C11 Incompatible Codes of Ethics and Inherent Conflicts Between Lawyers and Their Expert Witnesses

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After attending this presentation, attendees will receive observations about attorney/expert incompatibilities from an attorney- physicist who has been noting them for 35 years. The objective is to sort out conflicts between lawyers and experts when they work together.

The presentation will impact the forensic science community by making practitioners aware of those incompatibilities which are resolvable so that they can resolve them and those that are not so that they can be aware of them.

This presentation highlights the conflicts between the two types of practitioners, identifies those that appear insurmountable, and suggests ways to ameliorate the rest.

Aside from personality conflicts, most problems between forensic experts and their lawyer-clients are traceable to their radically different codes of ethics. Lawyers are obliged to provide the best representation possible for their clients consistent with the law. They are not permitted to suborn perjury; however, short of that and with the exception of prosecutors, they have no obligation to the truth. It is not a violation of legal ethics for a lawyer to shop for experts, a specialist who will say the "right thing," regardless of the lawyer's suspicion that the "right specialist" may be incompetent. Once a case is underway, the lawyer is not seeking the truth but rather trying to establish his or her client's theory of the truth. Indeed, for a lawyer to reveal too much truth at trial can be a violation of legal ethics. The reasons for these ethics rules are fundamental to our system of justice; in following them, lawyers are acting perfectly honorably.

Scientists are ethically obliged to tell the truth. They not only must not tell lies, they must avoid making deliberately misleading statements. Most scientists also have an urge to clarify, to explain, and to ensure that the other person understands. They therefore have a difficult time complying with the standard instruction lawyers give their witnesses before trial or deposition: *Your interrogator is neither your friend nor your student; just give the simplest, briefest answer to the questions and do not answer questions not asked.* President Clinton, in his Paula Jones deposition, showed how *not* to comply with this instruction, and suffered as a result. Asked, "Is there a… relationship between you and Ms. Lewinski?" he tried to help out his hostile interrogator, responding with his famous "It depends on what the meaning of "is' is." The correct response would have been "No," leaving it up to the interrogator to sharpen up his questions. Some scientists—as well as probably most laypersons–believe that this approach is lying by omission and therefore unethical. Moreover, they assert that it is a deliberate attempt not to tell the whole truth and therefore a violation of the witness's oath. Those scientists generally do not serve as expert witnesses.

It is difficult for scientists first encountering the legal system to accept the fact that certain phrases have taken on secondary meanings. The oath to tell "the truth, the whole truth, and nothing but the truth," if interpreted in the manner that most not familiar with the system do, would lead to the conclusion that the majority of witnesses testifying under oath are committing perjury. As a practical matter, only the first and third parts of this ritualized recital mean anything in court. There is another ritual phrase, one pertaining just to expert witnesses, that is even more removed from the meaning assigned it by the non-legal world. The experienced expert witness knows that he or she must answer affirmatively to questions of the form: "Is this your conclusion to a reasonable (medical, engineering, scientific…) certainty?" Unless one's conclusion relates directly to a fundamental law of science or the like, the most one can say about it is that it is far more probable than not. "Certainty" is a foreign concept with respect to what most specialists spend their lives doing, no matter how successfully.

A scientist documents what he or she is doing while carrying out a professional investigation by recording all the facts that have apparent relevance to the investigation, by describing the actions taken by the investigator in the course of the investigation, and by memorializing his or her tentative conclusions. When confronted by an edict to put nothing in writing, the honest professional usually is at a loss. While it is understandable that the lawyer hiring the expert wants to avoid paying to create material detrimental to the underlying case, this particular edict hamstrings the specialist. Moreover, it can leave the expert in an untenable position months or years later at trial trying to support his or her conclusion without any documentation to support it. Indeed, not have documented an investigation is so unprofessional and inimical to its quality that acceding to this edict would appear to be unethical on the part of the scientist.

Although few trial lawyers go so far as to direct their experts to make no fields notes, many try to restrict the experts' reports, even sometimes demanding that there be no written report. Field notes and an oral conclusion are all that is wanted. As litigation strategy, this may make sense, and it certainly is not unethical for either the lawyer to request no written report, or for the scientist to accede to the request.

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However, the experts generally do not like it, and for good reason that should convince lawyers as well.

The "no written report" demand may appear to arise from, at best, lawyerly superstition and, at worst, a wish to submerge the truth. While both motivations do appear, there is another, one that is the result of the adversarial legal system. It is in the nature of this system that one's legal adversary will seize on anything that appears to undercut one's case, something that regrettably leads to a great deal of demagoguery in litigation. Anything in an expert witness's writing that has the slightest appearance of contradicting the expert's conclusions may be, and often is, used to attack the expert and through the expert, the lawyer's case. An expert who is prepared can fend off these attacks. However, from an economic standpoint has (both in terms of time and in terms of expense) dictates that such discussions be avoided completely if possible–a special case of the rule that far better than successfully defending a lawsuit is not having to deal with it in the first place.

Although from the perspective of legal *ethics* the "no written report" rule has nothing wrong with it, from the legal *strategy* perspective, it has two very serious flaws. The less important is occasioned by the delays that drag out litigation. Not having prepared a detailed written report places the expert in the position of either being vulnerable at trial or of having to carry out the investigation all over again, and under less propitious conditions than existed the first time around. An added benefit of having a detailed expert report early in litigation is that through being deposed on it, the expert is in a better position to defend the report's reasoning at trial. These benefits should be clear to everyone, regardless of whether they have a scientific education or bent.

The more important reason for permitting, encouraging, the expert to prepare a formal report has to do with how scientists work. For all but a few, it is during the writing of a formal report that scientists do the final testing of their ideas. It is when they realize which of the elements of their theory are not adequately supported, giving them the opportunity to seek better support or, if necessary, discard them. How much better for this to happen months or years before trial than when the expert is under cross-examination on the witness stand!

The "no written report" trial lawyers appear to be getting few in number, and may disappear completely if and when the anticipated reforms in forensic practice take place. Nevertheless, probably a majority of them are afflicted by what may be called magic-words- phobia. Most scientists, and lawyers, too, when they are writing internal memos, feel compelled to present the full picture, the full array of facts underlying an incident in litigation. Invariably, some facts will exist that appear to undercut the scientist's theory, whether he or she is analyzing a murder case or seeking to explain an electron paramagnetic resonance spectrum. To simply ignore those facts is to stop short of completing the job. They need to be stated and, if possible, an explanation provided as

to why they do not torpedo the theory being presented in the conclusions section. Yet lawyers repeatedly will ask the consultant to not even mention the inconvenient facts, regardless of how small a fraction of the total picture they represent or, and this is the crux of the scientist's annoyance, no matter how well known those facts are to everyone concerned with the case. Refusing to mention inconvenient facts known to all is a form of superstition, or at the very least, the reasoning of a child: "If I don't mention that it is sleeting, maybe we will go on the picnic after all." This reluctance to mention inconvenient facts is traceable to the adversary nature of the system, and is understandable in that context. The scientist; however, feels put in the position of trying to slip one over when these facts are passed over without mention.

Another source of experts' annoyance with the lawyers they consort with is the failure of the latter to believe them. Although trial lawyers (a category which, contrary to the propagandized image, includes civil defense lawyers as well as plaintiffs' lawyers) are an unusually intelligent bright, ethical group, a pleasure for scientists to work with, there remain a few for whom superstition or perhaps pessimism trumps analysis. They are the lawyers who demand that their experts not carry out tests that the expert has explained will demonstrate the ridiculousness of the adverse expert's theory: "What if it turns out that they are right?"

Finally, with respect to lawyers' flaws, mentioning those people who do not understand their own case well enough to rehabilitate their expert after he or she has had to endure a series of "yes or no" questions that on their face make the expert witness appear ridiculous. A lawyer is not ready for trial until he or she is ready to do expert rehabilitation following a series of bogus "yes or no" questions.

Looking in the other direction, lawyers appreciate experts who understand the basics of the American trial system. Hard as it is to fathom, there are university professors and others who, after decades of testifying in court, are still unsure in a civil case as to which side is the plaintiff and which the defendant. Then there is the seriously incompetent expert witness who, rattled on cross, and responds to an apparently reasonable request for technical information: "I have absolutely no idea."

Ethical Conflict, Experts, Lawyers

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