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E23 Disclosing Information: Ethics for the Forensic Scientist

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This presentation will address the ethical obligations of scientific witnesses to “refrain from providing misrepresentation of data upon which an expert opinion or conclusion is based.” Through the use of case examples of forensic reporting and testimony, including cases where questionable forensic reporting and testimony contributed to wrongful convictions, the presenters will address problems forensic scientists face when they attempt to comply with their ethical obligations.

The cases of *Brady v. Maryland* and *Kyles v. Whitley* establish a duty upon a prosecutor to disclose to the defense any evidence, which tends to negate the guilt of the accused. This means that the prosecutor has a duty to learn about favorable evidence known to others acting on the government's behalf in the case, including the police. The question thus becomes, what kind of burden does this place upon forensic scientists.

According to the AAFS Bylaws, the ethical obligations for forensic scientists are, by their nature, generally applicable statements of proper conduct: “[AAFS members] shall refrain from providing misrepresentation of data upon which an expert opinion or conclusion is based.” (Article 2, Section 1(c)) Each time a scientist authors a report or testifies, questions arise concerning how much information a scientist must volunteer in order to comply with this ethical obligation.

A series of case examples will illustrate that forensic scientists at times fail to report weaknesses, shortcomings, and/or alternative explanations of the data. In some of these cases, the failure of the forensic scientist to disclose faulty forensic data has contributed to wrongful convictions.

Some scientists and commentators see it as the lawyers' problem to deal with: the adversarial process presumes that well-informed attorneys with equal access to resources will sift through the forensic evidence and present a fair and accurate view of the scientific evidence. This view is exemplified by the comment, “If the attorney had asked me the right questions, I would have divulged the information.” This proposition ignores the fundamental reality that most lawyers do not understand forensic science. They rely heavily upon the government forensic scientists to explain and interpret it for them. Budgetary constraints mean that defense counsel will not have access to an expert to help them interpret scientific evidence in every case, and must be selective in the use of their resources.

As forensic evidence, in particular DNA, becomes more prevalent in the courtroom, this reality will become a more common phenomenon. A lawyer who cannot effectively question a lab analyst has and will continue to lead to innocent men being convicted. Consequently, the forensic scientist often acts as gatekeeper to knowledge for both the prosecution and the defense. This makes them unique among witnesses, and forces them into a tough position in the adversarial system.

Moreover, as expert witnesses, the courts give them more leeway, allowing their testimony to include hearsay, opinions, and other ordinarily inadmissible forms of evidence. Thus, they are treated differently than an ordinary witness. This is why they have a Code of Conduct that lay witnesses do not have.

Questions addressed in this presentation are, How much candor are government forensic scientists ethically bound to show? Do they have to point out all of the weaknesses and shortcomings in the lab-work, and in the science itself? Are they to reveal all possible interpretations of the data?

Presumably the ethical duties of a forensic scientist spring from the ASCLD-Lab Code of Ethics, and the AAFS Code of Ethics and Conduct, and the Codes of ethics of the respective regional organizations. Reading these only gives one a general outline of what should be required. There is no set body of law on how this duty is interpreted. Looking to the case law of the Attorney Model Code of Ethics may give guidance to what the scope of this duty should be, notwithstanding the obvious differences of their respective roles.

An ethical duty of candor to all sides should arise from the moment that the lab work has been performed. Any ambiguities or quirks in any of the testing should be noted in detail in the initial report. Too often the report would not indicate that these types of problems are deeply buried in highly technical lab notes that require an expert to decipher.

This duty should continue into the trial itself. The witness should not view themselves as a witness for either side, because when they do that, the forensic evidence can get shaded, and the truth can be lost. Only through fully transparent conduct by these important witnesses can it be certain the truth comes out.

Expert Witness, Ethics, Disclosure