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Ethics and the Document Examiner Under the Adversary System

Ethics play an important role in all branches of forensic science and, yet, until this year, the subject has received little attention within the Academy. It is doubtful that this omission has occurred because members do not recognize the importance of ethics, but rather that they assumed that most forensic scientists were guided by high ethical standards. But what are proper ethical standards for the forensic scientist, and especially for the document examiner?

If a forensic scientist is guided by the precept that the expert's purpose in the courtroom is to assist the trier of facts in understanding and interpreting technical or scientific evidence, most ethical questions are resolved. Under the American adversary system, though, experts are engaged by one or the other of the adversaries who considers that he is engaging an expert to help his cause. Does this background to courtroom work modify the forensic scientist's ethics? While it should not, it can have an eroding effect on ethical practices by misdirecting his emphasis. Can a code of ethics assist in lessening or eliminating this eroding effect?

This Academy, or forensic scientists as a whole, has no formal code of ethics, although members of the legal and medical professions have such guidelines within the broader field of their professions. Among forensic scientists who are not members of these established professions, the document examiner may be somewhat unique as he does have a written code of ethics. It may be interesting to consider what influence, if any, this code has had on document examiners as a whole.

In the late 1940s, the American Society of Questioned Document Examiners compiled a code of ethics.[2] Although it was intended specifically for members of the Society, it was also formulated to be applicable to the profession as a whole. Since this society was organized by a small group of senior workers who served exclusively as consultants, some sections of the code were directed to a consulting practice rather than public service. Nevertheless, the majority and the more important sections have universal application. It should be recognized as well that the code was compiled by men with extensive courtroom experience entirely within the American adversary legal system.

The fact that the code grew out of this experience is important. The authors had served frequently as expert witnesses employed by litigants eager to gain advantage from this testimony. They had encountered on more than one occasion those of a group of

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[2] The code was slightly reworded in 1951 and 1952 and was published with an introductory note in 1954. See Ordway Hilton and Clark Sellers, "Code of Ethics Adopted by Questioned Document Examiners," *American Bar Association Journal,* Vol. 40, Aug. 1954, pp. 690–691.

forensic experts who might better be described as forensic science advocates, individuals who endeavor to do the very best they can for their client's case and who in time develop a partial blindness to everything that might seem adverse. Certainly, this condition influenced the code of ethics which, in a measure, was intended to point document examiners away from such practice or any tendencies in that direction and toward the role of an impartial interpreter of the physical evidence contained within the documents. Has this code of ethics been effective in accomplishing this to any measure?

To accomplish this end, the code deals with the need for a scientific and conservative attitude on the part of the examiner, for an impartial, nonpartisan role in the courts, for competency, for treating all problems with equal thoroughness, and for a confidential relationship between the client and expert; it also offers guidance to the consultant on the ethical aspects of compensation.[3] Of these, some elements, especially competency, may seem to deal with matters which are not completely problems of ethics, yet all can be viewed from this perspective. There is a strong interrelationship between the first four considerations, a scientific and nonpartisan attitude, competency, and thoroughness in all matters. In the eyes of the authors of the code, strict adherence to this interrelationship would eliminate most conflicts between experts and produce fact-finding examiners.

These ideals are essential guides to truly ethical procedures, but they raise significant problems working as we do in the atmosphere of courtroom advocacy. There is the ever-present danger of partiality, of unconsciously becoming biased if one is not careful, regardless of whether one works in the public service dealing continuously with the investigation of crime and as a witness for the prosecution, or as a consultant in criminal matters dealing primarily with the defense. In other words, being a frequent part of one or another team of advocates can color one's approach to a problem. Furthermore, in civil matters, courts accept a reasonably certain basis for an opinion which falls well below the scientific measure of virtual certainty. Thus, one may become less objective and impartial. Accuracy and thoroughness may suffer.

Whether courtroom conflicts in expert testimony are a good measure of the effectiveness of this code of ethics or a measure of ethical standards in general may be questioned. But it does suggest one measure at least. Conflicting expert testimony in the questioned document field is widespread. Many want to dismiss it as the result of a witness who acts as an expert witness-advocate willing to emphasize any small point which might help his client and to ignore or explain away all contrary evidence in the document. But this is only a partial answer. Too often experts of relatively good standing appear on opposite sides apparently convinced that their view of the evidence is the correct one. While at times they may have based their opinion on different known writing which emphasizes somewhat different writing habits or variables, or one may have significant and rather controlling background information which was not made known to the other, there are still cases in which factors of an ethical nature are the principal cause of conflict.

Probably the more common cause is carelessness or lack of thoroughness on the part of document examiners. With a busy schedule the apparently unimportant matter at hand may be studied only in a cursory manner. High work volume plagues public experts in some laboratories. This, no doubt, is basically an administrative problem, but does the individual concerned stop to review a case carefully when his findings are leading to a court appearance? Certain of these public experts have contrasted their situation with private consultants, pointing out that their work load precludes the extensive time and effort which private experts can devote to important problems, in which fees can be commensurable with the extensive study and testing needed to solve the

[3] The Code of Ethics as it was further revised in 1972 to apply to members in public service appears as an appendix to this paper.

problem. The inference is that the public examiner's work involves less important matters to which only limited time can be devoted. But what is more important, the proper control of thousands of dollars or the guilt or innocence of an accused man?

There is no monetary measure for the damage done by false conviction of an innocent man, even though only a minor crime may be involved. Do minor criminal or civil cases warrant spending extra hours to check and recheck findings? Is the expert giving the best possible service in all cases irrespective of the importance of the matter?[4] Private consultants may be just as guilty of incomplete study and lack of thoroughness in minor civil litigation. No one should say that the public servant is the sole offender. Unfortunately, some minor cases hinge upon involved problems. Every examiner must seriously relate his laboratory work in all matters to the oath he takes when he appears in court and seek the whole truth in every problem.

Document examination requires that the examiner observe elements in the writing, typewriting, or other parts of the document to evaluate these and relate them to one another in a logical and scientific manner. This process can involve a series of critical judgment factors. In difficult problems not every examiner may reach the same opinion, especially as to the degree of certainty. How does he react in court when he has reservations, for example, as to whether the defendant can be identified as having prepared the fraudulent paper? He has recognized that there is a good deal of evidence within the documents which tends to connect the man to the crime, but it falls short of conclusive proof. The opposing expert testifies in a semiscientific manner, rejecting any factors which could preclude a positive identification as inconsequential. Does the first examiner then limit his doubts to overcome the oversights of his opponent, or does he present these limiting factors as partial doubts, even though he may feel that in the case at hand this correct presentation may not overcome his semiscientific opponent's positiveness?

Further evidence of the influence of the adversary system can be found by reviewing a series of reports of some examiners. These men, because of constant work with either prosecution or defense, have lost touch with the fact that all written and oral reports should be technically correct and conservative and strictly in accordance with the physical evidence.[5] There are certain law enforcement examiners who almost never exonerate a suspect, and various defense-oriented experts who fail to report positive identifications of any defendants. The report often will simply say no identification is possible, despite the fact that the evidence is sufficient for a positive opinion that the suspect did or did not write the questioned material. They not only have come to assume the attitude that positive opinions should only be rendered when favorable to their side of the case, but they also recognize in part that it takes a little longer to make sure that a man did not write the questioned signature than to say simply no opinion is possible when it becomes clear that he cannot be identified as the writer. Directly to the point, the code of ethics is actually saying that when the evidence establishes a clear identification or elimination, the report, as well as the testimony, should state this regardless of the client's interest.

As one looks at the forensic science scene, especially from the position of the document examiner, the availability of a code of ethics seems outwardly to have had little effect on the courtroom situation. Obviously, ethics is not a matter which can be legislated or controlled by rules. A code of ethics merely serves as a guide by which each individual worker can discipline himself. It is a reminder of how his practice should be conducted. It undoubtedly leaves a great number of very critical questions unanswered, for no code of ethics is capable of spelling out the exact procedure in every instance. In any profession, a basic statement of ethical procedures serves as a means of establishing

[4] See Appendix, paragraph 6 under Application, Code of Ethics.
[5] See Appendix, paragraphs 4 and 8, Application, Code of Ethics.

a model course, but there will always be those who will ignore it or look for loopholes by which it can be circumvented. The vast majority of workers will undoubtedly find value in having some document to which they can refer from time to time for a guide in the turmoil which at that moment appears to have been created for the forensic scientists by the adversary system of our courts.

With or without a code of ethics, the questioned document examiner can resolve most ethical problems both in and out of court by keeping in mind two factors. First, it is his function to assist the court in interpreting the physical evidence found in the document, and second, he is sworn to tell the truth, the whole truth, and nothing but the truth. If he continually strives to interpret accurately technical questions which arise about documents, and if in his reports and discussions with those interested in the case he acts as though he is governed by the oath administered as he takes the witness stand, he will fulfill the requirements prescribed by the code of ethics under discussion. Certainly, he will by his actions promote justice and increase confidence in the forensic sciences.

APPENDIX

Code of Ethics of The American Society of Questioned Document Examiners

Aims and Ideals/The American Society of Questioned Document Examiners has for its purpose the promotion of justice through the discovery and proof of the facts relating to questioned documents, and to maintain and advance the technical and ethical standards of the profession of Questioned Document Examination.

Application/In furtherance of these Aims and Ideals each member of this Society pledges himself to abide by the following rules of conduct:

1. To apply the principles of science and logic in the solution of all document problems and to follow the truth courageously wherever it may lead.
2. To keep informed by constant study and research of all new developments and processes in document examination, with a full realization that accuracy is possible only through competence.
3. To treat information received from a client as confidential; and when a matter has already been undertaken, to refuse to perform any services for any person whose interests are opposed to those of the original client, except by express consent of all concerned, or where required by established administrative procedure or by law.
4. To render an opinion or conclusion strictly in accordance with the physical evidence in the document, and only to the extent justified by the facts. To admit frankly that certain questions cannot be answered because of the nature of the problem, the lack of material, or insufficient opportunity for examination.
5. To act at all times both in and out of court in an absolutely impartial manner and to do nothing that would imply partisanship or any interest in the case except the proof of the facts and their correct interpretation.
6. To give the best possible service in all cases, irrespective of the importance of the matter, and to decline to act in any case in which surrounding circumstances seriously restrict adequate examination.
7. To charge for services, when serving as a consultant, on a basis which considers the extent and character of services rendered, the importance of the matter, and the relationship of the problem submitted to the controversy as a whole. Remuneration shall be fair and equitable considering all of the elements in the case. No engagement shall be undertaken on a contingent fee basis. Members employed by public agencies under an annual salary or contract shall be controlled in respect to monetary matters by policies within their organizations.
8. To make technically correct and conservative statements in all written or oral reports, testimony, public addresses, or publications, and to avoid any misleading or inaccurate claims.

9. To maintain a constant spirit of fairness, combined with high ethical, educational and technical standards, thereby promoting justice and creating increased confidence in the profession of document examination; and by exemplary conduct and scientific thoroughness carry out the Aims and Ideals of this Society.

(This revision of the Code of Ethics was adopted in August 1972.)

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