

Colorado lab report shows potential issues with testimony on blood-tests

By Jordan Steffen *The Denver Post* *The Denver Post*
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A former supervisor at the state's toxicology lab repeatedly boasted to employees that her testimony about blood tests for alcohol and drugs "stuck it" to defendants, according to an internal report from the Colorado Department of Public Health and Environment.

Defense attorneys say the accusation is just one example of the supervisor's long-standing bias toward prosecutors that led to potentially tainted testimony in scores of criminal cases.

The 37-page report paints a portrait of a lab supervisor who openly rooted for prosecutors, failed to adequately train employees and then pressured them to testify about procedures they were unfamiliar with.

Since the report was released by the attorney general's office in June, the state lab has suspended all blood-alcohol and blood-drug tests and outsourced samples to six private labs, something defense attorneys warn could delay lab results and stall hundreds of pending criminal cases.

The report did not name any employees, but defense attorneys have identified the supervisor as former toxicology lab director Cynthia Burbach, who retired before the report surfaced.

Burbach testified in more than 1,300 criminal trials, according to the report.

Experts warn that inaccurate or biased testimony can be particularly damning as jurors — saturated with crime shows and other media — now expect and give great weight to scientific evidence. Defense attorneys say Burbach's potential bias is just one of several longtime problems at the state lab that could affect criminal cases that went forth before the report was released.

The Public Health Department, which oversees the lab, announced the suspension of all blood-alcohol and blood-drug testing June 28, almost a month after the report was released. During the suspension, a total of 800 blood-drug and blood-alcohol samples will be retested.

Eight employees and one supervisor reported Burbach spoke negatively of defendants or defense attorneys, according to the report. Lab employees reported Burbach would return from testifying and make statements such as "I wiped the board with the defense attorney" and "I did great on that one. He's going to jail, and it's because of my testimony."

Burbach denied making the statements, and two employees said they did not feel the supervisor was biased toward prosecutors, according to the report.

But employees also said her testimony was often confusing and "erroneous" at times.

Juries in criminal trials expect prosecutors to introduce scientific evidence and may hold it against

them if they do not, said Lawrence Kobilinsky, professor of forensic science and chair of the department of sciences at the John Jay College of Criminal Justice in New York.

"There is an inherent trust in science," Kobilinsky said. "Any statements made on the stand with reference to science — whatever it is — has to be based on science alone."

In Colorado DUI cases, it is common for prosecutors to call a toxicologist or chemist to get results of blood tests into evidence, explain how the test was completed and what the results show, defense attorney Abraham Hutt said. Toxicologists may also give a range of how intoxicated or impaired a defendant may have been when the sample was taken, based on test results and other research.

Problems arise, however, when toxicologists go beyond what the test results show and give definitive answers about whether defendants were able to properly function or drive, Hutt said.

"Every test has a margin of error. Every test has something that makes it subject to being wrong or unreliable," Hutt said. "For a long time, testimony was being given that was taken as gospel."

Before the stoned-driving limit took effect in May, poor testimony was particularly devastating for cases involving defendants accused of driving while under the influence of marijuana, Hutt said. Without the new set limit of active THC — the psychoactive chemical in marijuana — drivers may have in their blood, juries were forced to rely on expert testimony to show when a driver was too intoxicated to drive.

The allegation that employees were not properly trained before they testified about how tests for blood-drug and blood-alcohol samples were completed is also alarming, Hutt said.

One lab employee, who was repeatedly called to testify, said, "I was trained how to perform the analysis after conducting a test, but I was not trained on what the analysis really meant," according to the report. Another alleged that lab employees were not trained on how to answer questions about how certain instruments work.

Robert Lantz, director of Rocky Mountain Instrumental Laboratories in Fort Collins, said his chemists must complete training and meet certain criteria before they run tests and are allowed to testify.

"If you don't understand how things work, you don't understand how they don't work, where the screw-ups happen," Lantz said.

The lab is one of six private labs testing additional samples during the suspension at the state lab. As the workload continues to increase, Lantz said it is possible that more chemists may be called to testify, but he would not require them to do so if they felt uncomfortable.

An ongoing audit by the Association of Public Health Laboratories is examining other issues identified in the report. The 800 retests may take up to nine weeks to complete.

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