

SPECIAL COMMUNICATION

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Comments from the Perspective of the AAFS Ethics Committee Chairman*

Some of us are lawyers. We are informed they have a code of ethics. Doctors, dentists and other professionals have theirs, too. Those among us who work in fields without formal codes are still obliged to act ethically. But when we come together in the American Academy of Forensic Sciences, we take on a special group identity: we are all expert scientists and witnesses devoted to developing and presenting scientific evidence and opinions in the administration of justice. Though our efforts and focus are as diverse as our sections imply, each of us seeks to be heard and believed, compelling the creation of a code applicable to all of us. I chronicled the origin of the Academy's code in 1986 (1). I propose now to describe how it has functioned for the first 20 years.

Section 1(b): "Every member of the AAFS shall refrain from providing any material misrepresentation of education, training, experience or area of expertise."

This is the most frequently abused part of the code. When members seek to be heard and believed, they are obliged to announce their expert status, "Look who I am, my opinion counts." Section 1(b) attempts to curb overenthusiastic assertions of status. Some members have alleged possessing baccalaureate degrees or certificates never obtained, participating in training programs never attended, and performing deeds never accomplished. The Ethics Committee views these assertions critically. In scientific performance, there is little room for personal puffing. Even half truths, in terms of accomplishments, may lead to penalty.

Experts must keep their cool, so to speak, even in the heat of cross-examination. If opposing counsel tries to elicit specific statements concerning training and experience, the expert must be accurate. Guessing at dates and programs attended inaccurately constitutes misrepresentation of status, even though not uncovered during the testimony. If the expert cannot be accurate concerning his background, he should say so, or refer to documents. He should not try to cover his track record with ambiguous attempts to look good before the judge or jury.

There is a difference between an affirmative assertion ("I am a member of the Specialty Board," when in fact he is not) and an affirmative response (Counsel: "Are you a member of the Specialty Board?"; response: "Yes," when in fact he was not). The Ethics

Committee has occasionally excused the latter, but only when subsequently corrected, or when it has occurred only once. A pattern of repetitive misstatements by way of affirmative responses may be viewed as violations of Section 1(b).

This section is not limited to testimony. An expert who fails to utilize standard scientific techniques and methodology applicable to his area of expertise misrepresents his own expertise. The Ethics Committee utilizes consultants to determine what is expected of people who profess to be experts in a particular field. A person who claims expertise in ballistics is in trouble if he fails to use proper tools and methods. There may be room for disagreement in some of the exotic fields, but to date the Committee has had little difficulty with the issue of scientific technique and methodology.

There is a difference between nonuse (*supra*) and misuse (negligence/incompetence) of scientific techniques or methodology. A member of the Academy who fails to use required methodology misrepresents his area of expertise if he tries to render opinions in that area (even though his opinion may be correct, but for the wrong reason). On the other hand, misuse of appropriate procedures or methodology out of carelessness or incompetence does not necessarily qualify as a violation of the code. This has been confirmed by the Academy's Board of Directors at the annual meeting in New York (1997). It is conceivable that nonuse of mandatory techniques/methodology could arise from professional incompetence, but the Committee has not yet been confronted with that issue.

Standing alone, incompetence has been a difficult concept to fit within the existing code of ethics of the Academy. It is true that an applicant to the Academy professes to be competent, but he is not tested as part of his acceptance. The last sentence in Section 1(b) states: "Misrepresentation of one or more criteria for membership in the AAFS shall constitute a violation of this section of the code." But does this section give the Academy the right to test a member's competence after acceptance, and penalize him for misrepresentation if he turns out to be incompetent? The Board of Directors (1997) has delegated that issue to a special committee for determination. It is my belief that problems of incompetence should be resolved by education, not by penalty.

Section 1(c): "Every member of the AAFS shall refrain from providing any material misrepresentation of data upon which an expert opinion or conclusion is based."

How can an expert misrepresent the state of his evidence? One way is to overstate it by asserting that the evidence means more

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than it really should. For example, "I am absolutely certain that A equals B" probably misrepresents the status of that conclusion. Opinions about most scientific matters should not be expressed in terms more secure than *reasonable* scientific certainty.

Another way is to provide an opinion that is unsupported by the evidence. In a sense, this is another form of overstatement, even though the witness presents his opinion in terms of reasonable scientific certainty. This constitutes misrepresentation of data, unless the opinion is based on negligence or incompetence. But a pattern of overstated opinions (repetitive) may constitute misrepresentation even though the expert subsequently claims those opinions were negligently made.

The Ethics Committee has not hesitated to appoint consultants to assist in technical determinations of the validity of data and the propriety of opinions based on these data. The Committee is not limited to the expertise of its members.

Section 1(a): "Every member of the AAFS shall refrain from exercising professional or personal conduct adverse to the best interests and purposes of the Academy."

This section measures a member's performance against the interests of the Academy as a whole: Is the Academy embarrassed by the member's conduct? The Committee has answered, yes, under special circumstances: (1) When a member forges or tampers with evidence; (2) when a member has used drugs to the extent that it interferes with professional performance or when convicted of a crime involving drugs; and (3) when a member is convicted of any other crime related to professional performance. This is a list

of cases already determined. There are other yet unlisted circumstances that may warrant invocation of Section 1(a).

Section 1(d): "Every member of the AAFS shall refrain from issuing public statements which appear to represent the position of the Academy without specific authority first obtained from the Board of Directors."

In earlier days of the Academy some members were concerned that a few officious volunteers were attempting to speak for the Academy. This section put a stop to such conduct, to the extent that it existed. Since 1976 there have been no accusations invoking this section, nor does the Committee expect any. The Academy is much too large now for anyone presumptuous enough to speak for it without prior authority.

Conclusion

The Academy's code of ethics has proved efficient and effective. It is neither perfect nor all-encompassing. It has been a good first step. Whether we should go further is open to discussion.

Reference

1. Code of Ethics for The Academy, *J Forensic Sci* 1986 July; 31(3): 798-9. Editorial.

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