SPECIAL COMMUNICATION

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Ethical Practice in the Forensic Sciences—An Introduction

It is always difficult to function at the intersection of two disciplines, in this case, science and law. Science reaches tentative conclusions ever subject to change in the advent of the discovery of new data. The law would like definite conclusions in order to make definitive decisions, sometimes with literally life and death implications, necessitating opinions having "reasonable scientific certainty." However, there can be pressure to express unwarranted certainty not necessarily justified by the scientific evidence. In gray cases it may be tempting to give an opinion for the side doing the hiring or there can be subtle or not so subtle pressure to do so, especially if it involves pleasing an employer or could result in substantial sums of money for the "right" opinion.

There is also the hazard of confusing the forensic scientist's role with that of the attorney thereby obfuscating their widely disparate functions. The attorney does not take an oath to tell the truth and nothing but the truth unlike the forensic scientist. The attorney's job is to present the best possible one-sided case for the client whereas the forensic scientist's job is to present his/her honest expert opinion. Unlike attorneys scientific experts in court take an oath to tell the truth the whole truth and nothing but the truth. To the degree the court will permit it the scientific expert has an obligation to tell the whole truth and not a distorted portion of the truth, ignoring evidence that does not support the hiring side. Many cases do not go to trial but are settled by plea bargaining, or the cross examining attorney does not know the right questions to ask, so it is not necessarily sufficient to provide a one sided portion of the truth in a forensic report, being prepared to present the other side only if there is good skillful cross examination.

Unfortunately there are hired guns who like attorneys try to make the best case possible for whatever side hires him or her so long as it does not entail an outright lie or clear misrepresentation of data. The hired gun can slant opinions to favor the side paying his or her fee or salary and would be prepared to come to opposite conclusions depending on who wishes to do the hiring or who gets there first. The percentage of forensic scientists who function as hired guns is probably small and there is always the danger of considering the experts on the other side hired guns merely because they have honest differences of opinion. Yet unfortunately there are hired guns who give the ethical majority a bad name. The law is not always able to distinguish the hired gun from an honest expert and the pressures of forensic work often lead to a continuum of adherence to honesty and ethics among experts rather than a sharp dichotomy. The dividing line between placing a favorable "spin" on the data and distortion is often far from clear. However, the importance of the issue and the frequent ethical dilemmas should make all honest ethical forensic scientists concerned about raising ethical standards and not relegating ethics enforcement or even development of ethical standards to the legal profession. Courts may not be the best at distinguishing competence from incompetence, thorough evaluations from sloppy ones, honesty from dishonesty, legitimate reasoning and conclusions from emotional appeals to prejudice and sophistry, or legitimate science from quackery. Professional forensic scientific organizations could help the public, the courts, and the competent, honest, and ethical practitioner by providing guidance and setting standards in these areas. Judicial immunity for most forensic work removes malpractice litigation as an effective deterrent to negligent work so the remedies that discourage other forms of negligence may be ineffective. Even in cases of gross misrepresentation of data judicial immunity usually precludes a civil suit and criminal prosecution for perjury is rare.

The American Academy of Forensic Sciences does have an enforced Code of Ethics (1) but the hired gun problem remains an elusive one since subjective "opinions" and motives are not easily discernible. A Task Force on Ethical Guidelines has been formed to explore this issue as well as others such as whether the Academy should enter into questions of competence or negligence. Under scrutiny are issues such as:

The advantages of considering competence and negligence are: 1) If we do not police ourselves others will do it. 2) Incompetent and/or unscrupulous or negligent forensic scientists such as "hired guns" impact negatively upon the entire profession, giving a bad name to honest, ethical, competent and conscientious scientists. 3) Judicial immunity for testimony and generally for most forensic work prevents legal negligence and malpractice from being an effective tool for raising standards. 4) A "hired gun" may have good credentials and not misrepresent data or expertise but may draw totally unwarranted conclusions, or may do an inefficient or sloppy job.

The disadvantages of considering competence and negligence are: 1) It would be a most difficult job for the ethics committee requiring extensive lengthy input from each section regarding each discipline's view of competence and negligence. 2) For those members who are in professions in which either licensing boards or professional organizations have jurisdiction, those bodies most likely are in a better position to judge competence in a specialty. Also, ethical sanctions can apply despite judicial immunity. 3) Vigilance is essential to continually guard against labeling legitimate differences of opinion as unethical.

The existence of the Academy's Code though important does not mean that anyone who is not found in violation of it lives up to the highest ethical standards. That would be like saying that

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anyone not found guilty of a criminal offense is thereby proven to be innocent. Ethical Code violations provide the floor for minimally acceptable ethical behavior and not standards for the highest ethical behavior hopefully exhibited by the most respected leaders in the field. In addition to a Code for punishment consideration also should be given to the development of a Positive Aspirational Code (2) to help forensic practitioner decide the right course of action when ethical dilemmas arise or when a forensic scientist of the highest caliber is struggling to decide the best course of action.

An aspirational code would represent a standard of excellence and not cause for punishment often either because of the impossibility of total compliance or because it is impossible to decipher the motivation behind the certain actions by a forensic scientist. Instead they would be positive standards for which the best practitioners should strive, such as considering all relevant data, keeping up to date, striving to reach an objective opinion, etc.

Conflicts of interest would be possible considerations for additions to our Code. In this area attorneys are often more sensitive than scientists who may believe in their capacity nonetheless to maintain scientific objectivity. In this area appearance of a conflict may be almost as important as a real conflict because of the bad impression it can give of the profession. Although striving for objectivity in forensic science is essential I agree with the late Bernard Diamond (3) that impartiality is impossible and usually dishonest to claim. We all have our biases. Even in the unlikely possibility that we have no biases about a specific case at the start the power of the adversary system will make us want "our side" to "win" or at the very least to defend the legitimacy of our work and our opinion.

It also is essential to follow the relevant ethical codes of the pertinent scientific discipline. Forensic ethical requirements should be in addition to the ethical requirements of the respective scientific discipline and not be in opposition to them or in conflict with them Therefore violation of the scientific discipline's ethics might well also be considered a violation of the Academy's ethics.

Our Academy is one of the relatively few scientific societies that not only has a Code of Ethics but also has the ability to enforce it. It is obvious that no Ethics Code, even an expanded one, can cover all questions and situations involving guidance about the right thing to do. Conflict can occur even within ethics. Deontological (duty) requirements can conflict with consequentialist considerations. For example, convincing the public that every criminal is swiftly caught and severely punished may be the best way to stop crime. In the service of this single noble goal it might be helpful to select an unpopular person at random, perhaps a former criminal or a member of an unpopular minority group, quickly convict him, and execute him before he has an opportunity to convincingly persuade anyone of his innocence. It might achieve the goal of dramatically decreasing crime if the public could be convinced of the legitimacy of the process. It takes deontological notions of justice, honesty, and fairness to convince us that there is something wrong with this plan and the deontological considerations in this case should outweigh and overrule the purely consequentialist concerns. Sometimes the right decision is not clear and there can be legitimate differences of opinion.

The purpose of the following papers is to encourage you to think about various aspects and implications of ethical codes of conduct. There are rarely simple answers, and some scientists and ethicists find the challenge too great and will do their best to avoid courtroom involvement. However, doing so deprives the legal system of the expert knowledge necessary to arrive at a truly fair just decision. It is my opinion and I am sure the opinion of other forensic scientists that the difficult is not the impossible and part of the challenge of forensic science is to confront these ethical challenges and determine the proper ethical and scientific course of action in a specific case. Most cases of course do not lead to ethical conflicts but those that do provide important challenges. These situations require more than a knowledge of a Code that can only be a start by delineating clear unethical behavior. Complex cases often should require consultation with respected members of the profession known for their sensitivity to ethical issues. Sanctions after the fact are not helpful here and guidance is needed before the practitioner acts. In cases in which there are legitimate differences of opinion various actions could be ethically permissible.

Our goal in this series of papers is to disseminate knowledge of approaches not only to help practitioners stay out of trouble (a basic minimum) but also when faced with a challenge to be able to think out oneself dilemmas about the right thing to do. Because no ethical code can address all contingencies it becomes essential to learn to think out ethical problems yourself. Philosophers with their experience in analyzing complex problems can assist us in that process. In my opinion the greatest danger in confronting these dilemmas is to think that complex problems have simple answers or that the only ethical concerns are how to stay out of trouble or avoid ethical sanctions.

References

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