Forensics & Ethics: The Pathologist as Expert Witness

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How important are ethics in today's society?
Ethics

- Philosophy of moral aspects of behavior
- Theories of values
- Standards by which one can evaluate and ensure appropriateness of certain practices
- Options and alternatives for dilemma resolution
- Does *not* decide absolutely
- Differs from laws and religion that provide definite and absolute rulings

Medical Ethics

- Guidelines by physicians re ideal relationships to peers and patients.
- Ethical principles applied to clinical practice situations.
- Biomedical ethics: all fields of health professions
- Concern for medical ethics:
  - laws
  - decrees
  - oaths prepared by and for physicians

- Code of Hammurabi (Babylonia approx 1750 BCE)
- Charaka Samhita - one of the main texts of Ayurveda ("science of life") - "The Medical Students' Oath of Ancient India."
- The Oath of Hippocrates (460-377 BCE)
- Thomas Percival (1803)
  - *A Code of Institutes and Precepts Adapted to the Professional Conduct of Physicians and Surgeons*
Professional Behavior

- A question of character – and doing one’s duty without being supervised
- More than GPAs, Boards, degrees, publications, positions

Professional Behavior

- Each patient a whole, irreplaceable, unique, and worthy person
- Patient’s safety and health and the truth shall be protected, not subordinated to any end
  - Organizational, staff, education, research

Professional Behavior

- Dignity
- Responsibility
- Commitment to service
Unprofessional Behaviors

- Rudeness/condescension
  - Irresponsibility
    - Unreliable attendance
    - Poor follow-up
- Diminished capacity for self-improvement
  - Failure to accept constructive criticism
  - Argumentativeness
  - Poor attitude

- Felony convictions
- Substance abuse
- Misappropriation of substances
- Patient endangerment
- Deceiving/defrauding patient/clients
- False/negligent record-keeping

- Confidentiality
- Obtaining fee by fraud
- Commission of acts bringing the specialty or profession into disrepute
- Failing to conform to professional Code of Ethics
Professionalism

- Competence: “knowing what you don’t know” and acting accordingly
  - Two schools
  - “I may be wrong, but I’m never in doubt” versus
  - “The one thing an expert can say with 100% certainty is ‘I don’t know’” – L.C. McCloud, MD
  - avoiding the “MDIety Syndrome”

Professionalism

- “Be normal”
  - Richard “Murphy” Callery, MD, FCAP

Professionalism

- State Licensing Boards
Conclusions: In this case–control study, disciplinary action among practicing physicians by medical boards was strongly associated with unprofessional behavior in medical school. Students with the strongest association were those who were described as irresponsible or as having diminished ability to improve their behavior. Professionalism should have a central role in medical academics and throughout one's medical career.

Unethical Expert Witness Testimony

- Any physician can be qualified as an expert witness.
- Lies
- Willful failure to take into account all the circumstances of the case.
- Medical conclusions outside the realm of accepted scientific method and practice.
Unethical Expert Witness Testimony

- Currently handled by adversarial trial approach

AMA Council on Ethical and Judicial Affairs

- Physicians should help administer justice
- Medical witness must maintain equanimity
- Should prepare and testify honestly
- Should inform attorney of all favorable and unfavorable information about case
- Wrong to accept payment on contingency

From the AMA's Principles of Medical Ethics:

A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.
Unethical Testimony

From NAME’s Code of Ethics and Conduct:
c. Every member of the National Association of Medical Examiners shall refrain from providing any material misrepresentation of education, training, experience or area of expertise. Misrepresentation of one or more criteria or membership in the NAME shall constitute a violation of this section of the code.

Unethical Testimony

From NAME’s Code of Ethics and Conduct:
d. Every member of the National Association of Medical Examiners shall refrain from providing any material misrepresentation of data upon which an expert opinion or conclusion is based.

Unethical Expert Witness Testimony

- In 1997 AMA adopted Resolution 221.
  - Expert witness testimony should be considered practice of medicine subject to peer review.
    - Many difficulties
      - Time
      - Expense
      - Redundant vis-à-vis adversarial trial system
CAP Expert Witness Guidelines

Policy synopsis: Pathologists who provide expert testimony in litigation or administrative proceedings must:
- a) be qualified to provide the testimony they give
- b) testify as fairly and objectively as possible

CAP Expert Witness Guidelines: Qualifications

A pathologist who provides expert testimony in litigation or administrative proceedings should be:
- Licensed to practice medicine or osteopathy in a legal jurisdiction within the United States
- Certified by a recognized certifying body in pathology
- In active practice of pathology for three years immediately before the date of the incident or conduct that is the subject of the testimony

CAP Expert Witness Guidelines: Fairness and Objectivity

In providing and offering to provide expert testimony, a pathologist should:
- Possess current experience and CME in the area in which she is asked to testify
- Be willing to submit transcripts of depositions and trial testimony to peer review
CAP Expert Witness Guidelines:
Fairness and Objectivity

- The witness should not accept compensation that is contingent upon the outcome of litigation
- The expert should not provide testimony that is
  - False
  - Misleading
  - Without medical foundation

CAP Expert Witness Guidelines:
Fairness and Objectivity

- The expert should review the medical facts in a thorough, fair, objective manner and should not exclude any relevant information to create a view favoring the plaintiff or defendant
  - Example
- A pathologist should not misrepresent qualifications, experience, or background

Testimony

- It is **not** your responsibility as an expert witness to win or lose a case
  - Gain an agenda, lose integrity
- Your responsibility:
  - Educate
  - Teach via examination
What is an expert witness?

A witness, who by virtue of education, training, skill, or experience, is believed to have expertise in a particular subject beyond that of the average person, sufficient that others may legally rely upon the witness’s specialized (scientific, technical, or other) opinion about a factual issue within the scope of her expertise.

Notice “factual issue.”

- Your job is not to say whether Dr Stein committed malpractice, or whether Ms Allman murdered her husband.
  - Malpractice and murder are legal conclusions
- Only judges and juries have the power to make those conclusions

The expert witness

- Formal training is only part of what makes you qualified to offer your opinion
  - Experience is also important
  - Expect to be cross-examined on that
  - Courts have allowed heroin addicts to testify on the physical effects of heroin addiction
    - Such testimony may be more compelling than that of a scientific “expert”
Will my expertise be questioned?

Yes, as it should.
- Cross examination

Standards for expert witnesses vary by state and whether you are in state or federal court.

Your ethical loyalty is to the truth

- It is NOT:
  - To your medical association, or local medical community, or professional organizations
  - To the entity paying you
  - To certainty
  - To pride

To a medical association or local medical community:

- Medical association bylaw, calling for expulsion if, in testimony before court or other judicial body, he should disparage, by comment or insinuation, another physician, held unenforceable as against public policy


- A medical association would never have this law today, but in many areas the reluctance to testify against one's peers is still very strong.
- If you don't want to testify, don't testify. But do NOT support a medically unsound conclusion for political reasons.
- Saying untrue things in public for political reasons is tacky and uncouth.

Being redundant and repetitive:

- Do NOT testify on a contingency fee or have your fee be conditioned upon the outcome of the case.
- This has been settled law since at least 1885. See, e.g., Thomas v. Caulket, 24 N.W. 154 (1885) (witness to get $500 if plaintiff won $2000); Davis v. Smoot, 97 S.E. 488 (1918) (doctor to receive 20% of recovery in addition to expert witness fee).
- This is discoverable information. Don’t be unethical (or make a fool of yourself).

- Most states have statutory caps for lay witness compensation.
  - Doesn’t apply to expert witnesses.
- Not free reign to extort or to be bribed for a certain medical conclusion.
- All states require that your fee be "reasonable".
- Up to the courts to determine, but pushing the limit is a distraction.
  - calls into question your credibility.
Do NOT be a tool for the prosecution (or defense, or anyone else, or any kind of tool)

You will lose all credibility and maybe more

Chip Brown, *Pathologist Accused of Falsifying Autopsies, Botching Trial Evidence*, L.A. Times, Apr. 12, 1992, at A24 (“[F]ormer Dallas County assistant medical examiner Linda Norton was quoted as saying [Dr Erdmann] routinely performs ‘made-to-order autopsies that support a police version of a story.’”)

In 1992, Dr Erdmann was forced to surrender his Texas medical license to the State Board of Medical Examiners. He also pleaded guilty to charging several counties for autopsies he had not conducted.

Dr Erdmann often didn’t bother to weigh the organs he removed. In many cases, he didn’t even bother to eviscerate the body. He simply estimated their weights. Dr Erdmann got caught doing this when the family of a man he had autopsied noticed, in his report, the weight of the dead man’s spleen. Years before his death, this man’s spleen had been surgically removed.

In *Harrison v State*, the prosecution turned over an autopsy report in discovery. At trial the pathologist testified about factors not disclosed to the defense, including the fact that the murder victim had been raped, the qualifying circumstance for imposing the death penalty. The Mississippi Supreme Court held that it could not “countenance or condone the willful withholding of crucial evidence during discovery.” 635 So. 2d 894 (Miss. 1994) (en banc).
In *State v Wilson*, a laboratory report indicated that a gunshot residue test was inconclusive. However, at trial the expert testified that evidence of barium alone was consistent with the firing of a gun. The defense was never informed of this opinion and thus was misled by the report. The Supreme Court of Ohio criticized the prosecutor's conduct as "trial by ambush." 507 N.E.2d 1109 (Ohio 1987).

These are egregious examples of what are probably cases of pathologists being in cahoots with prosecutors. But you can be used unwittingly as well. Be thorough in your reports so that your conclusions are not mischaracterized or taken out of context.

Along those lines: create a report.

Roy Brown spent fifteen years in prison for murder before he was exonerated by DNA evidence. The case rested on bite marks on the victim’s body that a dentist testified matched Brown’s teeth.

Unbeknownst to the defense, a leading forensic odontologist had analyzed the bite marks and concluded that Brown was not the source of the mark. The prosecutor, however, never asked Dr Levine to file an official report . . . Instead, the prosecutors relied on [a] local dentist, whose testimony helped convict Mr Brown. Fernanda Santos, With DNA from Exhumed Body, Man Finally Wins Freedom, *The New York Times*, Jan. 24, 2007, at B5.
To certainty:

- Be objective. Say “It is more likely than not that ____” if you cannot conclude something with “a reasonable degree of medical certainty.
- Otherwise, you may be misleading a jury, and you will rightfully undergo a brutal cross-examination.
  - *(ad hominem)*

To certainty:

- State of Tennessee v. Elizabeth Ogle
- Voltaire

To Pride:

- You **must inform the attorney if you realize you’ve made a mistake** in your report or testimony, and she has a duty to inform opposing counsel.

  - *Scipio v. State*, 928 So. 2d 1138, 1142 (Fla. 2006)

    (when a medical examiner realized that he had been mistaken in his deposition testimony, but this information was not given to defense prior to the trial, “the State also had an obligation to disclose any material change in that statement”)*
Tips

- It is not unethical to work exclusively for plaintiffs or defense attorneys, or even the same firm repeatedly
  - BUT, it is an impeachable habit
- Juries listen to experts, not to people whom they perceive to be a law firm’s business partner
  - See under: “tool”

Tips

- Obviously, do NOT discard any evidence in an ongoing case
  - Spoliation of evidence
  - Civil or criminal penalties attached depending on your jurisdiction
  - Damaged credibility
  - Allow for your conclusions based on the evidence you destroyed to be thrown out of court
- Your lab should have a protocol
  - Follow it

Tips

- For the love o’ Pete:
  - do not lie on your resume.
  - In 2013, Florida’s Board of Medicine revoked the license of a physician who listed false qualifications on his expert witness resume (his medical certification had lapsed several years ago but did not mention this on his resume.)
  - Again: not your job to win or lose a case
- People have gotten away with this in Texas –

(Trial court did not abuse its discretion … in finding that ME was qualified to testify as an expert concerning the cause of child’s death because of his experience, despite falsely stating that he was board certified. In re D.J.R., 319 S.W.3d 759 (App. 8 Dist. 2010)

- Don’t do it: it’s a distraction and will tarnish your reputation

Tips

Be cognizant of your legal standards.

- Criminal proceeding
  • “beyond a reasonable doubt”
  • Ethical obligation re exculpatory evidence

- Civil proceeding, e.g., malpractice
  • “reasonable medical probability”
  • If something is plausible but not necessarily probable, you must explain

Thinking of the future

- Denton JS. Ethics education in forensic pathology fellowship training: is there a need? Acad Forensic Pathol. 2013 3 (3): 312 – 316
  • Unique ethical issues in forensics
How are you doing on your New Year's resolutions? I didn't make any.

See. In order to improve oneself, one must have some idea of what's good. That implies certain values.