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A Comment on George DeMartino's "Professional Economic Ethics: The Posnerian and Naïve Perspectives"

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Abstract

The DeMartino (2013) paper provides a provocative and informative review of the key aspects of the ethical problems faced by applied economists. The purpose of this Comment is not to challenge the contrasts drawn by the author between the two ethics perspectives. Rather, it is our intent to examine more closely the ethical issues that forensic economists may potentially encounter, as identified by the author. DeMartino's paper is rather ambiguous with respect to forensic economic ethics. On the one hand, the paper states that the pressures upon forensic economists are more powerful than those faced by other applied economists; yet, the paper identifies some reasons explaining why there are mechanisms that reduce such pressures. This Comment argues that the author has already identified the broad parameters that explain why ethical problems are *less* severe for practicing forensic economists. This Comment also expands upon the reasons for this more favorable situation. As a result, the author's conclusion that economics "today is a rogue profession" is excessively broad for two reasons: (1) the focus of the paper is on applied economics, not the entire economics profession, and (2) the phrase would more accurately be stated as: some but not all applied economics comprise a rogue profession.

I. Introduction

The DeMartino (2013) paper provides a provocative and informative review of the key aspects of the ethical problems faced by applied economists. Yet the paper is rather ambiguous with respect to forensic economic ethics. On the one hand, the paper states that the pressures upon forensic economists are more powerful than those faced by other applied economists; on the other hand, the paper explains some mechanisms that are in place that serve to reduce such pressures.

This Comment argues that the author has identified the broad parameters that explain why ethical problems are *less* severe for practicing forensic economists. This Comment also expands upon the reasons for this more favorable situation.

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II. Review of Ethical Issues

The ethical challenges facing applied economists are described in Section IV of the DeMartino paper, and fall under three categories: time constraints, pressure to generate biased work, and market pressures: "selling expertise" versus "selling opinions." This Comment focuses on their relevance to forensic economics. We first present a brief review of the three categories.

Time Constraints

Time constraints, it is argued, force economists to do "barely adequate work" under unreasonable time limits. Economists, it is said, "have nothing to draw upon in attempting to resist unreasonable demands" and "are left to make even substantial compromises with their professional duties ...." (pp. 8-9) What is being discussed is the situation where an economist employed by a government agency or private corporation is being told to produce a report supporting a pre-determined position, usually with a time constraint. This has little relevance to forensic economic work.

Pressure to Generate Biased Work

Pressure to generate biased work refers to client expectations of the expert "to produce evidence that justifies decisions that are already reached prior to the execution of the economic research." (p. 9) DeMartino identifies a related bias, namely, the pressure to avoid certain kinds of research. For forensic economists, this might mean not wanting to publish certain findings if such findings were to adversely affect how the economist calculates economic damages. It could also mean even choosing not to do research that might have a similar effect.

A brief discussion of another pressure, namely, to undertake an assignment with inadequate data, is presented: "Economists must then decide where to draw the line between working with inadequate data that are readily available and declining the contract altogether." (p. 15)

DeMartino also points out: "The relationship between economist and client can become particularly fraught when the client offers to provide some or all of the consultant's compensation in equity or a share of profits rather than in a fixed fee ...." (pp. 13-14) Again, this has little relevance to forensic economic work.

Market Pressures

Market Pressures "sometimes push the economist in the direction of providing the client with the result that best serves its interest rather than that which is best supported by the evidence." (p. 11) DeMartino cites one prominent economist who argued "that ethical economists could not survive in business since there is little demand for their work." (p. 10)

However, citing Hardwig (1994), an important point is made by the author, namely, that the market for consulting services is segmented. On the one hand, clients in both the public and private sectors have a need for reliable, unbiased analysis about their markets or economic landscape. "In such cases there is no conflict between the goals of the client and the professional imperatives driving the economist." (p. 11)

In contrast, contested environments such as in zoning variance applications or in litigation create pressures upon the economic consultant by "clients who want to buy validation and legitimacy, not economic expertise." (p. 11) One substantial pressure is the offer of high rewards for selling opinions. DeMartino states: "The pressure to adopt and shade one's findings toward the viewpoint of the client is particularly acute in forensic economics, of course...." (p. 14) At this point, therefore, it is worthwhile to scrutinize the pressures forensic economists face.

III. Forensic Economists and Ethical Pressures

Having highlighted the key ethical problems faced by economic consultants, we turn to what the author says about economists who work in the litigation arena. Forensic economists, a subgrouping of economic consultants examined by DeMartino, operate within a unique environment characterized by counterbalancing forces that DeMartino recognizes as reducing substantially the ethical pressures other applied economists may encounter. The author's statements about counterbalancing forces are instructive in this regard.

> First, in cases where substantial financial or other interests are at stake, the work of the economic consultant is exposed to intensive scrutiny by those opposing the client's mission. ... [T]he economist's work may very well undergo a more rigorous test than it would under the review process of a prestigious journal. The adversarial process ensures that tainted or otherwise inadequate work will fail to advance the client's interests; hence, clients will rationally come to demand expertise rather than opinion.
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> Second, ... it is relatively easy for potential clients to ascertain which consultants do good work in the sense of producing credible analysis. Reputational effects are therefore substantial in this industry. (p. 12)

In addition, DeMartino points out that consultants believe they are behaving ethically when they are willing to accept

> contracts from any potential client who seeks legitimate work. Providing services to clients of divergent interests is consistent with the conception of the work as objective and unbiased. At the same time, ... it enhances the consultant's professional reputation. (p. 13)

In effect, forensic economists who provide their services to both plaintiffs and defendants tend towards doing less biased work than those who choose to work for only one side. In personal injury/death cases, most retentions are for the plaintiff who bears the burden of proof in establishing damages. In commercial cases, both sides often retain an economist.

In light of the preceding, we revisit the three categories of ethical pressures identified by DeMartino as they apply specifically to the work of forensic economists.

Time Constraints

In forensic economic work, it is not unusual to face court deadlines for submission of an economic loss report. In our experience, the blame sits squarely on the shoulders of the retaining attorney who, for one reason or another, delays engaging an economic expert until the very last minute. In many instances, the plaintiff's attorney is hoping to settle the case without the need to hire many experts. Also, since proving liability and causation take precedence over proving damages in the early stages of a case, attorneys tend to put off hiring economic damages experts until absolutely necessary.

Of course, if the economist cannot possibly meet the deadline, he or she will simply not take the assignment. On the other hand, if a forensic economist can set aside the time necessary to do a "rush job" within the specified time, he or she might take the case.

But things can get more complicated, especially if insufficient or inadequate data are provided, with no opportunity to request and obtain needed missing information. In such circumstances, the ethical forensic expert needs to explicitly incorporate conditional statements to the methods and conclusions presented in the resulting economic damages report. If the hiring attorney balks at the caveats stated in the report, it would be wise for the economist to withdraw from the assignment. Knowledge of potential cross-examination and scrutiny by the adversary attorney during a deposition or trial should serve as a sobering reminder to the expert not to make unsupported statements or assumptions. Those who ignore this fact risk endangering their reputation as credible experts.

For forensic economists who have multi-person staffs, taking on a rush assignment may not be a great difficulty. But for those with a substantial case load, this means "bumping" other cases in order to complete the early-deadline assignment. This may delay somewhat the completion of the other cases. In our experience, we have seen practitioners levy an "expedited fee" for rush assignments that serves two purposes: it provides financial resources that might be needed to compensate staff to work overtime, and it serves as a reminder to attorneys that a penalty is paid for unreasonable lateness in retaining an economic expert.

In summary, time constraints in cases with inadequate data are dealt with by adding conditional statements to the opinions expressed.

Pressure to Generate Biased Work

The adversarial process poses threats to economic consultants who do biased work. These threats come in the form of deposition and, ultimately, trial cross-examination. As argued by Tinari (1993), critique of an expert's work from the adversary comes in two stages: first, at the report/deposition stage, and ultimately at the trial stage for those minority of cases that do not settle. Hence, the adversarial competition that exists in the practice of forensic economics is palpable.

Actually, depending on the state venue of the litigation, there could be three levels of potential critique faced by forensic economists. The first level occurs after submission of a written economic loss report since it may be subject to written rebuttal by an economist hired by the adversary attorney in a case. The second level is that of deposition cross-examination wherein, under oath, the forensic economist must explain his or her methods, sources, communications, research and opinions. Finally, there is the trial level where, again, testimony is given under oath. Most other applied economists do not face this tri-level gauntlet that is part and parcel of working on litigated matters.

While it is a fact that most litigation settles before ever getting to trial, the first two levels of potential challenge and examination still serve as strong incentives to minimize bias and unprofessional standards. The more biased or exaggerated the opinion being offered, the more likely it is that opposing scrutiny will be triggered.

Further, since an expert's reputation is, perhaps, his or her most valuable commodity, forensic economists have a strong incentive to maintain as much objectivity and consistency as possible. The fear of losing credibility is acknowledged as one of the most powerful incentives for forensic economists to perform professionally and ethically. (Sattler, 1991, pp. 264-66)

Ward and Thornton (2013) tabulated the views of NAFE members who responded to an ethics survey. A common theme was that problems in reports issued by economic damages experts seem to stem from incompetence, a lack of knowledge of the literature in the field, and a lack of background facts to make proper calculations, rather than bias or other ethical violations. In DeMartino's words: "The adversarial process ensures that tainted or otherwise inadequate work will fail to advance the client's interests; hence, clients will rationally come to demand expertise rather than opinion." (p. 12)

It should be noted that the dominance of the internet in accessing information serves to reinforce adversarial pressures inasmuch as, in our experience, attorneys have ready access to their colleagues on list-servs, blogs and the like, and can obtain copies of an expert's report prior reports and testimony transcripts. The existence of a record of past depositions and trial testimony helps to enforce consistency in methods. It is the foolish expert who ignores such potential access.

Another factor serving to minimize biased work is the policy, widely used by forensic experts, of providing one's services to either side of a litigated matter. With rare exceptions, such availability forces the forensic economist to maintain consistent and defensible methods of analysis. DeMartino recognizes this factor when he states: "Providing services to clients of divergent interests is consistent with the conception of the work as objective and unbiased. At the same time, ... it enhances the consultant's professional reputation." (p. 13)[1]

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[1]One reviewer pointed out that in personal injury matters a retention rate for plaintiff of over 70% is normal, and few economists testify at trial for the defense. So, balance is less important than consistency and unbiasedness in the methodologies used by the expert.

Of course, in litigation engagements, the expert can only undertake his or her analysis based on the information provided. Thus, it is possible that unintentionally biased work would result if slanted, inadequate or incomplete information is given to the expert. This is all the more reason for the expert's report to be fully transparent, stating any and all sources, and including conditional statements with phrases such as "our conclusion may change should additional information be uncovered that changes any of the assumptions or inputs in our analysis." But in these circumstances it cannot be said that the forensic economist is acting in a biased, unethical manner if the economist has been advised that the information provided is complete and accurate.

Market Pressures

With respect to potentially very high compensation, expert economists who testify are prohibited by legal standards from accepting contingent payments. While that is not true with reference to other types of applied economic consulting, it is a welcomed ethical blockade to being unduly influenced by the outcome of one's expert opinion.

Nevertheless, it may be that an economic expert may fear that if he or she does not accede to certain assumptions or methods of calculating damages being insisted upon by retaining counsel, he or she will lose that attorney as a client in future potential engagements. After all, the attorney could "shop around" until a desired expert is engaged. While DeMartino states that the economist may have to undertake "delicate negotiations" with the attorney about these matters, a more effective mechanism is in place, namely, the need of the economist to protect his or her reputation and credibility. Only foolhardy experts would take such an assignment without thought to how his or her work will possibly be cited in future engagements. Again, it is the adversarial process and its mechanisms that force the forensic economist to adhere closely to professional standards or practice, or suffer the potential consequences.

III. Conclusion

DeMartino's article and the book from which it is drawn provide a thorough and comprehensive overview of the ethical issues faced by applied economists. With respect to confronting ethical issues within the ranks of economists, DeMartino states: "Forensic economics is the outlier in the profession in the degree to which its practitioners are addressing explicitly the ethical entailments of their work." (p. 17) This is an unintentionally ironic statement because, as we have argued here, the forensic economics market has several built-in safeguards, countervailing forces, if you will, that serve to minimize the tendency towards unethical practices. It is ironic inasmuch as all of our discussions of the issue, in our journals and at conferences, as noted in Thornton and Brookshire (2013), are not the main reason for the relatively positive situation in forensic economics. Survey comments submitted by practicing forensic economists expressed a general feeling that adversarial pressures could be relied upon, rather than published ethical standards, to rein in potentially unethical practices: "Cross examination works!" "I prefer to let the 'market' to do that (e.g., by providing examples of inconsistency to lawyers to use on cross examination)." "Let word of mouth do it within the legal profession and among practicing economists." (Ward & Thornton, pp. 34-35)

As a result, the author's conclusion that economics "today is a rogue profession" is overreaching for two reasons: (1) the focus of the paper is on applied economics, not the entire economics profession, and (2) the phrase would more accurately be stated as: some but not all applied economists comprise a rogue profession. Further, with respect to the practice of forensic economics, it appears that the vast majority of forensic economists are constrained to act ethically, and "that unethical forensic economists comprise a minority of practitioners, and that cross-examination, *Daubert*, and reputation have had an effect on the extent of unethical practice in the field." (Ward & Thornton, p. 35)

References

DeMartino, George. 2011. *The Economist's Oath: On the Need for and Content of Professional Economic Ethics*. NY: Oxford University Press.

DeMartino, George. 2013. "Professional Economic Ethics: The Posnerian and Naïve Perspectives." *Journal of Forensic Economics* 24(1): 3-18.

Hartwig, J. 1994. "Toward an Ethics of Expertise" in D.E. Wueste (ed.), *Professional Ethics and Social Responsibility*. Lanham, MD: Ravman and Littlefield Publishers: 83-101.

Sattler, Edward L. 1991. "Economists, Ethics and the Marketplace." *Journal of Forensic Economics* 4(3): 263-68.

Thornton, Robert J. and Michael L. Brookshire. 2013. "NAFE and the Ethics Question." *Journal of Forensic Economics* 24(1): 19-23.

Tinari, Frank D. 1993 "Competition for Forensic Economists and Their Ethical Behavior." *Journal of Forensic Economics* 6(3): 263-69.

Ward, John O. and Robert J. Thornton. 2013. "Can Statements of Ethical Principles and Codes of Practice Make a Difference? The Results of a NAFE Survey." *Journal of Forensic Economics* 24(1): 25-39.