearings in the list of forums wherein actuaries can be “qualified as experts”, a better construction would be to say “when they provide testimony in rate hearings, court hearings, ...”. This may well be applicable when an actuary testifies as an outside expert to offer an independent opinion on a rate filing.

But: Does this standard apply to all actuaries providing testimony at rate hearings? Are actuaries in such hearings specifically “qualified as experts”? The latter term calls to mind the active legal process by which an expert’s qualifications are elicited (and potentially cross-examined) in an adversarial proceeding. In other words, here “qualified” is a verb rather than an adjective (as in “a qualified actuary”). I have not observed this to be the case in recent rate hearings that have been broadcast by insurance departments (e.g. LTC rate hearings in Pennsylvania and Maryland). Actuaries testifying as representatives of a company may not be considered “expert” witnesses in this case. Other Standards of

Practice regarding actuarial communication with regulators on particular topics would seem to be more appropriate guidance in this situation.

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.

I understand this sentence to mean that one may be an expert on some other, unrelated, topic in addition to being an actuary, in which case this standard will not apply. But a "qualified actuary" may be providing testimony other than as a legally "qualified" expert "under the evidentiary rules applicable in the forum". That situation is left ambiguous, and should be further clarified or left to existing Standards.

Section 2.5 Principal

This definition is a good example of legalese run amok. The former definition ("A client or employer of the actuary.") was succinct.

Section 3.2 Reliance Upon Attorney ...

- A) I suggest that this paragraph should be a sub-paragraph of §3.3 Review and Compliance. The logical flow of the Standard works better that way: First §3.3 says to follow the procedural rules, then §3.3(a) (i.e. relocated §3.2) says you can rely on the lawyer to tell you what those rules really mean.
- B) As written, the actuary may no longer rely on the advice of the principal herself; is this an intended change from the existing Standard?
- C) The third sentence, stating an actuary "is not responsible" for having followed the lawyer's advice, is a clumsy construction. Most likely the intent is to protect an actuary from adverse disciplinary proceedings, in which case "an actuary ...is not culpable" might be a better word. Most ASOPs describe what an actuary **is** responsible for; it seems strange to encounter the word "responsible" in this legalistic, exculpatory sense.
- D) What should the actuary do if a "judge, arbitrator, ... [etc.]" **does** determine that the legal (or other) advice the actuary is relying on is against the rules?

Section 3.8 Hypothetical Questions

Should say "... may include actuarial or other assumptions the actuary believes to be untrue or unreasonable." Unfortunately, our term of art introduces some confusion here. The current standard

does not restrict hypotheticals to only “actuarial assumptions”. An actuary should not be required to answer hypothetical questions based on any “unreasonable assumption”, whether actuarial or not.

Thank you for the opportunity to comment and hopefully contribute to the improvement of Actuarial Standards of Practice.

A handwritten signature in black ink, reading "J. Patrick Kinney III". The signature is written in a cursive style with a horizontal line at the end.

J. Patrick Kinney, FSA, MAAA