

Guide to Computer Forensics and Investigations Fourth Edition

Chapter 16 Ethics for the Expert Witness

Objectives

- Explain how ethics and codes apply to expert witnesses
- Explain how other organizations' codes of ethics apply to expert testimony
- Describe ethical difficulties in expert testimony
- Explain the process of carving data manually

Applying Ethics and Codes to Expert Witnesses

- **Ethics**
 - Rules you internalize and use to measure your performance
- **Codes of professional conduct or responsibility**
 - Standards that others apply to you or that you are compelled to adhere to by external forces
 - Such as licensing bodies
- People need ethics to help maintain their balance
 - And self-respect and the respect of their profession

Applying Ethics and Codes to Expert Witnesses (continued)

- Laws governing codes of professional conduct or responsibility
 - Define the lowest level of action or performance required to avoid liability
- Expert witnesses should present unbiased, specialized, and technical evidence to a jury
- Expert witnesses testify in more than 80% of trials
 - And in many trials, multiple expert witnesses testify

Applying Ethics and Codes to Expert Witnesses (continued)

- The most important laws applying to attorneys and witnesses are the rules of evidence
- Experts are bound by their own personal ethics and the ethics of their professional organizations
- In the United States, there's no state or national licensing body for computer forensics examiners

Computer Forensics Examiners' Roles in Testifying

- Computer forensics examiners have two roles:
 - Scientific/technical witness and expert witness
- As expert witness
 - You can testify even if you weren't present when the event occurred
 - Or didn't handle the data storage device personally
- Criticism: it's possible to find and hire an expert to testify to almost any opinion on any topic
 - Beware of attorneys' opinion shopping

Considerations in Disqualification

- One of the effects of violating court rules or laws is **disqualification**
- Opposing counsel might attempt to disqualify you
 - Based on any deviations from opinions you've given in previous cases
- Some attorneys contact many experts as a ploy to disqualify them
 - Or prevent opposing counsel from hiring them
- Determine who the parties are to reduce the possibility of a conflict

Considerations in Disqualification (continued)

- Whenever you are aware of a possible disqualification issue
 - Bring it to the attention of the attorney who has retained you
- Factors to disqualify an expert include:
 - Whether the attorney informed the expert that their discussions were confidential
 - Whether the expert reviewed materials marked as confidential or attorney work product
 - Whether the expert was asked to sign a confidentiality agreement

Considerations in Disqualification (continued)

- Factors to disqualify an expert include: (continued)
 - Number of discussions held over a period of time
 - The type of documents that were reviewed
 - The type of information conveyed to the expert
 - The amount of time involved in discussions or meetings between the expert and attorney
 - Whether the expert provided the attorney with confidential information
 - Whether the attorney formally retained the expert

Considerations in Disqualification (continued)

- Factors to disqualify an expert include: (continued)
 - Whether the expert voiced concerns about being retained
 - Whether the expert was requested to perform services for the attorney
 - Whether the attorney compensated the expert

Traps for Unwary Experts

- Be cautious about the following potential traps
 - What are some differences between the attorney's motives and the investigator's duty?
 - Is the function of the expert witness in conflict with the investigator's code of professional responsibility?
 - You should anticipate that the opposing counsel will look at your organization memberships and those organizations' codes of professional responsibility
- **Contingency fees** aren't allowed except in certain limited circumstances

Traps for Unwary Experts (continued)

- Avoid obvious ethical errors
 - Don't present false data or alter data
 - Don't report work that was not done
 - Don't ignore available contradictory data
 - Don't do work beyond your expertise or competence
 - Don't allow the attorney who retained you to influence your opinion in an unauthorized way

Traps for Unwary Experts (continued)

- Avoid obvious ethical errors (continued)
 - Don't accept an assignment if it cannot reasonably be done in the allowed time
 - Don't reach a conclusion before you have done complete research
 - Don't fail to report possible conflicts of interest

Determining Admissibility of Evidence

- Hypothetical questions can give you the factual structure to support and defend your opinion
- Although expert opinions can be presented without stating the underlying factual basis
 - The testimony isn't admissible if the facts on which the opinion is based are inadequate
 - Or there's insufficient evidence to allow stating a legitimate opinion

Organizations with Codes of Ethics

- No single source offers a definitive code of ethics for expert witnesses
- You must draw on standards from other organizations to form your own ethical standards

International Society of Forensic Computer Examiners

- Includes guidelines such as the following:
 - Maintain the utmost objectivity in all forensic examinations and present findings accurately
 - Conduct examinations based on established, validated principles
 - Testify truthfully in all matters before any board, court, or proceeding
 - Avoid any action that would appear to be a conflict of interest

International Society of Forensic Computer Examiners (continued)

- Includes guidelines such as the following:
(continued)
 - Never misrepresent training, credentials, or association membership
 - Never reveal any confidential matters or knowledge learned in an examination without an order from a court of competent jurisdiction or the client's express permission

International High Technology Crime Investigation Association

- HTCIA core values include the following requirements related to testifying:
 - The HTCIA values the Truth uncovered within digital information and the effective techniques used to uncover that Truth, so that no one is wrongfully convicted
 - The HTCIA values the Integrity of its members and the evidence they expose through common investigative and computer forensic best practices, including specialized techniques used to gather digital evidence

International Association of Computer Investigative Specialists

- Standards for IACIS members include:
 - Maintain the highest level of objectivity in all forensic examinations and accurately present the facts involved
 - Thoroughly examine and analyze the evidence
 - Conduct examinations based upon established, validated principles
 - Render opinions having a basis that is demonstratively reasonable
 - Not withhold any findings that would cause the facts of a case to be misrepresented or distorted

American Bar Association

- Be aware of the basic rules of professional conduct attorneys must follow
- ABA's Model Code of Professional Responsibility (Model Code) and its successor, the Model Rules of Professional Conduct (Model Rules)
 - Are the basis of state licensing bodies' codes
- Codes contain provisions limiting the fees experts can receive for their services
- The ABA has stated that expert witnesses do not owe a duty of loyalty to their clients

American Medical Association

- Sets out five recommendations:
 - The physician is a professional with special training and experience and has an ethical obligation to assist the administration of justice
 - The physician may not become a partisan during the legal proceeding
 - The medical witness should testify truthfully and be adequately prepared

American Medical Association (continued)

- Sets out five recommendations: (continued)
 - The physician must make the attorney calling him or her aware of favorable and unfavorable information uncovered in the physician's assessment
 - The physician may not accept a contingency fee
- Several other provisions address the ethical constraints of testifying physicians
- The AMA also sets goals in dealing with its members

American Psychological Association

- APA's Ethical Principles of Psychologists and Code of Conduct
 - The most broadly accepted set of guidelines governing psychologists' conduct as experts
- Several standards in the APA's Ethics Code apply to psychologists' expert testimony
- The Ethics Code also cautions psychologists about the limitations of assessment tools
- Other Ethics Code standards are related to expert testimony, too

Ethical Difficulties in Expert Testimony

- There are inherent conflicts between the goals of attorneys
 - And the goals of scientists or technicians (experts)
- Attorneys work in an adversarial system and look to sway the judge or jury
- Science requires experts to focus on the evidence without the influence of others' objectives
- *Daubert* and the APA's forensics guidelines
 - Can challenge experts to choose between complete impartiality and responsible advocacy

Ethical Difficulties in Expert Testimony (continued)

- Enforcing any professional organization's ethical guidelines is difficult
 - Principles can be enforced only against members of the organization
- All guidelines rely primarily on internalization of the codes and witnesses' analysis of when and how they will participate in a case

Ethical Responsibilities Owed to You

- Your attorney owes you
 - A fair statement of the case or situation
 - Adequate time to review evidence and prepare your report
 - A reasonable opportunity to examine data, conduct testing, and investigate the matter before rendering an opinion
- Most attorneys, including opposing counsel, are competent, courteous professionals

Ethical Responsibilities Owed to You (continued)

- Some opposing counsel attempt to make discovery depositions physically uncomfortable
- As a measure of protection, you might want to have your personal attorney attend the deposition
 - This attorney can't object to questions but is available to advise the attorney who retained you or to advise you during breaks

Standard and Personally Created Forensics Tools

- The tools you use to recover, control, and track evidence are subject to review by opposing parties
 - If the court deems them unreliable, the evidence you recovered with those tools might not be admitted
 - Or might be admitted with a limiting instruction
- If you use standard tools, you simplify the process of validating them
- Personally created tools might have advantages that you can demonstrate to a judge
 - Who determines whether evidence is admissible

Summary

- Ethics can be defined as rules you internalize and use to measure your performance
- There's no U.S. licensing body for computer forensics examiners
- Be aware of attempts to disqualify you as an expert
- Courts use many factors in determining whether to disqualify an expert
- Be aware of obvious ethical errors

Summary (continued)

- No single source offers a definitive code of ethics for expert witnesses
- The inherent conflict between the needs of the justice system and your obligations for professional conduct can create ethical difficulties
- The attorney who has retained you, opposing counsel, and the court owe you ethical responsibilities as an expert witness
- The tools you use to recover, control, and track evidence are subject to review by opposing parties

Summary (continued)

- After carving data artifacts, analyzing as much of the information as possible is critical