# The Authority of the Ethics Consultant

**Kenneth Kipnis**

*Just who do you think you are?*

Christine Korsgaard, *The Sources of Normativity*

## I The Question of Authority

What is it that can sometimes endow certain ethical judgments with their remarkable power to impose themselves upon our practical deliberations? Christine Korsgaard, about whom I will say more, has written about this feature of morality, referring to it as "normativity," a kind of ethical *gravitas*. It seems that offering some account of normativity would be critical to anyone claiming ethical authority. What authority (if any) can ethics practitioners summon for the judgments that constitute their professional work? Some response to these questions must be at the core of any professional legitimacy that the field might enjoy.

It is a commonplace to distinguish between two conceptions of "authority." The first conception focuses on the social position occupied by one who is "in authority." I will refer to this as the Authority of Position. One can usefully think of most societies and organizations as constructed out of "normatively rich" social roles, slots that carry with them formal obligations and permissions. Those who are doctors, lawyers or professors occupy examples of the pertinent social positions. Consider that the institution of the family commonly includes both parents and children with important differences between the two roles. Parents have a determinate authority over their children and overall responsibility for their well-being (elements that are linked), while children have reciprocal duties to conform to parental instruction. The institution of the nuclear family is characteristically a formal association of persons occupying both roles. The roles are

"normatively rich" in that it is possible to reflect productively about the scope and justification of the obligations and permissions that are attached to the roles.

In a university classroom, professors like myself have the positional Authority to assign readings and to issue grades. An ethics professor might believe (as I once did) that with the possession of a doctoral degree, a lengthy specialization in ethics, and the blessings of some accredited university, he or she is somehow empowered to pronounce authoritatively upon ethical questions. One utters the words "In my professional judgment . . ." and follows it with some *ex cathedra* pronouncement to be taken to heart. But it would be a mistake to suppose that ethicists, clinical ethics consultants, professors of philosophy, or academic philosophers have some God-like power to create moral obligations merely by solemnly pronouncing them. Lest there be any misunderstanding, I make no such claim to such a power.

The second conception of authority -- the Authority of Expertise -- points to the special knowledge possessed by the expert. One can be an authority on high-energy physics, the Book of Genesis, the Irish Civil War, Mafia morality, and so on. In each case, authority consists in mastery of some sphere of expertise. So what exactly is the knowledge that an ethics expert possesses that could warrant the ethical judgments that he or she might offer?

The literature of bioethics is filled with discussions of substantive ethical questions about what ought to be done in vexing circumstances. But there are also quite newer questions about what ethics consultants are, and what we could be: how we might someday conceive ourselves as professionals. The ambiguous use of the term "conceive" in the last sentence is revealing. The term can make reference to an act of intellectual imagination: An author might "conceive" the plot of a novel. Or the term can reference the coming into being of some new entity: A

generation of college students might conceive a novel political movement. In talking about "conceiving oneself" as an ethics consultant, both meanings are in play. Indeed, a professional typically comes into being during the course of systematic education. He or she begins to assume a new practical identity. Similarly, a new profession can emerge from the collective creative activities of reflective practitioners. Social roles are historical works of our individual and collective imaginations -- human artifacts -- and, at the same time, they are palpable social entities out of which we construct relationships and organizations. Like all human artifacts, social roles can be crafted with wisdom or foolishness. Responsible communities must stand ready to assess and reconfigure these creations when the occasion calls for it. A new social role -- the professional ethics consultant -- may be emerging into being.

We who do clinical ethics consultation spend much of our time on a broad range of focal ethical questions arising in health care: nontreatment decisions for extremely low-birthweight newborns, for example. But apart from substantive questions, there are also contested organizational issues that surround the emerging field of ethics consultation itself. Should we enjoy some type of monopoly, as doctors and lawyers do? As with doctors and lawyers, should the unlicensed practice of ethics consultation be prohibited? Should training programs be vetted and accredited? (And if so, by whom and in accordance with what standards?) What should novices be taught, and how? What abilities and knowledges should aspiring practitioners be certified as possessing? How should the clinical work of practitioners be structured? Is there anything that a clinical ethics consultant must never do? Should any such prohibitions be enforced and, if so, how?

In the face of this complexity, it is not surprising that a few ethics consultants are looking to dispute resolution, mediation and facilitation as models for our clinical work. Conceiving the

task in this way would permit practitioners to sidestep some of the most difficult questions about the ethical content of the field. A proposed resolution is satisfactory if and only if the parties accept it and the dispute ends. While it is to its credit that mediation can often bring about a sorely needed consensus -- a workable compromise or a *modus vivendi* -- success in ending disagreement is not always the same as building a moral community on an intellectually responsible foundation. The substance of the consensus, and whatever reasons that might support it: these may be deeply flawed. Indeed, consensus-building might go better if the parties assiduously avoided the task of trying to agree on the reasons for the shared position. So, coming back to our original question, and assuming that the work involves more than mediation, how might ethics consultants account for the normative authority that they would have to wield? It can't be just that the community of ethics practitioners claims to have it.

In what has been a multifaceted career, I have had to grapple with this question in several different settings. When I was starting out as an undergraduate philosophy student, the conventional wisdom was that philosophers had nothing to say about substantive ethical problems. That task belonged to moral reform, an unrelated and, at the time, a somewhat suspect endeavor. Ethical judgments were (many thought then) irrational expressions of emotion. Since those youthful days, I have had to revise my thinking on many occasions. Indeed, to be a philosopher is to advance intellectual positions in the face of severe criticism. If you weren't ready to change your mind, you had made an error in career choice.

Over time, I learned that there are few critics more challenging than the lawyers whose job it was to demolish expert ethics witnesses.

# 2 Challenges to the Expert Ethics Witness

Not very long ago I was contacted by a law firm with a request that I consider working for them as an expert witness. It was not the first time I had done such work and the facts of this case were not complicated. The plaintiff (the party filing a complaint to the court) was a man whose life had taken a tragic turn. He had retained a psychologist to help him get back on his feet and, following improvement, their professional relationship had come to something of an end. (Actually whether the professional relationship had terminated was a contested issue.) The psychologist's association with his patient then evolved into something like a friendship. The therapist occasionally stayed at the patient's house, the two men vacationed together, and the psychologist eventually became a valued source of advice, particularly on financial matters. Indeed, the therapist arranged the transfer of substantial amounts of the client's wealth into a seemingly lucrative investment. But the "lucrative investment" turned out to be a swindle. Any returns that the scheme's longer-term "investors" hoped to enjoy would be paid out of sums newly transferred to the fund manager who was, at the time, enjoying significant wealth. The psychologist was one of several "finders" working for the manager, receiving payment for each mark brought into the bogus investment fund. Scams like these are called "Ponzi schemes", after Charles Ponzi whose victims famously lost millions before he went to jail in 1920.

This case was a civil lawsuit that turned, in part, on whether the psychologist had violated the norms of his profession. Though it was not something I ever discussed, I had assumed that the duty of some insurance company to pay damages to the client would turn on whether the patient's losses were liabilities that were covered by the psychologist's insurance

policy. And that would depend on whether the injuries had occurred in the context of the psychologist's professional work. If the psychologist's damaging conduct had occurred outside of the professional relationship, the insurance company would be off the hook. The key question was whether the psychologist's behavior violated the ethical duties of his profession, duties that the law would recognize.

As a matter of law, lawsuits such as this one required the plaintiff's attorney to prove three elements in court. First, was the psychologist subject to some duty recognized by law? The norms of professional ethics qualified as such, but identifying them and explaining their scope and justification to a judge and jury are rarely easy. Were there applicable ethical standards, and, if so, were they mere technicalities, easily ignored, or were they rules that reasonable people would want their therapists to honor? The second element to be proved in court was that the defendant had failed to conform to the duty established under the first element. I had no role in establishing any such facts. And the third element was that the plaintiff had suffered compensable injuries caused by the violation of the duty. The proof of this element too would have to fall to others. My concerns were narrowly with the first element: What pertinent professional duties were applicable to the psychologist?

I had agreed to be an expert ethics witness only after having reviewed the extensive case files. Per my routine, I requested a fixed fee to cover this initial review, and for an "academic" lecture in the lawyer's office, on what I could testify to in court. If the attorney thought my testimony would be helpful, I would receive an hourly rate thereafter, usually less

than the rate earned by the other lawyers working on the case. If what I said were not useful, I would collect the fixed fee and bow out, usually happy that I didn't have to do all of that time-consuming and stressful work. If I took the brief, I would have to prepare myself to educate the judge and jury on the scope and importance of the applicable ethical standards and to defend myself against attacks by opposing counsel.

Following an agreement to work with the law firm, I prepared a summary for submission to the court as an affidavit. Though I might polish and sharpen my thinking as the case moved forward, especially after reading the response of the defense's expert witness, the plaintiff's attorney kept an arms-length distance from me. It was never suggested that I shape my judgments to the defense attorney's specifications.

Managing the responsibilities of the expert witness is, without doubt, the most intense challenge I have had during my professional career. As a professor, I have never had my position and expertise seriously challenged by a student or colleague. As a clinical ethics consultant, I have been both ignored and challenged. As a researcher, my publications were routinely critiqued, firmly but generally politely. Over the years, the quality of my work has benefited richly from those careful attentions. Until recently the most grueling professional ritual I have had to endure was the defense of my doctoral dissertation, about 40 years ago. In retrospect, the criticisms of my dissertation committee were child's play compared to the grueling interrogations I would later face in depositions and at trial. Despite experience at law school and my associations with lawyers, I knew I would be a guileless innocent if I ever had to face a skilled litigator. They were much better dressed thanacademicians and intimidatingly

well-prepared. Their intellectual traps were positively Socratic in their cleverness. These were highly skilled professionals who were playing for very high stakes. Where they didn't have the requisite understandings themselves, they had the resources to summon their own experts. Really good ones. While their desire to prevail was obsessional, I soon realized that it was dangerous to be drawn into competition with them. My primary responsibilities were narrow: to do my homework, to be on top of ***everything*** I would need to know, and to decline to discuss anything that was outside of my sphere of expertise.

Note that this "sphere of expertise" is, in a sense, the central issue of this essay. There is nothing like expert testimony to focus your attention on the limits of your competency. At some level I appreciated that I was going to have to prepare for intense challenges to whatever authority I thought I had.

I was fortunate to have encountered, years earlier, the writings of Giles Scofield, a law professor who had made a career out of choreographing the courtroom annihilation of expert ethics witnesses. Scofield was educated and clever. His advice to would-be inquisitors was an inspiration to improve my grasp of what it was to be an ethics authority.

As a first cut, I would try to achieve a broad familiarity with the ethical standards applicable to psychology. While it was useful, as background, to have chatted informally with experienced practitioners, The American Psychological Association's (APA) Ethical Principles of Psychologists and Code of Conduct (the Ethics Code), carried much more weight. Although lawyers and journalists speak of conflicts of interest, and doctors commonly refer to "double agent" problems, the related idea of "multiple relationships" was central to the ethical thinking

of psychologists, both in the American Psychological Association's code and much of that profession's literature. The key language is in section 3.05 of the code:

> **Multiple Relationships**
>
> (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person . . .
>
> A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

If this language were taken to be definitive of the professional's distinctive responsibility, then a surface reading of the code would appear to support the psychologist. It could be argued that, since the professional relationship between the therapist and the client had ended, there never was a time when the psychologist simultaneously occupied the roles of financial advisor and therapist. Since the two relationships were not in place "at the same time" (as required by the Ethics Code), the psychologist's behavior, however dishonorable, was not a violation of professional ethics. Accordingly, the injuries done to the former client did not occur within the context of the therapist's professional work and the therapist's insurance carrier would not have to compensate the former patient for the losses caused by the psychologist. My lawyer and his client would lose.

There is more to this discussion below. But before moving on, it would be useful to consider the work of Christine Korsgaard.

# 3 Christine Korsgaard on Normativity

Korsgaard's account of ethics begins with the observations that ethical standards "make *claims* on us; they command, oblige, recommend, or guide" [FN: SoN p. 2] – and that honoring the demands of morality can be burdensome and costly. So, Korsgaard asks, why be moral? What is it that makes us susceptible to morality's influence even when the costs are high? (17).

Korsgaard's moral psychology focuses on the human mind's characteristic capacity for self-reflection: our ability to stand back from our desires, inclinations, drives, motivations, etc., and ask: Do I have a sound reason to act? Confronted with an ethically problematic situation, it is open to us to reflect. The identification and appropriation of a reason to act is, Korsgaard says, the hallmark of deliberative success. It is this capacity for "reflective endorsement" that sets us apart from creatures driven by passions. To embrace and act upon a reason – a "reason" being the distinctive product of practical deliberation – is to defer to the authority of reflection. Autonomy, as Korsgaard puts it, is "commanding yourself to do what you think it would be a good idea to do."

But why defer to the commands of reason when doing so is burdensome? Here Korsgaard adds a new and distinctive element to a broadly Kantian account of morality. What you think you have a good reason to do, Korsgaard says, "depends on who you think you are." (107) In a section of her book she entitled "The Solution" (3.3.1), Korsgaard writes:

> When you deliberate, it is as if there were something over and above all of your desires, something which is *you*, and which *chooses* which desire to act on.

The "something" that is "over and above all of your desires" is, according to Korsgaard, a "description under which you value yourself . . . a conception of your practical identity." She reminds us of the familiar "I couldn't live with myself if I did that."

According to Korsgaard, the ways we conceive ourselves can give rise to "unconditional obligations." (102) To embrace a practical identity is to identify with a principle, a "way of choosing" (100); it is to become "a law unto yourself" (104), an autonomous agent. To conceive yourself as a friend, a comrade in arms, a teacher, a lawyer, a citizen, a doctor, a psychologist, a child of God, a student, an ethicist, or an Irish patriot, is to endorse reflectively the norms that somehow flow from these practical identities.

> When an action cannot be performed without loss of some fundamental part of one's identity, and an agent could just as well be dead, the obligation not to do it is unconditional and complete. If reasons arise from reflective endorsement, then obligation arises from reflective *rejection*.

I think the point Korsgaard is making here is sound. To betray one's fundamental obligations can be to cast oneself into the abyss. John Ford's 1935 movie, *The Informer*, based on Liam O'Flaherty's novel, illustrates the possibility. Gypo Nolan is a burly, dull-witted Irishman, actively sympathetic to the Irish insurgency against the British in the 1920's, but also eager to leave an Ireland that has fallen on terrible times. He sees a picture of one of his political comrades on a wanted poster, enters a police station and, to collect the reward, tells the authorities where they can apprehend him. Later on at his rebel-conducted trial, he confronts, through an alcoholic haze, his betrayal of a comrade-in-arms. Gypo's self-conception is undone. In Liam O'Flaherty's words, he became a "phantom of a human soul stripped naked of the covering of civilization . . . horror-stricken, without help, without hope of mercy". [FN: Liam O'Flaherty , *The Informer*, , New York, New American Library, 1961, p. 133 .] In Korsgaardian terms, he has demolished his practical identity as an Irish patriot and friend. Condemned as an informer, Gypo's death, at the hands of his former comrades, comes quickly.

For Korsgaard, practical identity is the bedrock upon which normativity rests. Her account gives us an explanation for firm commitments to ethical principles – rules that are somehow built into our practical identities. From the perspective of practical ethics, this work is, I believe, an important contribution.

# 4 Cohen's 'Mafioso' Objection

In the first of the five critical essays included in *Sources of Normativity*, G.A. Cohen asks us to consider a "Mafioso" whose practical identity requires the performance of contemptible misdeeds. In that he offers no account of the infraction and its surrounding circumstances, I will fill out his example. Let us suppose our Mafioso is a New York *capo* during the 1950s. He must order one of his soldiers to kill an associate who has passed information to the police.

What we today call the "Mafia" once existed as a collection of loosely affiliated secret organizations that revealed themselves in foreign-dominated Sicily during its mid-19$^{th}$ century transition from feudalism to capitalism. Aristocratic forms of social order were losing whatever authority they might have had, and trustworthy political and police functions had yet to appear. Within this social upheaval, Mafia "families" offered a kind of protection and financed themselves in a variety of illicit ways. They established corrupting relationships with public officials and enforced distinct ethical standards for their "men of honor." With the resources needed to bring pressure upon officials and employers, such an organization might have represented, at the time, an improvement over what had existed earlier.

Mafia secrecy contributed to the organization's survival. "Omertá," the overriding prohibition against collaborating with the authorities, is older than the Mafia. The convention was a plausible defensive strategy when Italy's French, Spanish and Austrian governors of the

16th to 18th Centuries, and their minions, were seen as ruthlessly bent on eradicating potential opposition. By tradition, a Mafioso would have solemnly forsworn all lawful collaboration with public officials, and would have understood both that transgressors would be killed and that he could be called upon to execute such a sentence.

Following Korsgaard's approach, Cohen's Mafioso would reflect upon his practical identity and its normative implications. If the description under which he valued himself was "man of honor" (as the Mafia understood that social role), his deliberations would issue in a reasoned decision to conform to the code that defined his practical identity. He will order the death of the collaborator. Most of us would consider such a killing to be a moral violation.

Cohen considers the possibility that Korsgaard has given us merely an account of "the experience or phenomenology of obligation, not its ground or authenticating source." If so, this would rule out reading her work as an essay in normative ethics. The "justification" for normativity that her theory promises cannot be delivered using the tools she has assembled. As Cohen's example seems to show, the bare fact of successful reflection on the normative implications of one's practical identity cannot be the foundation of moral rightness. Perhaps something must be added to the mix to make a Korsgaardian obligation into an ethical one. And, if that were done, why the Mafioso lacks that essential ingredient would need to be explained.

# 5 From Practical Identity to Social Role

It is a critical step in Korsgaard's analysis that the norms that can compel us to act flow somehow from a practical identity. But her text is not very clear how ethical obligations are generated in this way. As she conceives it, one's "practical identity" is a part of one's moral psychology, and while her discussion may suffice to explain why one might fervently believe

one has a good reason to act in some way, it fails to explain why acting in that way would be ethically required. That, I think, is the thrust of Cohen's objection.

Fortunately, a foundation for such ethical obligations can, I believe, be located close by.

Let us turn our attention away from moral psychology, and consider that the concept of practical identity, upon which Korsgaard places so much theoretical weight, can be supplemented by the way our practical identities make their appearance in the public sphere: as persons who occupy discrete and familiar social roles. For Korsgaard, a "practical identity" is a *psychological entity* answering the question How do I conceive myself? In contrast, a "social role" is a *societal entity* answering the question What parts do I play in relationships and organizations? While it is possible for the two to diverge – think of Don Quixote – they are characteristically two sides of the same coin. One of my practical identities is "philosophy professor" and, in fact, I have long occupied such positions at colleges and universities.

The normative dimension of social roles is particularly evident in the professions, where the collective attention of practitioners is commonly focused on the ethical principles and ideals that are built into the role itself. It can be puzzling when one steeped in philosophical ethics discovers that the special obligations attaching to professional roles can be in conflict with obligations commonly believed to be applicable to everyone. The contrast between the demands of ordinary morality and the normative implications of professional responsibility can be striking. Professional obligations of confidentiality are perhaps the best-known examples.

As an occupation develops into a profession, practitioners begin to conceive themselves as colleagues who have, collectively, taken on a responsibility to attend appropriately to one or more important social goods. Good doctors play a determinate part in a broad and complex social

undertaking aimed at healing the ill. Good lawyers, as we understand them, work at securing justice for clients within a complex adversarial legal system. The provisions in a profession's code of ethics are norms that, provided they are generally honored by practitioners, will ensure that the sphere of social concern delegated to and appropriated by a profession as its distinctive collective responsibility, receives the care and attention it is due. Our health care and legal systems – both critically important social institutions – would not work as well as we want them to if practitioners failed to care deeply about applicable professional standards. The norms that shape professional duties are attached publicly to codes that authoritatively promulgate standards that are themselves the product of collective deliberation.

Philosophers are not the only ones who think seriously and systematically about ethics. The members of professions do so as well. When a profession is in good order, experienced professionals will deliberate about the ethical dimensions of professional practice even as novices internalize the standards together with the reasonings that ground them. And practitioners who egregiously breach the standards – even to serve socially beneficent purposes – may lose their licenses to practice (the professional "death penalty"). As one studies the literatures of professional ethics, one finds arguments advanced for role-specific obligations, including, on occasion, obligations that diverge strikingly from "ordinary morality." What can ground these obligations can be a collective social responsibility to provide care and attention to some critical arena of societal concern. Provisions in ethical codes precipitate out of the profession's responsibility for some overriding constituting task.

I want to suggest that the distinction between the normativity of the Mafia's commitment to *omertá*, and the normativity of the legal and medical profession's commitments to confidentiality, becomes evident when we assess the social organizations in question. If we think

through the issues using the tools of social and political philosophy, we will likely be led to the judgment that societies like ours require their lawyers to be honorable in determinate ways, and they require their doctors to comply with norms that permit health care systems to function well. When the institutions we rely upon for justice and health care are functioning satisfactorily, we are all more likely to be better off.

In striking contrast, it is not now a benefit to society that our mobsters honor the venerable precepts of *omertá*. In the near anarchy of mid 19th Century Sicily, it could have been plausibly argued that the Mafia was necessary as a "mutual protective association." A small business owner who had Mafia protection could appeal to the local Don if he were victimized by a common criminal. But absent the checks of democratic accountability, the practice of collecting fees for protection can (and did) evolve into a protection racket. Regardless of the social purpose that the Mafia may once have served, it seems that communities no longer need their services, and no longer should be extorted into paying for them.

Viewed in this way, the complaint that will stand against the Mafioso is not that he is a bad person, nor that he violates commonly accepted norms, nor that his behavior conflicts with the practical identity that he has, nor a practical identity that he should have, though all of these complaints may be well-grounded in the end. It is rather that he works within an organization that would not exist within a just social order.

Clearly a just social order would require institutions that are needed because of imperfect compliance with the demands of justice. Any robust political philosophy must have something to say about crime and punishment, civil disobedience, rebellion and revolution. Though the death of Gypo at the hands of the Irish resistance shares some features of a Mafia hit, one can make a

general case for the permissibility of organized armed rebellion against the injustice of occupying oppressors. But such an argument would not be available to the *capo* 30 years later in New York City.

When we shift our attention back and forth, between the personal side (our practical identities) and the public side (our social roles and the institutions and relationships of which they are a part), we have, I think, a solution to Korsgaard's problem, at least in cases involving professional obligations. While the experience of obligation might be grounded on practical identity, at least some *ethical* obligations are grounded when practical identity is analytically linked to a normatively rich social role, and the role in question is linked to a social relationship or organization that is critical to the well-being of a social order.

For one who becomes a professional, the novice's pre-professional morality is commonly displaced by a professional code of ethics. For the profession, the collective process of reflection bears many of the features that Korsgaard identifies and values in ethical deliberation. At least in the arena of professional ethics, her overall account is enriched by extension into the domain of the political.

## 6 The Psychologist's Culpability

We can now return to the question of the psychologist's professional culpability and the role I played as an expert witness. It has become my practice to draw on two sources in assembling testimony as an expert ethics witness: (1) the ethical provisions in the consensus documents, and (2) the associated arguments drawn from the secondary literature . My deposition lasted for about six hours. Here I can only sketch the main lines of my thinking.

***(1) Consensus Documents:*** Especially after an ethical issue has been well discussed, it is commonly possible to locate pertinent provisions in professional codes or consensus statements. (Usable consensus statements will be absent when an issue hasn't been noticed or when the favored response is heavily contested.)

For many experts, consultation with the code is as far as ethical research goes. Pertinent obligations are thought to be found exclusively in the black letters of the document. In contrast, it seemed to me that the norms specified in authoritative documents were not themselves authoritative. They were not like divine commands, worthy of endorsement merely because they were inscribed on the profession's Holy Tablets. They were in the code just because they had been, at the time they were drafted, taken to be sound ethical precepts. In that sense, the code was not the source of the professional's special obligations. Rather, the Ethics Code was the profession's public acknowledgement of the scope of its obligations. Following Korsgaard, the sources of the profession's obligations were to be found in the good reasons for the ethical provisions.

***(2) Associated Arguments:*** Accordingly, it could not settle a question of professional ethics that the American Psychological Association's Code said that, (with one exception to be discussed below) multiple relationships commencing after the termination of treatment were permissible. I would need to consult with psychology's professional journals, textbooks, and other documents. What interested me were the arguments that could be brought to bear on the limits of permissible multiple relationships, especially those that might commence after the termination of treatment. I would need to familiarize myself, not just with the code's rules, but also with the literatures that challenged, explained and justified those rules.

This deep and broad familiarity with arguments and reasons is at the heart of the ethics consultant's distinctive expertise. It is a species of the Authority of Expertise. Ideally the ethics expert will be well-versed with the pertinent ethics literature of the profession in question and with parallel discussions drawn from other professions. The question on the table will be: What are the good arguments for configuring professional obligations in one way rather than another?

In a courtroom, it will not be enough merely to have mastered those arguments. One will have to have the ability to represent them in ways that are clear enough for a judge and jury to follow. Equally important, opposing counsel should also be able to appreciate that both the judge and the jury will be able to follow the arguments. The good expert witness is, above all, a good teacher.

As I continued to read and re-read the code, a puzzling element came into focus. Far removed from the "multiple relationship" language was a discussion of sexual relationships with clients. In a section entitled "Therapy," there were the following provisions:

**10.08 Sexual Intimacies with Former Therapy Clients/Patients**

(a) Psychologists do not engage in sexual intimacies with former clients/patients for at least two years after cessation or termination of therapy.

(b) Psychologists do not engage in sexual intimacies with former clients/patients even after a two-year interval except in the most unusual circumstances. Psychologists who engage in such activity after the two years following cessation or termination of therapy and of having no sexual contact with the former client/patient bear the burden of demonstrating that there has been no exploitation, . . . (See also

Standard 3.05, Multiple Relationships.)

The parenthetical reference to Standard 3.05, the provisions regarding "Multiple Relationships," suggests that the authors of the code were aware that a sexual or romantic relationship would qualify as a multiple relationship under 3.05, discussed above. So why, one might wonder, was the issue of sexual intimacy with former clients not subsumed under "Multiple Relationships"? Further, why did the prohibition on multiple relationships expire when therapy terminated, even as the prohibition on sexual relationships survived for at least two years following termination? What was it that justified the difference?

Having done work on professional ethics in several fields, I was aware that professional obligations often survived the termination of the fiduciary relationship: for example, the duties to preserve confidences and maintain accurate and complete records. But there were other cases that highlighted the problems created by successive relationships. For example, a lawyer who had once done work for a businessman would not be permitted to represent, later on, the businessman's wife in her divorce with the former client. Consider that if the lawyer agreed to represent the wife, he would have to stand ready to use all of his resources against the husband. Such is the paramount duty of zealous advocacy. And yet, because of confidentiality, he would be prohibited from using what he had learned about the businessman while he was acting as the lawyer for that former client. If financial information earlier obtained from the husband were potentially useful in the wife's case, he would have had conflicting obligations both to use that information on behalf of his second client and not to use that same information out of an obligation to his first client. For this reason legal ethics prohibits attorneys from entering into successive representations where such conflicts of obligation are possible.

The authors of the APA Ethics Code seem to have been aware of such risks. In delimiting the prohibition against sexual intimacy, the Ethics Code permits sexual intimacy with a former client after a two-year post-termination period, provided that there have been no sexual relations beforehand and provided that the psychologist can demonstrate that there has been no exploitation of the client.

But notice that a restrictive, formalistic interpretation of the code would still support the defense. While sexual intimacy was the one exception to the rule prohibiting only simultaneous multiple relationships, the psychologist's complicity in the swindle did not remotely qualify as a sexual relationship. Nonethless, the secondary relationship (financial manager) nonetheless did more than merely risk exploitation and harm. It actually visited both upon the former patient.

As it happened, the Ethics Code itself explicitly discouraged such restrictive, formalistic interpretations.

> In applying the Ethics Code to their professional work, psychologists may consider other materials and guidelines that have been adopted or endorsed by scientific and professional psychological organizations and the dictates of their own conscience, as well as consult with others within the field.

I took this language to be a formal encouragement of consultation with those who had contributed to the professional literature: "others within the field." It was not difficult to locate commentators who were also puzzling over the unexplained discrepancy between the prohibition on post-termination sexual relationships and the permissibility of other potentially harmful or exploitative relationships that commenced only after termination. The emergent view seemed to be that both represented breaches of professional ethics.

Among the most common worries was that the psychologist, having come to understand the patient's weaknesses during treatment, was in a position to take advantage of the former patient's vulnerabilities even years after treatment had ceased. The trustworthiness of practitioners would erode if psychologists were free to exploit their former patients as soon as therapy ended. Moreover, the former client might require a return to therapy, which could be blocked if a secondary relationship were in place. Concluding a comprehensive review of the literature on posttherapy non-sexual multiple relationships, psychologist Randolph B. Pipes proposed that the obligations of psychologists "should clearly prohibit us from unrestrained exploitation of recently terminated clients and that the profession should seriously consider limiting significant posttherapy nonsexual relationships between therapists and their former clients for at least some minimal period of time." [FN Pipes http://www.kspope.com/dual/index.php#decision ]

My purpose in deposition was to show that a deeper and more comprehensive appreciation of professional ethics in psychology could reach well beyond the black letters of the code, that there were reasons for acknowledging a prohibition on exploitative nonsexual relationships commencing after treatment had terminated, that commentators on the profession had already appreciated the good reasons for such an acknowledgement, and that the reasons for endorsing and conforming to such a norm were, in fact, good reasons. A responsible psychologist would never enter into such a relationship.

The parties to the lawsuit settled a few days after my deposition. Opposing counsel had unsuccessfully tried to have me removed as a expert witness.

# 7 The Authority of the Bioethicist

The work of the expert ethics witness, as I have tried to understand and practice it, can make a contribution to the health of professions and their communities. For it is in courts of law where the reasonings of professionals come under the most intense public criticism and review. In a very real sense, the ultimate client of the expert ethics witness is the community as a whole. For a central collective task of the liberal profession is to identify and achieve a stable and just accommodation between those involved in the delivery of professional services and the members of the communities they serve. The task of reconciliation is rendered more difficult by moral pluralism and the tendency to act and judge out of personal interest rather than out of professional and civic values. Sound professional norms, if broadly honored by practitioners, enable the profession to discharge the social responsibilities assumed in the political process of professionalization, and enable the profession to secure and further its distinctive values exactly as citizens are entitled to expect it to.

As I understand the task of the consulting ethicist, the expertise associated with this emerging role consists in (1) a deep and broad appreciation of the literatures on ethics in the professions, (2) the ability, over time, to resolve anomalies, contradictions and tensions within those literatures, and (3), the ability to lay out sound reasonings in ways that the lay citizen can understand and appreciate. Today, ethics consultation is at best, only an embryonic profession.

Unlike lawyers and doctors, it is generally not possible today to retain an ethics consultant with authoritative assurance that the selected practitioner will be competent to meet the demands of a task. Licensure and certification are complicated and neither one is in place. There are no accredited training programs nor is there an accepted agency of accreditation. [FN I have considered these issues in Kipnis, “The Certified Ethics Consultant”. ]

I do not ask opposing counsel, judges, juries, to take my word for anything. I am serving as what has been called a "knowledge broker," trying to provide my clients with what they need to know. Earlier I asked What is it that can sometimes endow ethical judgments with their remarkable power to impose themselves upon our decisions. Following Korsgaard, the only authority that counts is the authority we each have to reason through to our own conclusions. The ethics consultant possesses the Authority of Expertise: one who is knowledgeable about the ethical standards of the profession in question, The normative authority that an ethics consultant can wield resides in the power, soundness, and applicability of the justifications that such a professional can make available.

As a professor of philosophy, I have had the invaluable opportunity to devote most of my professional career to studying the scope and justification of professional norms. I do not ask my students (and clients) to trust me, but to follow the arguments. Like all professionals, I have tried to be responsible in my work. However it is inevitable that one will sometimes fall short. When I have erred, I have taken solace in a venerable Hippocratic precept: *Ars longa, vita brevis.* Life is short, but the craft endures. Those of us who have moved from philosophy to bioethics, and later to ethics consultation, owe a debt to medicine. For here we are reminded of the challenges and satisfactions to be found in mending a frayed social fabric, in healing a part of the world in a small but perhaps important way.