

# Forensic Ethics and the Expert Witness



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# Forensic Ethics and the Expert Witness

For my first bioethics teacher, Jonathan D. Moreno, PhD, with profound gratitude and affection.

Philip J. Candilis

For my late parents, Mandel George and Ida Weinstock, for a lifetime of inspiration and support.

Robert Weinstock

For Al Martinez, my late father and friend, and the late Robert D. Miller, MD, PhD, teacher, scholar, mentor, and friend.

Richard Martinez

# Foreword

Why a book about the ethics of forensic psychiatry and related disciplines? Most psychiatrists, after all, learn something in their training about the ethics of medical practice in general and of the practice of psychiatry in particular. Do the maxims that steer all physicians through the ethical complexities of clinical medicine not provide equally effective guidance to clinical and scientific expert witnesses? The answer, in short, is "No."

When psychiatrists, for example, enter the realm of the expert witness, they tread on moral terrain with a significantly different topography than the paths to which they are accustomed in their clinical roles. Clinical psychiatrists owe primary allegiance to their patients' interests; for them the principles of beneficence (doing good) and non-maleficence (avoiding harm) will generally take priority over all other considerations. For psychiatrists who serve as experts, however, there are no patients to whom fidelity is due. There are only persons being evaluated for the sake of providing opinions to third parties. Perhaps a defendant in a criminal case, a plaintiff in a tort action, or a claimant in an adjudication of disability benefits or workers' compensation—but not a patient. And that makes all the difference.

Whatever its other virtues, no theory of the ethics of forensic psychiatry will serve its purpose unless it offers the psychiatric expert direction in dealing with this situation. When one no longer has the best interests of a patient as a lodestar by which to steer, what principles assume the guiding role held elsewhere by beneficence and non-maleficence? And how do those principles apply to the multifarious situations that are evoked by the adversarial context in which most forensic issues are resolved? Although the ethical theories canvassed in this volume differ in many particulars, it is the dilemma of the absent patient—replaced by an evaluatee with a different moral valence—to which they all respond.

Perhaps, though, it is not obvious that the usual rules of medical ethics are inapplicable here. A simple thought experiment should suffice to make the point. Imagine the outcome if forensic experts were to feel bound by

the ethical dyad of beneficence/non-maleficence. If experts could only reveal information and conclusions that benefited and avoided harm to evaluatees, the result would be of no value at all to the process. Evaluatees already have attorneys whose role it is to argue as vigorously as possible for their interests. The expert's role is different: to bring professional—in this case psychiatric—knowledge and experience to bear on the legal issue in question. Only if experts speak from a neutral position, allowing for the possibility that their words may harm or help the person they have evaluated, can they be helpful to the ultimate legal decision maker.

Although this book is rich in descriptions of various approaches to addressing the differences between the clinical and forensic contexts, it may be worthwhile by way of example to rehearse one of those arguments here. Some years ago, I formulated a theory of forensic ethics meant to fill the gap between the ethics of clinical work and the reality of the forensic context. At the time, other commentators were asserting that forensic psychiatry lacked any moral grounding, and that perhaps it was not possible to find neutral principles on which forensic practice could rest.

In response to these challenges, I suggested that just as the principles of clinical ethics had grown from the nature of medical practice—what value, after all, does a treating physician have who is not primarily oriented toward the patient's well-being—so the ethics of forensic practice could be identified from an analysis of the functions of the psychiatric expert. Two principles seemed to arise self-evidently from this functional analysis: truth-telling and respect for persons. By truth-telling, I meant the obligation to speak honestly about one's views, regardless of whether they might benefit or harm a particular party, and also to situate those views in a broader setting of empirical data and professional opinion ("subjective" and "objective" truth-telling, respectively). And by respect for persons, I signified the duty to treat the evaluatee as a morally important person, obtaining consent, avoiding deception, and respecting confidences beyond the scope of the evaluation. Though perhaps not an exhaustive list of the principles that should frame forensic practice, these seemed to me—and still do today—to be central to the role of the expert witness.

As the following pages make clear, there is no shortage of alternative theoretical structures. Some writers would shun the "principlist" approach that I embraced for one of the other ways of thinking about ethics (virtue ethics or narrative ethics, for example). Other theorists, more comfortable with a set of principles as the basis for an ethical code, want to quarrel about the specific principles included in the list. In particular, the extent to which the standbys of beneficence and non-maleficence may still be operative in the forensic role has attracted a good deal of attention. Though the issues may seem abstract, that does not mean that they are incapable

of arousing passion, something that will be evident to the perceptive reader—especially since forensic psychiatry is involved with questions of responsibility, compensation, and punishment (above all, the death penalty), which tend to bring strong emotions to the fore.

To be sure, there are often more differences in words than in actions when varying approaches to forensic ethics are considered. I suspect that, faced with any number of challenging ethical conundra, many writers who take opposing theoretical stances would end up advising a similar course of behavior. But that is not to say that differences in theory do not often lead to differences in behavior. It is easy to cite examples such as whether experts should offer testimony on the ultimate legal issue in a case, or whether it is permissible to participate in evaluations of a death row prisoner's competence to be executed, to illustrate the very real areas of contention that remain in the ethics of the field, the outcome of which are materially determined by the ethical theories with which one begins.

So ethics do matter, often in very concrete ways. That is why a book like this has value. To be sure, it is not a guide to action. It will not tell a forensic psychiatrist what to do when faced with a particular dilemma. Rather, it is a guide to thought. These pages, carefully read, will help the psychiatrist who chooses to assist the legal and administrative processes on which so many critical determinations depend to identify a reasonable construct of ethics by which he or she may be guided. Specific answers will follow. But their value will depend greatly on the energy expended in getting the basic concepts just right.

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# Acknowledgments

When we envisioned this book for our colleagues in the courts and the forensic fellowships, we knew we would have many friends to thank. Our own fellowship directors—who exposed us to the basic ethics dilemmas, the classic writings, and the methods of ethical reasoning—inspired the framework of the text. Kenneth Appelbaum, Robert Truog, and Robert Miller provided the kind of wisdom we aspire to in these pages.

We are grateful to the scholars who laid the groundwork for this discussion: the question “who bears our allegiance as courtroom experts?” We cite their work both to explore their influences and to honor them for asking the difficult questions.

Our contributions to this book would not have been possible without the intellectual and personal experience gathered over the years from three disciplines—general psychiatry, bioethics, and forensic psychiatry. In each discipline, we have been fortunate to work with mentors, teachers, and colleagues with great generosity, curiosity, and enthusiasm for their areas of study—and each with a desire to share knowledge and experience.

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Our editor Andrew Szanton, a good friend and colleague, helped our disparate styles find one voice. His close familiarity with the tensions of professional ethics and the great writings of Western thought kept our own thinking on track even when our drafts were muddled.

We place high value on the historical narrative of our profession, a value that would be far less meaningful without the guidance of Professor Marvin Prosono. Access to his extensive historical scholarship on courtroom experts and his nuanced explanations of their history placed our work in an important context. Watching the historical struggle of science and law unfold in his work was a humbling reminder of humankind's scientific and philosophical failings.

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The late Bernard L. Diamond introduced many experts to an alternative approach to forensic ethics—an approach that, in its time, received too little notice. We hope to correct that oversight in these pages.

To our colleagues on the Unit for the Deaf and Hard of Hearing at Westborough (MA) State Hospital—Susan Jones, Wendy Petrarca, and Neil Glickman, PhD—we extend our gratitude for numerous discussions and examples of culturally affirmative practice. These were important reminders of how much science, medicine, and law have been shaped by context and culture.

Our own personal narratives were important, too. We are grateful to our parents for imbuing in us a taste for the ancient philosophers and the importance of the written word. Our parents were our first teachers in this, and every, respect.

We have built on the work of many contributors, but believe we offer a new integration of thought. As we build on the people, history, and models that came before us, we invite experts, attorneys, evaluatees, and their families to anticipate our direction, to make the leaps we have made as authors, and to speculate with us on what they mean for the ethics of courtroom practice.

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# Section I

## Introduction and Overview



# 1

## The Problem of the Expert's Ethics in Court

### Introduction

Courtroom testimony by scientific experts is ethically challenging and complex. Expert witnesses bring the ethics of their own disciplines into the legal system, a system dominated by ethics of a different kind. This difference can be notable, especially when experts come from a helping profession such as medicine.

Psychiatry is an ideal model for discussing this problem, for at least three reasons. First, psychiatric testimony draws on many sciences; including neurology, biochemistry, pharmacology, psychology, sociology, and statistics. Second, it uses clinical and scientific reasoning that intersects politics and social policy. Finally, psychiatry describes behaviors of seminal importance to the law, ranging from sexuality and aggression to hyperactivity and obsession. The theories and science behind such behavior draw heavily from psychiatric scholarship on thoughts, perceptions, and emotions. These have important implications for the law. Psychiatry's array of hard and soft sciences, its reliance on interpretive and inferential reasoning, and its use of analytic methods common to many disciplines make it ideal for illustrating the ethical intricacies of expert testimony. It is relevant to all forensic disciplines.

Sciences like psychiatry differ from the law in how they analyze problems. Scientists develop tentative hypotheses, testing and revising them over time as new facts come to light. By contrast, the law must make definitive judgments on matters of immediate consequence and with little room for revision.

Psychiatry as a medical science differs in another important way: it is chiefly concerned with serving patients. True, it has parallel duties to society such as reporting child abuse or confining violent patients, but the patient's care is paramount.

The law has its own specific interests. As a discipline, the law is chiefly concerned with resolving disputes. Justice and truth are foundational principles. The law does have other purposes such as retribution, deterrence, and rehabilitation. In fact, it may regulate other professions. But the primary purpose remains the preservation of social order.

Forensic experts act as consultants to the legal system. Through statute and case law, the legal system expects the experts who come before it to help the law achieve its ends. At the same time, professional organizations guide experts in the practice of their own profession, with distinct codes of behavior and professionalism. This gives rise to an important ethical tension. Forensic psychiatrists and other experts work under two different—and potentially competing—ethical frameworks.

The tension between disciplines can be dramatic. It may be most evident when, in pursuit of justice or retribution, the law causes harm to an individual (e.g., by imposing fines, imprisonment, or even death). Courtroom experts in such instances contribute to goals that may differ dramatically from those of their profession.

In daily practice there are many ways in which the tension between professions and the law becomes apparent (Appelbaum, 1990; Weinstock, Leong, & Silva, 1990). Courtroom experts may feel tempted to mislead the evaluatee in order to gather information. They may feel tempted to mislead the court to gain credibility or advantage, perhaps posing as an expert instead of a fact witness. They may subordinate the facts of a case to their political or social agenda. Conversely, experts may recognize threats to a defendant so great that they feel obliged to re-define their involvement in the proceedings (Candilis, Martinez, & Dording, 2001; Weinstock, 2001). They may offer pseudo-legal counsel or therapy to an evaluatee, stepping temporarily out of role (Ciccone & Clements, 2001). Professionals who are sensitive to the special nature of forensic work often struggle to balance the court's mission, their own professional standards, and the individual's rights.

In fact, when certain distinctions between professional ethics and law are ignored, forensic experts are dismissed as "hired guns." The term suggests that experts sell their professional expertise to the highest bidder. The perception of experts as "hired guns" was the greatest ethical problem identified in a classic survey of forensic psychiatrists (Weinstock, 1986). This group of psychiatric professionals, as we will show, has spent considerable effort analyzing ethical problems at the intersection of law and the professions.

In the adversarial atmosphere of a packed courtroom, it is a common human response for an expert or attorney to assume that an opposing expert is a "hired gun." But this assumption is often wrong. In fact, scientific, academic, and clinical work is replete with honest differences of opinion.



This is evident in the ongoing debates over the safety of anti-depressants in children, the aggressiveness of treatment for certain cancers, and the risks and benefits of alternative or naturopathic remedies.

A courtroom battle of the experts can spring from legitimate differences of opinion. These may be based on differences in theoretical foundations, analyses of data, or inherent research biases. The vagaries of the legal system can also fuel this perception as when, for example, an expert is not aware of data that has been excluded for legal reasons.

Ethical problems in courtroom testimony, then, have multiple sources. They may arise not only from competing professional and legal influences but from both proper and improper differences of opinion. Improper differences include exaggeration, withholding of contrary data, and “spinning” data to leave false impressions or remove legitimate doubt. Proper differences may arise from one’s own perspective as a behavioral scientist or Freudian talk-therapist.

What then are the hallmarks of ethical testimony? What is the theory that grounds testifying experts in both their profession and the courtroom? How might these ethical matters influence how experts shape their arguments for the court? On a more personal level, how might being a crime victim affect the cases an expert chooses, or the testimony she gives? How might membership in a persecuted minority group affect her interaction with the legal system? This book will explore each of these questions.

Our starting point may be a modest one: merely suggesting how to stay out of trouble. By this standard, any behavior is ethical as long as it does not lead to sanctions. The letter of the law is everything; the underlying principle is only of concern if it threatens the individual with punishment.

Our hope is that forensic experts will go beyond this poor standard in gauging ethical behavior. We advocate an approach that has been called aspirational ethics (Dyer, 1988; Weinstock, 1997; Candilis & Martinez, 2006). It aspires to standards of professional and personal integrity that we will use in this book to describe a more complete view of the expert’s work. This approach crafts rules from theory, and applies them to specific courtroom arguments. It distinguishes between legitimate disagreements and unethical testimony. It integrates the professional obligations of the forensic expert into the conditions of the courtroom, and honors both professional and personal ethics. It encourages the right or best action.

First, we will explore how the study of history and of ethical reasoning on this topic can help reveal the ethics of forensic work. Our approach examines historical influences on forensic consultation and on ethics language in forensic work in general. It sets up a framework for handling difficult cases.

It is the history of thought in a profession, its rich variety of moral frameworks, and the language that recognizes inherent ethical tensions