

**ETHICS IN FORENSIC SCIENCE
AND MEDICINE**

ETHICS IN FORENSIC SCIENCE AND MEDICINE

Guidelines for the Forensic Expert
and the Attorney

Edited By

MELVIN A. SHIFFMAN, M.D., J.D.



Charles C Thomas
P U B L I S H E R • L T D.
SPRINGFIELD • ILLINOIS • U.S.A.

Published and Distributed Throughout the World by

CHARLES C THOMAS • PUBLISHER, LTD.
2600 South First Street
Springfield, Illinois 62794-9265

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ISBN 0-398-07024-5 (cloth)
ISBN 0-398-07025-3 (paper)

Library of Congress Catalog Card Number: 99-047828

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*Printed in the United States of America
SM-R-3*

Library of Congress Cataloging-in-Publication Data

Ethics in forensic science and medicine : guidelines for the forensic expert
and the attorney / edited by Melvin A. Shiffman.

p. cm.

Includes bibliographical references and index.

ISBN 0-398-07024-5 (cloth) -- ISBN 0-398-07025-3 (paper)

1. Evidence, Expert--United States. 2. Forensic sciences--Moral and ethical aspects--United States. 3. Medical ethics--United States. I. Shiffman, Melvin A.

KF8961 .E86 2000
347.73'67--dc21

99-047828

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PREFACE

The attorney utilizes and depends upon the expert witness in many instances to establish various aspects of a legal matter. Selection of the expert must be done cautiously because a critical aspect of the case may hinge upon the ability of the witness to present clearly and convincingly an interpretation of the facts.

The honesty and integrity of the forensic expert is an uncontrolled parameter in the field of litigation. The individual expert must evaluate data and testimony, extricate the facts, and come to opinions which are logical, truthful, and untainted by even a hint of bias. Dealings with those involved in the process of utilizing an expert should be aboveboard and the forensic scientist must not be swayed to stretch the truth.

At times the "truth" can be a tenuous term. There are various shades of gray in the interpretation of so-called facts which must be extricated from volumes of records. The training, education, skill, and experience of the forensic expert is utilized to interpret the facts to a legal forum in a clear, logical, and concise manner.

This book attempts to identify areas of ethical behavior to which the forensic expert should adhere and their effects on the attorney's case. The contributors bring their expertise and experience to educate the forensic expert and the attorney in the pitfalls of forensic science and medicine.

MELVIN A. SHIFFMAN, M.D., J.D.

INTRODUCTION

Physicians and forensic scientists who become directly involved as expert witnesses in civil and criminal litigation, whether as an independent consultant, treating doctor, or government forensic specialist, must always be cognizant of ethical considerations in their relationships with attorneys, other experts, and litigants. It is not sufficient to assume that because you are an “ethical, honest person,” your conduct in medicolegal matters need not be a matter of special concern. The interface of law with medicine and science has its unique aspects, the ignorance of which can be fraught with hazard for the naive acolyte. Manipulative, opportunistic lawyers—let alone unethical and deceitful practitioners—can lead an unsuspecting scientific expert into a potentially dangerous situation that could result in personal embarrassment, professional organizational disciplinary action, or even formal legal charges.

Most ethical problems arise because the physician or forensic scientist fails to keep in mind some basic, rather obvious, simple tenets. If you are a treating doctor, your primary responsibility flows from the physician–patient relationship and its mandates, namely, confidentiality, timely release of clinical information when requested by the patient or his authorized attorney, and a reasonable effort to cooperate with legitimate demands of the judicial system relating to your patient’s medical condition. If you are an independent consultant, you should deal only with the attorney or agency that has retained you. You are not at liberty to disclose information, disclose records, or even engage in discussions with opposing counsel

unless you have been asked and authorized to do so by the attorney who consulted you, or you have been ordered to do so by the court.

If you are a governmental forensic scientist, and if your involvement in a particular case emanates from official work that you did in the course and scope of your employment, then the situation becomes more complex. Are you an elected coroner or appointed medical examiner? Is there legislation or executive statute or regulation that defines to whom you may release copies of the postmortem protocol and other lab reports? If you are going to be testifying as a forensic pathologist for the prosecution in a homicide trial, are you ethically permitted or obliged to discuss your autopsy findings and opinions with defense counsel if such a request is made? If you are a criminalist (in any of the various specialties), and you work in a local, regional, or state “crime lab,” should you consider yourself at all times as an adjunct of a law enforcement agency and an arm of the prosecutor’s office? Under what circumstances, if any, are you ethically constrained to disclose information about scene investigations, test results, etc. that might tend to be exculpatory, and which the defense attorney knows nothing about?

Depositions and trial testimony present their own special problems for the inexperienced and unsuspecting scientific expert. The philosophical and pragmatic differences between the academic disciplines of law and the medical/biological/physical sciences are at no time and place more apparent than during the course of a trial, especially a complicated, multifaceted personal injury action

(e.g., medical malpractice, products liability) or a controversial, much-publicized criminal case (e.g., murder, rape, child sexual abuse).

The physician and forensic scientist have been trained to seek the correct answer, i.e., the "truth." There is no adversarial approach in the resolution of a scientific problem (although there may be more than one universally acceptable modality, e.g., Salk vs. Sabin vaccines to prevent polio; radical vs. simple mastectomy for breast cancer, etc.). Scientists in our country have great difficulty, intellectually and viscerally, in understanding and appreciating that our legal system is not necessarily or solely designed to learn the truth about some particular matter, but rather to ensure that "justice" is served. In a divorce action, a malpractice case, an unnatural death—what is the truth? Who determines, with unquestioned certainty, what the actual facts and events were at a given moment in time?

Physicians and forensic scientists whose professional endeavors bring them into the legal arena—voluntarily or unsolicited, happily or resignedly—must come to realize that they are playing by a different set of rules, in an unfamiliar forum, and with people who may not show them the respect and deference they are accustomed to in their own professional milieus. Even ordinary interpersonal civility may be eschewed by some attorneys and judges, and there is really nothing that can be done about it.

For the most part, being honest, forthright, personable, properly respectful, and even gracious will usually enable you to get your message across to a jury. Although you are not an adversary, you should not permit an aggressive, bullying lawyer to make you equivocate or waffle in your opinions if you genuinely believe them to be valid. You should not allow your own attorney or opposing counsel to carry you into areas

beyond your expertise, either in your emotional zeal to aid a litigant or social cause you are strongly sympathetic to, or in your anger after being goaded and assailed to lash back at a litigant or concept that you have developed great hostility for.

It is neither feasible nor desirable to have courts or state legislatures implement rigid rules and regulations regarding the use (and abuse) of medical and scientific experts in the civil and criminal justice systems. There are too many intangibles and subtle variations that could not be anticipated or clearly defined. It is essential that judges and attorneys keep in mind that they, too, have a critical role to play in this ongoing human drama, and they should behave in a fair and ethical manner in their treatment of expert witnesses. Obviously, they will not be obsequious or even solicitous, but they can be decent and courteous. After all, the non-litigant expert witness is a "guest" who has been invited into their house to assist them in accomplishing something that a democratic, civilized society expects—a fair, honorable, and honest quest for justice (and hopefully, in most cases, the "truth").

Physician-attorney Melvin Shiffman and his eminent colleagues have compiled an excellent book that sheds much light and pearls of practical wisdom for physicians and forensic scientists who become involved as potential experts in the legal system. If the ethical precepts and professional guidelines that Dr. Shiffman and his fellow authors have set forth were to be adhered to by all their peers, as well as by trial attorneys who need and rely upon such experts, then the pursuit and dispensation of justice would be much enhanced.

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**ETHICS IN FORENSIC SCIENCE
AND MEDICINE**

Chapter 1

HOW TO SELECT AN EXPERT

MELVIN A. SHIFFMAN

SOURCE

There are many ways to find an expert in a specific specialty or field, however, the first decision the attorney must make is which specialty or field. In some cases multiple experts may be necessary to analyze and testify to each of the factual aspects of the case. In an auto accident case, a physician can evaluate the injuries, causation, and medical damages, an accident reconstructionist may be able to show fault, and an

economist can evaluate financial losses.

Once the type of expert is decided upon, there are various methods of finding that expert.

SERVICES: There are businesses that advertise in law journals (Fig. 1-1 and 1-2) and at meetings that will obtain an expert in the field desired. There is a cost for the service as well as for the expert.

“Medical Malpractice Verdicts, Settle-

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The Network of Transportation Safety & Compliance Professionals providing Consultation Services & Expert Testimony in the Following Areas:

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- Reasonableness of Truck Driver's Actions
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- Loading & Load Securement Requirements

V. Paul Herbert, Director

Former Truck Driver, Highway Patrolman, Trucking Company Safety Director and Executive. Certified Practicing Safety Administrator, Certified Master Instructor for the Commercial Driver License Program, Truck Accident Reconstructionist and Consultant Providing Safety & Compliance Services to the Transportation Industry.

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Figure 1-1. Service for expert witnesses in the transportation industry.¹

Credible.

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California physicians have more credibility with California juries. We have more than 900 California physicians who have agreed to review your malpractice case, and if it has merit, testify for you. Plaintiff or defense.

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Figure 1-2. Service for expert medical witnesses.²

ments & Experts”⁴ publishes yearly a list of experts in the cases reprinted. This can be very helpful in finding an expert in a specific field.

PERSONAL ADVERTISING: Individual experts may advertise in journals (Fig. 1-3) and at meetings. Care must be taken with these “professional” experts since the opposing attorney may attempt to show that this expert makes his living on testifying, which may modify the value of the expert’s testimony in the eyes of a jury.

OTHER ATTORNEYS: An attorney friend may be able to advise regarding a specialist who has already been used in other cases. This is an opportunity to obtain firsthand information on the qualities and the negative aspects of the expert.

LITERATURE: There is an advantage to seeking forensic experts from publications such as books or journals. There may be

authors available in the field desired or even in an obscure aspect of the field. The advantage is that the expert’s opinions may already be in writing.

PHYSICIANS: Physicians that are known by the attorney may be contacted for their opinion as to who is an “expert,” or at least highly knowledgeable in the medical specialty desired.

INDUSTRY: When an expert is needed in the sciences, direct contact with one of the businesses dealing in that field may be helpful.

Laboratories may have knowledge of a toxicologist or forensic pathologist and an auto manufacturer may have access to the names of experts in auto mechanics and design.

UNIVERSITIES: The academician, especially the chairman of a department, will hold some stature in the eyes of a judge or

BIOMECHANICS EXPERT and MEDICAL DOCTOR

DAVID M. McCANN, M.D.

Can analyze and testify on Accident, and how it caused, (or did not cause), injuries. *** Two Experts for the price of one! *** Medical Doctorate and B.S., M.S. Engineering, 13 years with General Motors (2 patents), ER Trauma experience, Internal Medicine & Musculoskeletal injuries, 2,000+ Muscle/skeletal and Neurological Injuries in private practice.

- * Analysis of Accident & Medical Records
- * Calculations of Speeds & G Forces
- * Were seat belts worn?
- * Are injuries reasonable?
- * Effects of pre-existing conditions?

I.M.E., Q.M.E., American Academy of Disability Evaluating Physicians; Member, American Academy of Forensic Sciences; Diplomate, American Board of Forensic Medicine, Society of Automotive Engineers.

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Fax: 1 (916) 988-0782

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Figure 1-3. Individual advertisement for biomechanical expert.³

jury. However, in medicine, many times the academician may not be fully aware of the standards of practice in the community and may even have a bias against community practitioners.

PRIOR EXPERTS: Care must be utilized in

continuously utilizing the same expert time and again. Although the opposing attorney may try to show that this expert is friendly to the lawyer, the qualities and abilities of the expert are best appreciated with repeated experience together.

QUALITIES

Before hiring an expert, what does an attorney have to look for? First obtain a curriculum vitae and a schedule of fees.

FEES: Costs may be a deciding factor in hiring an expert, especially for a plaintiff's attorney working on a contingency basis. Some experts charge outrageous fees and

should be avoided. It may be advisable to obtain an estimate from the expert of the time needed to evaluate the records and place a reasonable limit on the time in writing. Beware of the expert who seems to add hours to review records in comparison to other experts' reviews of the same records.

KNOWLEDGE: Initial contact with the expert should dwell upon knowledge in the specialty or field desired by the attorney. Questions to be asked, if not contained in the curriculum vitae, should include years in the specialty, years of experience in forensics, and publications.

Find out if the expert has been sued in similar factual situations. If this has occurred, his opinions may be discounted by the jury.

DEMEANOR: The forensic expert may have to testify in front of a jury, judge, or arbitrators. The attorney should evaluate the following characteristics:

- a. Appearance
- b. Clear and understandable speech
- c. Capability of explanations in lay terms
- d. Attitude toward the case and the individuals involved

EXPERIENCE: Find out how many cases have been reviewed in the past, as well as how many depositions and trials in which the expert has been involved. Experience allows experts to adjust to the legal aspects and maneuvers that may occur in the legal forum.

PUBLICATIONS: It takes time to write an article or a book and the author should know his subject thoroughly. It also impresses a judge or jury if the opinion on the subject

has been published by the expert in a peer reviewed journal.

UNIVERSITY AFFILIATION: University affiliation may impress a jury but most lay persons do not know the difference between a professor, associate professor, or a clinical professor. Find out what the expert really does in the way of hands-on teaching, actual experience in the area of needed opinion, and knowledge of community standards of practice.

ETHICS: It is essential that there has been no prior ethical misconduct. Contacting previous attorneys who have utilized the expert can be helpful to obtain information concerning ethical behavior.

LEGAL PROBLEMS: An attorney must be aware of all situations which may be detrimental to the expert's credibility. Although prior lawsuits are not likely to be allowed into evidence at trial except as they may pertain to the involved case, this information should be elicited. Since the opposing attorney may very well investigate the expert's background, it is essential to obtain information from the National Data Bank and the state medical board.

AVAILABILITY: Make sure the expert will be available at the time of trial and also will make himself available for deposition.

HANDLING THE EXPERT

Send all records pertaining to the case to the expert. A chronological summary of the case may be helpful in a complicated case. Do not withhold information even though it may save money. The first thing the opposing attorney will ask at deposition is, "What records did you review?" At trial it may be intimated that the expert did not review or have knowledge of certain crucial information before formulating his opinion.

Try to meet with the expert prior to deposition and trial. Discuss the expert's views on the case. Present your views and approach to the case. Find out if the expert has any suggestions for questions which might be asked of the opposing experts. This gives the attorney an opportunity to evaluate demeanor, knowledge, and communication skills.