

# The Silent Expert

David B. Menkes, MD, PhD

Following a telephonic deposition, the author discovered that a psychiatrist expert witness for the other side had electronically eavesdropped on the entire six-hour proceedings. Under cross-examination the expert admitted eavesdropping on instruction of state's attorneys, and directing their deposition of the author, but denied wrongdoing. The ethical implications of such deceptive behavior and its rationalization are discussed.

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As a liaison psychiatrist in the United Kingdom with specific training in psychopharmacology, I was engaged by defense lawyers in the United States to examine their client in a homicide case. After returning to the United Kingdom, my evidence was deposed by three-way telephone conference as follows:

1. Deponent (me) and court reporter in my office in Wales.
2. Defense lawyer in his office in the United States.
3. State's attorneys in their office in the United States (elsewhere).

These parties identified themselves, and a six-hour deposition followed. Several months later, the defense lawyer discovered that a State prosecution expert, also a psychiatrist, had "attended" my deposition surreptitiously from a third site in the United States. His presence emerged when the defense lawyer had occasion to review costs in the case and noticed the expert's invoice to the State regarding 6 hours of attendance at my deposition. On the basis of such ostensibly unethical behavior, the defense sought to exclude the prosecution expert's testimony by a motion *in limine* (anonymized transcript follows).

## Defendant's Motion *In Limine* To Preclude Testimony of XX, MD

The Defendant, YY, by and through undersigned counsel, hereby moves the Court to enter its Order precluding the State from making reference in opening statement or closing argu-

ment to, or seeking admission in evidence of, any testimony by XX, MD. In support thereof, the Defendant states:

1. The State has listed as a witness XX, MD, to testify in response to one aspect of the defense of temporary insanity raised in this case.

2. In reviewing certain materials pertinent to Dr. XX's involvement in this case, his billing records include an entry stating that he had attended by telephone the telephonic deposition of David Menkes, MD, PhD, taken by the State on (date).

3. During Dr. Menkes' deposition, those present, either in person or by telephone, were asked to identify themselves. See Exhibit "B," attached hereto, at 5–7 (excerpt of portion of Dr. Menkes' deposition). The individuals who identified themselves or otherwise were identified at that time were Mrs. AA and Mrs. BB, counsel for the State, Mr. CC, counsel for the Defendant, the court reporter and the witness. Dr. XX failed to state his presence at that time or at any other time during Dr. Menkes' deposition, and the fact that he was listening on the telephone was not in any other manner disclosed to all parties to the telephonic deposition.

4. Eavesdropping or other interception of an oral, wire or other electronic communication, without the consent of all parties thereto, is unlawful. See Section 123, State DD Stat. (2003).

5. The fruits of such an unlawful interception further are not admissible in any proceeding. See Section 123, State DD Stat. (2003). Further, Dr. XX's testimony is tainted by the unlawful conduct described herein, and the attendant inadmissibility of evidence of the content of the interception, such that no testimony by Dr. XX can properly be admitted in evidence in this case.

WHEREFORE, the Defendant respectfully requests this Honorable Court to enter its Order in limine precluding the State from making reference in opening statement or closing argument to, or seeking admission in evidence of, any testimony of XX, MD.

Respectfully submitted,

CC, *et al.*

Attorneys for Defendant

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## Expert Role and Ethics

The state's attorneys acknowledged subsequently in open court that the prosecution expert had emailed their office real-time advice regarding my ongoing deposition and questioning. The judge opined that the eavesdropping "may not be very nice" but disputed the contention that it represented unlawful interception of communication on the basis that it was "for the purpose of Court proceedings." Thus, the motion *in limine* was denied and the case continued. When later cross-examined about this in court, the expert acknowledged having telephonically dialed in and listened to the entirety of my deposition on instruction from the state's attorneys and having fed questions to them during the deposition. The expert denied professional ethical misconduct, on the grounds that he "was going to be reading it [the deposition transcript] anyway."

This case illustrates a clear example of deliberate deception by a psychiatrist expert witness. Although the expert ostensibly followed instructions from state's attorneys in this regard, his actions are at variance with the expectation of ethical behavior and honesty in professional forensic practice.<sup>1</sup> It is also reasonable in a novel case such as this to appeal to the most basic common-sense principle of moral behavior: the reciprocity of the golden rule. If Dr. XX considers it morally permissible to eavesdrop on the telephone deposition of his colleagues, then he must agree that it is morally permissible for others to do the same to him. Since it is doubtful Dr. XX would consent to this proposition, his behavior cannot become a universal moral rule. It remains to be ex-

plained why the judge saw fit not to sanction the expert, raising the question of how such behavior would be seen in other jurisdictions.

Expert witnesses may be subject to various potential sources of bias, including notably when working only for one or the other side of forensic cases.<sup>2,3</sup> Competing interests, especially when unrecognized or denied, constitute a significant source of bias, and have prompted, *inter alia*, the American Academy of Psychiatry and the Law (AAPL) ethics guidelines to require explicitly "honesty and striving for objectivity" in expert witnesses.<sup>2,3</sup>

In a more general sense, it is incumbent on psychiatrists not to abuse the trust placed in them by their patients, colleagues, and the wider public. Professional colleges of psychiatry in the English-speaking world are accordingly explicit about members' requirements for honest and ethical behavior, including a shared "responsibility for upholding the integrity of the medical profession."<sup>4</sup>

## References

1. Martinez R, Candilis PJ: Commentary: toward a unified theory of personal and professional ethics. *J Am Acad Psychiatry Law* 33: 382-5, 2005
2. Commons ML, Miller PM, Gutheil TG: Expert witness perceptions of bias in experts. *J Am Acad Psychiatry Law* 32:70-5, 2004
3. Gutheil TG, Simon RI: Avoiding bias in expert testimony: the general practice clinician stepping into the arena of forensic psychiatry must take care to maintain objectivity. *Psychiatr Ann* 34:260-70, 2004
4. Royal Australian and New Zealand College of Psychiatrists: The RANZCP Code of Ethics. October 2004. Available at <http://www.ranzcp.org/pdffiles/publications/Code%20of%20Ethics.pdf> (accessed May 16, 2006)