Ethics: Codes of Conduct for Expert Witnesses

Introduction

It is universally understood that, in the practice of their professions, forensic scientists are required to refrain from unethical practices, but what is “unethical” is often difficult to determine. By what standard is the ethical nature of one’s conduct to be measured? The very first source of information of what is considered unacceptable professional behavior is the code of ethics of the professional association to which one belongs. Most forensic membership groups maintain a code of ethics [1]. Since many scientists belong to more than one society, the person’s conduct may be governed by several different codes of ethics that may not necessarily look similar. All of them, however, make engaging in ethical conduct a requirement of belonging to the association and provide sanctions for violating the professional standards of conduct.

In addition to defining unprofessional conduct, codes of ethics also typically contain procedural mechanisms whereby purported unethical conduct is to be investigated and, if appropriate, sanctioned. Such sanctions can run the gamut from a mere reprimand to expulsion from membership in the organization. This may, at times, be accompanied with loss of license, accreditation, or board certification. Since the law in common law countries tends to view membership in a professional association as a valuable property right, the mechanisms whereby a person is stripped of that right must comport with procedural safeguards against abusive and otherwise improper exercise of the power to sanction. Because of the great variety of mechanisms, this article does not concern itself with the “due process” aspects of procedures that seek to enforce the ethical injunctions imposed upon an association’s membership. This article is confined to a general overview of what conduct may be regarded unethical.

The conflicts between the codes of various groups are at times de minimis, but one must, nevertheless, remain sensitive to the fact that wide differences in approaches to ethics can exist. Some scientists who must possess a license to practice their profession granted by governmental authorities in some countries – i.e., medical doctors, dentists, psychiatrists, psychologists, etc. – may see their licenses jeopardized if found to have been sanctioned for unethical professional behavior.

Professionals may also belong to specialty boards with different ethical codes, such as that of the generalist group, as well as the codes of ethics promulgated by specialty boards. The same is true of the members of virtually every specialty group within the forensic sciences.

Finally, it should be remembered that, in addition to the sanctions that can be imposed by a professional society upon its own members, there is a “common law” of ethical conduct as well. Violating these common law prohibitions against unethical conduct, usually involving professional conduct that includes deception, fraud, overreaching, perjury, or behavior merely considered to be dishonest or inequitable, whereby either the public or society, in general, is injured – as by engaging in “negligent” professional conduct – may expose a forensic scientist to civil legal sequelae in damage actions as well as potential criminal liability for perjury or fraud. These are sanctions that professional societies cannot impose. Even the expert witness who does not belong to an organization that has a mandatory code of conduct may be subject to such legal actions. Potential liability of this sort falls within the area of “professional malpractice” for either intentional or unintentional (negligent) conduct – tortious conduct – as defined by applicable law.

Defining Ethics

The existing ethics provisions in forensic science vary greatly in how the terms “ethics” or “unethical conduct” are defined. Some list specific prohibitions, others frame ethical principles in terms of aspirations. How these rules can be applied in specific fact settings is not always clear. Outside the legal profession, most professional societies do not publish compilations of ethics complaints that were decided by its boards. Additionally, while general ethical principles may be listed, the manner in which ethics codes have been applied in illustrative cases may remain obscure to the membership.

In general, the professional codes of conduct devote much more space to outlining the procedure to be followed when an accusation of questionable ethics has been made, than to the definition of ethics
itself. Perhaps that is understandable because notions of fair play and clear advance notice of what conduct is complained of, require provisions that outline the process of enforcing codes in more elaborate terms. The notion of “due process” that pervades the forensic sciences, because of its close connection to civil and criminal litigation, of necessity requires it to exemplify fairness in the application of its rules of conduct to its members.

**Defining Prohibited Conduct**

The definition of what constitutes unacceptable expert behavior is stated, in some ethics codes, only in general terms. Other codes go into great detail about the type of conduct that it requires of its members. Perhaps the majority of codes of conduct define ethics in terms of prohibitions. An example of the broad general approach is that of the American Academy of Forensic Sciences (AAFS), which contains just four general prohibitions:

```
a. Every member . . . shall refrain from exercising professional or personal conduct adverse to the best interests and purposes of the Academy. The objectives stated in the Preamble to these By-Laws include: promoting education for and research in the forensic sciences, encourage the study, improving the practice, elevating the standards and advancing the cause of the forensic sciences;
b. No member or affiliate . . . shall materially misrepresent his or her education, training, experience, area of expertise, or membership status within the Academy.
c. No member or affiliate . . . shall materially misrepresent data or scientific principles upon which his or her conclusion or professional opinion is based;
d. No member or affiliate . . . shall issue public statements that appear to represent the position of the Academy without specific authority first obtained from the Board of Directors”.
```

It is understandable that required conduct provisions of a society such as the AAFS, which gathers under its umbrella members who are engaged in a wide variety of different disciplines, be fairly general. It is impossible to describe specific instances of prohibited conduct when the organization contains a broad spectrum of specialties, each of which may also be subject to ethics codes within its own specialty.

An example of a code of professional conduct that is more explicit in terms of prohibited professional behavior is the American Board of Criminalistics (ABC) Rules of Professional Conduct which, in Article IV.5.d of the bylaws, enumerate 18 specific mandatory rules of behavior that its members “shall” obey. Unlike the AAFS code, it enjoins members to report to its Board any violation of the rules by another applicant or diplomate.d The ABC rules place a great emphasis on impartiality and integrity when dealing with evidence,e and prohibit members from using “techniques and methods that are known to be inaccurate and/or unreliable”.f Considering that users of a technique will invariably advocate its reliability, there may, nevertheless, be an important segment within a profession that frowns upon use of some methods of analysis, which they consider to lack reliability. One wonders how controversies on those issues can ever be effectively resolved.

**Defining Ethical “Aspirations”**

Rather than defining the prohibited conduct, the approach within some professions is to define appropriate professional conduct in terms of the aspirations toward which its members should strive. The Code of Conduct of The Forensic Science Society in the United Kingdom is an example. It states that members have a duty to

```
“... conduct themselves honourably in the practice of their profession
 - promote to the utmost of their power the interests of the Society * * *
 - have special regard at all times to the public interest and to the maintenance of the highest standards of competence and integrity * * *
 - only undertake any forensic activity commensurate with and in the field within which they are registered or accredited by the Society”.
```

Some groups eschew categorizing any specific instances of unprofessional conduct or the categorization of “standards” of behavior. An example of such a group is the American Psychological Association (APA), which describes the “Ethical Principles of Psychologists and Code of Conduct” into five rather wordy aspirations, wherein a full paragraph of text each is devoted to Beneficence and Nonmaleficence; Fidelity and Responsibility; Integrity; Justice; and Respect for People’s Rights and Dignity. The APA code then elaborates on these aspirations in more than a dozen pages of ethical standards stated in broad, generalized concepts.\h
While flexibility in terms of expected professional aspirations are the norm in the behavioral sciences, similar approaches are taken also in some organizations that deal with the physical or comparative sciences. The International Association for Identification (IAI) Code of Ethics is not worded in terms of prohibited conduct but is, instead, worded in the form of a personal pledge of good behavior that its members publicly affirm. Its true “code” of prohibited conduct then follows as “Standards of Professional Conduct.”

Similarly, the code of ethics of the Northwest Association of Forensic Scientists lists series of ethical considerations relating to five different categories: those relating to the scientific method, to opinions and conclusions, to aspects of court presentation, to the general practice of forensics, and to the profession.

The importance of a thorough familiarity with a profession’s ethics rules is particularly crucial because potential legal sequelae may follow from proven unethical conduct. When legal actions for damages are brought against forensic scientists based on either negligent or willful conduct, or when a prosecution for criminal conduct is initiated, whether the activity that is the subject of the complaint is considered “ethical” or in accord with “professional standards” may well be taken by courts as depending on what conduct the applicable professional society expects of its members.

Fact Settings Presenting Potential Ethical Problems

Fact settings in professional practice that may involve ethical problems fall within certain categories. While clear authority for each fact setting may be difficult to provide, the experience of persons serving on ethics committees may serve as a guide.

A first type, and perhaps the most frequent complaint lodged against experts is in regard to inaccuracies in the way they represent their training, education, and experience. Misrepresentation of this sort may occur in statements made in a public forum (in speeches, on websites, or in correspondence), or in drafting curriculum vitae that are disseminated to potential clients and courts. If the inaccuracies simply amount to exaggeration that can be justified as “puffing,” the perceived inaccuracy will not necessarily be considered an unethical practice. More often, the assertions are made in support of establishing the expert’s competence and qualifications in depositions or in court testimony. If the misrepresentation is deemed significant and occurs at a time the expert is giving sworn information to a court, whether in a deposition or testimony, the expert may also be subject to criminal prosecution for perjury, or in damages in a civil suit by parties injured or aggrieved as a result of willful misstatement of one’s background and experience.

Examples of misstatements that are normally considered material and significant would be to assert having received credentials (diplomas, academic degrees, board certifications, and honors), which were not, in fact, obtained. In this same category, fall claims of membership or of a category of membership status for which the expert has not been qualified.

A second category of ethical complaints, and one that is more fraught with enforcement difficulties, encompasses assertions that a person was incompetent when he engaged in a certain examination. In many disciplines, it may be disputed whether a particular methodology leads to reliable or repeatable results. When a method is fairly novel, there exists a danger in prematurely using an unproven method as the basis for expert opinions in court. Influential people in a discipline may assert that the method was not properly validated and that, consequently, reliance on test results produced by such methods is evidence of incompetency. Because of the difficulty of defining “competency,” some associations refrain from entertaining complaints based on incompetency altogether, especially if the organization has fairly rigorous standards for admission to membership and the person complained of has met these criteria.

Lack of established reliability or inability to establish method validation has become a more frequently litigated issue in courts as a result of court decisions and other legal provisions, which place restrictions on opinion testimony based on unreliable processes or technologies.

A third category of potential problems has to do with fraud and deceit in such areas as misrepresenting data examined, results obtained, or in testifying to conclusions that are not supported by the examinations conducted. While fraud and deceit typically connote willful conduct, certain acts of omission may be placed in this same category – allegations that a person did not use recommended or standard methods...
which the profession recognizes as valid and routine for a specific purpose.

Finally, there exists a category of potential ethical conflicts that do not fall within the above categories, such as those arising from conflicts of interest or violation of confidentiality rules. Alleged unethical conduct in these areas often depends on existing law on conflicts of interest and confidentiality in the jurisdiction where the conduct arose.

Sanctions Against Experts for Unethical Conduct

Most, but not all, ethics codes provide for a gamut of potential consequences that befall a member found to have violated its ethical provisions. The sanctions range from measures that may be seen by the public as a simple “slap on the wrist,” such as a reprimand (whether oral or in writing), to the more serious ones, which encompass public censure, suspension of membership for a stated period of time, or expulsion. Where applicable, the most severe sentence of expulsion may also be accompanied by a revocation of credentials or professional certifications.

The imposition of severe sentences against professionals such as membership suspension or expulsion can be imposed only if a procedural code exists which affords due process to the accused member. Due process typically requires notice of the specific charges brought, presentation of evidence at a hearing at which the accused is permitted to attend, confront the charges against him, and present evidence to rebut them. It also typically requires the complaining association to carry the burden of proving that the violation occurred, though the quantum of proof is by no means uniform.

In some codes, the quantum of required proof of unprofessional conduct must be “beyond a reasonable doubt,” though, more typically, ethics provisions require that unprofessional conduct be established by either the greater weight of the evidence or, at most, by clear and convincing evidence. Some ethics codes permit the member against whom the complaint is filed to be assisted by legal counsel at the hearing. Some codes also make provisions for a right to appeal an ethics board decision to the entire membership of the organization.

Since the imposition of a severe sanction may impair the ability of the member to engage in his profession, especially when an expulsion also has the effect of revoking the member’s certification, courts whose power was thereafter invoked by the expelled member have insisted that the procedure, whereby the expulsion was effectuated, comported with due process of law. In deciding such lawsuits, when the procedural aspects of the ethics codes were found to satisfy notions of fairness and fair play, courts tend to be deferential to the professional society’s factual determination of unprofessional conduct.

Conclusion

If professional societies intend to retain the power to sanction conduct of their members that is deemed unethical, the rules of professional conduct must be described with particularity so as to provide adequate notice to its members of the type of conduct that is deemed unacceptable. The process by which violations of the codes of professional conduct are to be enforced must also comport with basic notions of fair play and due process.

End Notes

a. For example, Medical examiners will belong to generalist countrywide, state or local medical societies, such as the American Medical Association (AMA), and further be subject the professional rules of conduct of the National Association of Medical Examiners (NAME), the American Board of Forensic Pathology, and the Pathology-Biology Section of the American Academy of Forensic Sciences.

b. See, in this regard the related article on Malpractice of Experts.

c. The Code of Ethics and Conduct is contained in Article II of the group’s Bylaws. See, 2007 DIRECTORY OF MEMBERS AND AFFILIATES– AMERICAN ACADEMY OF FORENSIC SCIENCES, p. 222. The version printed herein was as modified at the Annual Meeting of the membership in Washington, D.C. on February 20, 2008. It will be noted that subsection a. appears to be a catch-all provision that may be difficult to enforce for lack of specificity. Both subsections b. and c. deal with misrepresentations, but the addition of the word “material” may also make it difficult to know in advance when a misrepresentation might not rise to the level of materiality.

c. Subsections 3–5 require members to treat objects of potential evidential value with care so as to ensure their integrity, provide appropriate technical analysis while following the necessary standards and controls.

f. Subsection 6. Emphasis is placed elsewhere on the duty not to “exaggerate, embellish or otherwise misrepresent qualifications,” (sub. 11) and “maintain an attitude of independence and impartiality in order to ensure an unbiased analysis of the evidence” (in sub. 14).

g. http://www.forensic-science-society.org.uk (accessed on, 2008) See also the provisions of The International Institute of Forensic Engineering Sciences, Inc. (IIFES), which, in defining its Rules of Professional Conduct, lists 11 aspirations in positive terms rather than in prohibitions. The 11 provisions are: “1. Be aware of ones [sic.] own professional and technical qualifications in dealing with each case, and address only those factors that are within ones [sic.] own expertise and competence. Seek the assistance of other qualified experts whenever necessary. “2. Treat ones [sic.] own personal integrity with great respect, and never do or say anything that might compromise that personal integrity. This entails not only saying the truth at all times, but also giving due weight to all pertinent observations and facts. “3. Treat all information from a client, agency, or any other exclusive source with the confidentiality required. “4. Treat every object or specimen of potential evidential value with the case and control necessary to preserve its integrity. “5. Utilize the appropriate standards and controls in conducting examinations and analysis. “6. Render opinions and conclusions strictly in accordance with the evidence in the case and only to the extent justified by that evidence. “7. Maintain an attitude of independence and impartiality in order to ensure an unbiased analysis and presentation of the evidence. “8. Carry out the duties of this profession in such a manner as to inspire the confidence of the public. “9. Respect ones [sic.] peers in this profession and regard them with the same standards that one holds for oneself. “10. Report to the IIFES board any violation of these rules by any other person who is accredited by the board. “11. Refuse to accept, on a contingency fee basis, any assignment involving opinions, conclusions, or expert testimony intended for use in arbitration and/or litigation.” See, http://www.iifes.org/ethics.htm (Last visited, Feb. 11, 2008).


i. The Code of Ethics of the International Association for Identification is printed on page 1 of the 2008 IAI Membership Directory. It provides: “As a member of the International Association for Identification, and being actively engaged in the profession of Scientific Identification and Investigation, I dedicate myself to the efficient and scientific administration thereof in the interest of Justice and the betterment of Law Enforcement”. “To cooperate and others in the profession, promote improvement through research, and disseminate such advancement in my effort to make more effective the analysis of the expert”. “To employ my technical knowledge factually, with zeal and determination, to protect the ethical standards of the profession of Scientific Identification and Investigation”. “I humbly accept my responsibility to Public Trust and seek Divine guidance that I may keep inviolate the Profession of Law Enforcement.” This “Code of Ethics” is then followed, on page 2, by a series of nineteen specific instances of mandatory conduct that are titled “Standards of Professional Conduct”.

j. See, in this regard, the related articles on Admissibility of Expert Opinion Evidence (Expert Opinion in Court: a Comparison of Approaches; Expert Opinion: United States; Expert Opinion in Court: Civil Law Jurisdictions (France, Germany, Italy, and Spain); Expert Opinion: United Kingdom, Canada, and Australia) and on the influential court decisions in Daubert v. Merrell Dow Pharmaceuticals Daubert v. Merrell Dow Pharmaceuticals and in Kumho Tire v. Carmichael [514].

References


[2] A different, but related, form of “unethical” conduct of this nature exists when experts, in their student days, are shown to have resorted to falsification of data, plagiarism, or other fraudulent practices in academic pursuits. When these practices are discovered years later, experts may suffer the added consequence of seeing their earned credentials revoked for fraud. See, Johnston, R.G. & Oswald, J.D. (1998) Academic dishonesty: revoking academic credentials, *Journal of Marshall Law Reviews* 32, 67.

ANDRE MOENSSENS