

Commentary: The Higher Standards of Aspirational Ethics

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In response to a case presented by Dr. David Menkes, the authors argue for a standard of forensic practice that aspires to more than minimal requirements of ethics and law. Professional ethics for forensic experts require acknowledgment of both the duties and ideals of the profession if they are to meet societal expectations, honor the intent of legal procedure, and overcome jaundiced views of the “hired gun.” Common values of transparency, truth-telling, and respect for moral relationships in professional work are suggested for analysis of this case, as are respect for the profession and its historical narrative. In fact, a robust professional ethic that requires broader consideration of personal, professional, and community values finds renewed expression in this ethical analysis.

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A psychiatric expert’s undisclosed scrutiny of a homicide deposition strikes several painful chords in professional ethics. At a time of video and computer monitoring in the workplace, warrantless eavesdropping by federal investigators, and opaque proceedings for military detainees, moral standards of transparency and accountability in public life are taking a beating. In Dr. David Menkes’s story,¹ the undisclosed presence of a forensic expert at a deposition raises similar concerns. The claims that the deposition will eventually be public record or that the forensic expert “was going to read it anyway” ring hollow.

We believe this case illustrates violations of several established standards of ethical conduct in forensic practice. These include requirements of generalizability, truth-telling and honesty, openness, procedural justice, respect for others, and respect for the profession and its historical narrative. All were violated by the silent expert in this case.

Psychiatrist David Menkes¹ himself makes a compelling case that the behavior of the silent expert violates basic principles of ethics in forensic practice. Appealing to principles of common morality and

common sense, Dr. Menkes draws on centuries of writings that invoke “the golden rule.” Immanuel Kant did the same: for an act to be ethical it must generalize to all settings. Does it in this case?

Philosopher Jennifer Radden reminds us that professional ethics are embedded in common morality, or else they lose their moorings.² We, like Professor of Psychiatry Ezra Griffith, echo this reminder when we appeal to personal and professional influences to guide our behavior.^{3–5} Dr. Menkes is right to invoke general principles of ethics that are recognizable to everyone.

The behavior itself already carries implicit admissions of impropriety. Why was it clandestine? Why were details of the expert’s coaching revealed only under cross-examination? If not intended to provide an unfair advantage to the prosecution, the clandestine nature of the behavior would not have been necessary.

To appreciate the lapses in ethics in this case, we may consider the usual standards of disclosure and transparency in the deposition process. The context, narrative, or culture of the deposition is specific. It is guided by a specific judicial authorization for the collection of specific data and specific rules about who will be present. Defendants themselves have a specific right in this regard.

The development of normative behavior during depositions has traveled a specific course for specific purposes: it cannot be discounted easily. In an earlier issue of the *Journal*, we pointed out the moral signif-

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ificance of the historical narrative of a profession.³ Dr. Griffith too has reminded us of the critical contribution of context to our professional behavior.⁵ Narrative theory will join principles in militating against the silent expert's dismissal of the profession's historical narrative.

Consequently, the silent expert undermines a critical process developed by the American judicial system: predictable and dependable procedure. A system like ours, grounded in adversarial process, recognizes the difficulty of discerning truth.⁶ Predictable and dependable procedure is developed so that truth can be approximated by imperfect moral actors. In an adversarial process, procedural rules are devised to maintain fairness. Circumventing procedure by failing to declare formally the expert disables the very architecture that maintains the system's moral integrity.

Why then use a tactic that short-circuits a process with standardized expectations on who is there and who is not? We may consider what would be different if the expert were declared and openly present. Perhaps the testifying expert would be more specific, more complete. Perhaps he would address the known biases or writings of the expert opposing him. This, of course, would weaken the impact of the silent presence—motivation enough to hide him.

The opportunity for both sides to be treated equally is lost under the circumstances of the case. Fairness, a grounding principle of any modern judicial system, is sacrificed.

So we might say the silent expert does not support fairness. Indeed, the silent expert provides an advantage to the attorney who is being coached in the nuances of behavioral science. Under principles of fairness, both sides should be allowed the benefit of a running commentary if they choose. Both sides should be allowed the opportunity to object. Both sides should be treated alike, especially in adversarial procedures grounded in this cardinal principle.

When we assess fairness we can answer whether a behavior generalizes to all settings. Because our judicial system is grounded in procedural fairness—treating like petitioners alike, treating like cases alike—it allows fair access to information, witnesses, and evidence. Surprise witnesses, undisclosed evidence, and indeed, unvetted experts are not the usual currency of a system of fairness and trust. Silent experts do not generalize.

There are other problems as well. The silent expert is neither open nor transparent—both conditions required of courtroom experts for decades. Bernard Diamond⁷ and Seymour Pollack⁸ provide classic examples of these important habits and behaviors of the ethical practitioner. They were both open and transparent in their work, underlining their biases in favor of prosecution or defense and laying out their arguments plainly for courts to see.

The silent expert is not honest. Silence, while an act of omission, is not consistent with the truth of the encounter. Depositions are infused with principles supporting truth-telling; they exist to preserve or collect evidence. Truth is undermined by a shadowy eavesdropper.

Silence at the bidding of prosecutors does not lessen the expert's moral culpability. He is a free moral agent with specific responsibilities for his own actions. He is no mere technician unaffected by personal or professional morals. He has obligations to the profession that privileges his actions.

Consequently, the silent expert denigrates the profession. Such behavior, whether legal or not, undermines societal confidence in the profession, the legal process, and the importance of expert testimony in the adversarial process. The value of expert testimony is directly dependent on the procedure that allows for critique and scrutiny of the expert's contributions. Even when experts assist attorneys early in cases, procedure is available to oversee them.

Moreover, the silent expert does not show respect for the professionals in the deposition. Forensic theorist Paul Appelbaum,⁹ himself a strong proponent of truth-telling, has invoked the principle of respect for persons in his theory of forensic ethics. In his treatment, this is a protection of evaluatees in the forensic encounter. But respect is also due to the professionals who work in this setting. In our previous writing, we have stated that all forensic professional activity must recognize that moral relationships are fundamental in guiding decisions and actions.⁴ The silent expert shows no such respect for the moral relationships affected by his behavior.

Dr. Menkes goes on to cite our work in this journal last year. We endorsed the aspirational definition of professionalism as a “structurally stabilizing, morally protective force in society.”¹⁰ Aspirational ideals set a higher standard for professionals than any minimalist legal requirement. An aspirational professionalism recognizes the importance of the moral rela-

tionships within forensic work. Just as the silent expert does not respect moral relationships in his work, he does not provide the structurally stabilizing, morally protective presence.

Aspirational ethics for forensic practice are concerned with what the profession ought to be.^{3,4} Consequently, we advocate honoring both the duties and the ideals of our work. Simple duties of honesty, truth, and fairness are only the starting point. Ideals are also vital if we are interested in improving a system that is still flawed: from its treatment of non-dominant groups to its tolerance of financial inequity before the bar. The simplest question for resolving such important issues can then be: "Is this the kind of profession we want to be?"

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