



Questioned Documents Section – 2010

J26 Expert Witnesses: Lawyers' Ethical Obligations Under the Rules of Professional Conduct

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After attending this presentation, attendees will understand the ethical rules for attorneys that impact their interface with expert witnesses, what attorneys can reasonably expect of expert witnesses and what experts, in turn, have a right to expect from the attorneys with whom they work.

This presentation will impact the forensic science community by serving as a guide for both attorneys and expert witnesses for the ethical preparation and presentation of expert testimony in court, as well as the proper recourse for expert witnesses when ethical violations occur.

In recent years, members of the forensic science community have expressed dissatisfaction over unethical and unprofessional conduct on the part of the lawyers with whom they work. Some commentators have proposed a special Code of Conduct for lawyers when dealing with forensic experts; others have suggested the need for an Expert Witness Bill of Rights.

On February 18, 2009, the National Research Council of the National Academies released a report entitled *Strengthening Forensic Science in the United States: A Path Forward*. While the committee was critical of a number of forensic disciplines, the legal system was also roundly faulted for its shortcomings:

...the adversarial process relating to the admission and exclusion of scientific evidence is not suited to the task of finding "scientific truth." The judicial system is encumbered by, among other things, judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner...

The problems are real. Lawyers often build their cases around evidence they do not understand and put experts on the witness stand without adequate preparation. Some lawyers engage in procedural gamesmanship and attempt to delay or deny their opponents access to the factual and scientific foundation of experts' proffered opinions. Others go so far as to mischaracterize their experts' conclusions and deceive the court and opposing counsel with false or misleading exhibits.

What many in the forensic science community do not appreciate is that existing Rules of Professional Conduct already address these situations. Rather than develop new codes and standards, what is needed is scrupulous reporting and enforcement under existing rules.

The American Bar Association's Model Rules of Professional Conduct serve as the template for the ethics rules adopted in most states. A number of these provisions bear directly on the practices complained of within the forensic science community:

Rule 1.1 - Competence

A lawyer shall provide competent representation to a client. Competent representation requires...thoroughness and preparation reasonably necessary for the representation.

Rule 3.3 - Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal ...
- (3) offer evidence that the lawyer knows to be false...

Rule 3.4 - Fairness To Opposing Party And Counsel A lawyer shall not:

- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party...

These brief excerpts demonstrate that incompetence and unethical practices are cause for action against the licensure of attorneys under existing professional legal standards. What is lacking is widespread enforcement of the rules. It is the ethical obligation of both legal **and forensic science professionals** to report violations. The lawyer who "can't even spell DNA" is no laughing matter; while a phenomenon that is all-too-common, such lawyers represent a serious failure within our system of justice and must be called to task.

Ethical Obligations, Experts, Attorneys