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Presentation of Canine Detection Evidence in Court

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Foreword

This technical report was revised, prepared, and finalized by the Dogs and Sensors Consensus Body of the AAFC Standards Board. The Dogs and Sensors Subcommittee of the Organization of Scientific Area Committees (OSAC) determined that Presentation of Canine Detection Evidence in Court should be established for evidentiary testimony.

The introduction of canines into policing in the United States in the latter part of the 19th century began largely to combat crime. Canines were used by patrol officers to track fugitives, and for crowd control. Changing social attitudes toward drugs and their control led to the use of canines to detect drugs. Many agencies also began to train canines to detect bombs and other chemicals in arson investigations.

Today, canines are utilized by local, state and federal agencies nationwide for a variety of purposes in criminal investigations, from tracking, trailing, and human scent discrimination, to substance detection. Such evidence is admissible in a majority of jurisdictions to not only establish probable cause (e.g., in the case of drug detection), but also to identify the perpetrator of a crime (e.g., in the case of human scent discrimination). This evidence, however, may be challenged in court. It is important therefore, to establish to the court the reliability of the canine team. When such evidence is also relied upon in part to prove the identity of the perpetrator, there must be other evidence to support the accuracy of the identification. The corroborating evidence need not be evidence which independently links the person to the crime. The evidence should be sufficient if it supports the accuracy of the scent discrimination.

As a general rule, each canine's ability and reliability is required to be shown on a case-by-case basis. This ability is a fact which, like other facts, may be proven by expert testimony. This testimony should come from the canine handler or trainer, or another qualified expert, who is sufficiently acquainted with the canine, the canine's training, ability and other indicia of reliability. If such person is able to demonstrate specialized expertise in the area of training, tracking or detection, or the operational performance of his or her canine, he or she is qualified as an expert to state an opinion as to the ability of the particular canine in question to perform the targeted task.

All hyperlinks and web addresses shown in this document are current as of the publication date of this technical report.

Key Words: Expert witness, courtroom, testimony, admissibility, reliability, evidence.

Table of Contents

1	Scope.....	1
2	Normative References.....	1
3	Terms and Definitions.....	1
4	Establishing Reliability.....	3
5	Preparing for Court.....	4
6	Qualifying as an Expert.....	5
7	Preparing for Expert Testimony in Court.....	6
9	Courtroom Decorum.....	6
	Annex A (informative) Bibliography.....	8

DRAFT

Presentation of Canine Detection Evidence in Court

1 Scope

This Technical Report provides information and guidance pertaining to presenting canine detection evidence in court. It includes an overview of issues to consider and a resource of relevant case law to assist the lawyer and the expert witness (e.g., canine handler, scientist) in the presentation of evidence in court.

2 Normative References

There are no normative reference documents, Annex A, Bibliography, contains informative references.

3 Terms and Definitions

For purposes of this document, the following definitions apply.

3.1

admonished witness

A witness that has been given specific directions by a judge regarding the testimony.

3.2

attorney

A person who is authorized to practice law in the relevant jurisdiction. As used in this Technical Report, "attorney" includes the attorneys of record for each of the parties to the litigation in which the canine handler or expert is involved.

3.3

certification

A process that attests to the successful completion of an examination of relevant skills for the canine team.

3.4

chain of custody records

The chronological documentation or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of physical or electronic evidence.

3.5

deployment

Assignment of a canine team in an operational environment.

3.6

distracting stimuli

Meaningful or meaning less blank target sources that prevents concentration or diverting attention.

3.7

expert testimony

The testimony made by a qualified person about a scientific, technical, or professional issue. An

expert is often called upon to testify due to his/her familiarity with the subject or special training in the field.

3.8

expert witness

A person who, under applicable law, is deemed qualified by virtue of their knowledge, skill, experience, training or education to testify in the form of an opinion.

3.9

maintenance training

Continuing training conducted beyond the initial training of a discipline, designed to maintain a level of proficiency by ensuring the team's capability to perform desired tasks.

3.10

masking odor/scent

The presence of an odor/scent that impedes detection of the target odor/scent source.

3.11

negative control or blank testing

A known odor /scent sample that is used to assess the canine's proficiency in a non-matching odor/scent scenario. The canine is expected to give a negative response.

3.12

operational experience

A person's years of training and experience related to mission specific objectives.

3.13

proficiency assessment/testing

An evaluation during training; a tool to assess a canine team's ability

3.14

reliability

The extent to which an experiment, test or measuring procedure yields the same results on repeated trials. Low probability of alerting to anything other than a target odor/scent and a high probability of alerting to a target odor/scent. Evidence that establishes a fair probability that a target odor/scent is present. The extent to which a measurement is repeatable and consistent and free from random errors. (See 3.90 consistency.)

3.15

scent

Volatile chemicals emitted from a live human that are perceived by the canine through olfaction. "Scent" has traditionally referred to human detection. "Odor" has traditionally referred to substance detection. (See Odor)

3.16

scent discrimination

Ability of the canine to use olfactory capabilities to differentiate one scent from another.

**3.17
substance detection**

Recognition and response to trained target odor.

**3.18
tracking**

The propensity or learned ability of a canine to methodically follow odor/scent on the ground (human/ground disturbance) by working the canine close to the pathway. Canines are not typically pre-scented on an object.

**3.19
trailing**

The propensity or learned ability of a canine to methodically follow the target scent. The canine may follow a scent plume which can either be airborne or settled on the ground/vegetation. The canine will use whatever technique to get them to the target most efficiently. Canines are typically pre-scented on an object.

**3.20
trainer/instructor**

Any member of a specific discipline who is in a situation of instructing any part of the canine handler team using established methods and validated training guidelines.

4 Establishing Reliability

4.1 Establishing the reliability of a canine team is a foundational requirement in cases where odor/scent evidence is sought to be introduced as evidence in court. The task of the canine handler is to provide all necessary information to the investigating agency and the attorney handling the matter concerning a specific canine taking part in a given activity (e.g., tracking, drug detection). The preliminary steps in the legal process of establishing reliability (documentation is required) follows.

4.1.1 Compile the canine team's maintenance training, proficiency assessments, and certification records.

4.1.2 Provide the canine team's relevant deployment results (affidavit or testimony protocols).

4.1.3 Document the collection of evidence where applicable using chain of custody records. The reliability of a canine team can be demonstrated by successful completion of initial training, maintenance training records and certification(s) as outlined below:

4.1.4 Initial and maintenance training records, should reflect the following.

- a) Odor/scent dispersion. Discipline-related training.
- b) The use of masking odors/scents or distracting stimuli or both.
- c) The use of varying training scenarios.
- d) Periodic canine team assessments, including but not limited to, blank testing, single blind/double blind assessments.
- e) The canine team's certification(s).

4.1.5 Operational deployment experience.

4.1.6 In determining the weight to be given to such evidence, the court will consider the training, proficiency, experience, and proven ability, if any, of the canine, its trainer, and its handler, together with all the circumstances surrounding the given activity (e.g., tracking, drug detection).

4.2 A canine team should be certified on an annual basis and will be valid for up to one year (365 days) and in turn proves the reliability of the team. Certifications are one factor, among many, that may be considered by the court in establishing reliability when a canine is being used as an investigative tool to develop reasonable suspicion, establish probable cause, or identify the perpetrator of a crime.

4.3 The purpose and practicality of a well-defined maintenance program is to ensure the continued operational proficiency of the canine team in the field.

4.3.1 Maintenance training is meant to improve and enhance the performance of the team. The written documentation of the canine's ongoing training is an important element in establishing the canine's reliability.

4.3.2 Maintenance training records document the type and amount of training that the canine team has undergone before and after the team's participation in the investigation (e.g., drug seizure, odor/scent identification).

4.3.3 Deployment or utilization records have limited utility in establishing reliability, other than demonstrating the operational experience of the canine team in the field. For example, records of outcomes from currency sniffs may be used to demonstrate the reliability of the substance detector canine in currency forfeiture cases.

4.4 Maintenance training issues that may arise in court include whether the canine is exposed to varying quantities of training substances, masking odors/scents and other distracting stimuli, negative controls/blank testing or blind assessments and various scenarios in its regular training regimen.

4.5 The greatest measure of the team's reliability can be found in documents reflecting the team's maintenance training, and results from canine team assessments and certification.

4.6 Records subject to discovery in court proceedings should be preserved by the canine handler, department, organization or agency, and /or copies provided to the investigating agency. Record retention policy shall be determined by the department, organization, agency guidelines. Those records should include training, certification(s), and other applicable records, up through and including the date of the relevant deployment.

5 Preparing for Court

5.1 It is recommended that the canine handler make available to the attorney handling the matter relevant documentation regarding the canine team in a timely fashion. The documentation should include updated copies of the team's resume, training records, results from canine team assessments, certification(s), deployment/utilization records, including confirmed case results, seizure records, up through and including the date of the relevant deployment, and any reports that may have been prepared concerning the team's participation in the investigation. If a person other than the canine

handler is testifying as an expert in the case, the expert should provide his or her resume to the attorney handling the matter and review all relevant materials prior to his or her testimony.

5.2 It is generally desirable for the canine handler or expert to meet with the attorney handling the matter before he or she testifies in court to discuss the training and experience of the canine team or expert, the circumstances of the case, the team's participation in the case and the canine handler or expert's opinion. The canine handler or expert should be prepared to discuss at length not only the canine's training and experience, but also his or her own training, education and experience, both in the classroom and in the field. Adequate time before the hearing should be set aside for this meeting.

5.3 It is not unusual to encounter attorneys who have little to no experience in the area of canine related evidence. It is therefore useful for the canine handler or expert witness to have a list of routine foundational questions that are commonly asked in court relating to the qualifications of the expert and canine team, the team's participation in the investigation, including collection, handling, and storage procedures that may have been utilized in any given case. The canine handler or expert witness should be prepared to address questions or objections that may be expected from opposing counsel during the expert's presentation and discuss them with the attorney handling the matter.

6 Qualifying as an Expert Witness

6.1 Canine handlers may qualify to testify as an expert in relation to the performance of their canine, as long as the canine handler can demonstrate sufficient training, education and experience in the targeted task (e.g., tracking, drug detection).

6.2 It is not unusual, however, for other professionals to testify as experts (e.g., scientists) in this area. Such an expert should be thoroughly familiar with the materials submitted by the canine handler.

6.3 Experts draw from a broad mix of education, training, and experience, and attorneys should try to bring out all three. Having acceptable technical qualifications allows the expert to testify in the form of an opinion and the attorney's role in court is to persuade the fact finder to give credence to the opinion. In this context, demonstrating that an expert is a specialist in the narrow issue before the court is more persuasive than just listing broad qualifications, no matter how impressive they may be.

6.4 General qualifications for experts include the following.

6.4.1 Specialized knowledge or skill; existing degrees, honors, licenses, practical training, years of experience, relevant teaching and writing, publications, professional internships or apprenticeships, duration of professional practice, and experience in the specific area that helps render the witness competent to offer an authoritative opinion on the subject matter at issue.

- a) Offices and memberships in professional societies.
- b) Previous experience as an expert witness.
- c) Practical experience.
- d) Knowledge and/or ability to explain what certification(s) means and what it took to obtain.
- e) Continuing professional training outside the job, and continuing task-related activities.

f) Relevant professional activities.

7 Preparing for Expert Testimony in Court

7.1 When called as an expert witness, the canine handler or other expert should be prepared to address the following areas in court.

7.1.1 Be thoroughly familiar with the canine-related odor/scent records in the possession of the attorney handling the matter.

7.1.2 Conduct a detailed analysis of the records, together with the canine's participation in the case.

7.1.3 Be prepared to render an opinion concerning the canine team's reliability and provide the basis for such opinion.

7.1.4 Consider preparing visual aids in order to illustrate the nature of the case (e.g., diagram of a track or trail), as well as any other aspect of the subject matter before the court.

7.2 A scientific expert should be thoroughly familiar with and be able to reference the latest literary sources and scientific findings (such as, quantitative data, results of experiments, etc.) to support the expert's reasoning and opinion.

8 Courtroom Decorum

8.1 If the court excludes witnesses from the courtroom, this means that, until excused as a witness, all witnesses will remain outside the courtroom except when testifying. The witness should wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. This rule also forbids admonished witnesses from discussing with anyone but the attorney the content of their prior testimony. If witnesses talk to the attorney about their testimony, they should do so outside the presence of other witnesses and jurors.

8.2 The witness should dress in a manner showing proper respect for the court. Business attire or duty uniforms are appropriate. Employing the proper dress code may accomplish more in conveying your professionalism than pages of even the best written documentation. The impact of the expert's opinion starts from the moment he or she enters the courtroom (i.e., his or her 'first impression').

8.3 The canine handler or other expert should be cognizant of the following when testifying in court.

8.3.1 Method of courtroom presentation—responses should be brief and concise; when receiving a question look at the attorney asking the question; when giving an answer look at the jury or the attorney who posed the question.

8.3.2 Pace of speech—in general, the pace of speech should be relatively normal; avoid speaking too quickly; your testimony should not seem 'rehearsed' or 'memorized'; you should be relaxed and natural.

8.3.3 Voice modulation—to emphasize the most important aspects of your testimony it often makes sense to use voice modulation or to pause before the most important statements. This allows the court and jury to focus on the expert and the information being delivered.

8.3.4 Vocabulary—when possible, avoid specialized canine industry terminology and technical terms unless an explanation in layman terms is provided.

8.3.5 References to literature—it is often necessary and helpful to make reference to literature and scientific studies to support certain statements or the expert’s opinion. If referencing such materials, it is critical to be accurate.

8.3.6 References to own experience or experiments—any experiments should have a sound scientific basis.

8.3.7 Always be familiar with and have a thorough knowledge of the factual aspects of the case at hand. Your answers are important and should be based on your knowledge of the case.

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Annex A
(informative)

Bibliography

This is not meant to be an all-inclusive list as the group recognizes other publications on this subject may exist. At the time this standard was drafted, these were the publications available for reference. Additionally, any mention of a particular software tool or vendor as part of this bibliography is purely incidental, and any inclusion does not imply endorsement.

1] ASB Technical Report 025, *Crime Scene/Death Investigation – Dogs and Sensors – Terms and Definitions*. 2017

SWGDOG documents can be downloaded from:

https://www.nist.gov/sites/default/files/documents/2018/04/25/swgdog_general_guidelines.pdf

<https://www.nist.gov/topics/forensic-science/dogs-and-sensors-subcommittee>

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