

Doing Forensic Work, I: Starting the Case

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The private forensic work discussed here is performed as an “expert” or “expert witness,” defined in law as a person who is allowed to offer opinions to a court. One should not be an expert in forensic matters that involve one’s own patients. Initial communication with the potential retaining entity (e.g., lawyer, court, agency, insurance company) should clarify the case, the lack of conflict of interest, one’s possible forensic role, and practicalities such as fees, scheduling, and the way in which the work will be performed. One should guard against being misused, or having one’s opinions misconstrued, in forensic matters, including being named as an expert witness without actually being retained (a “phantom expert”). Communicating orally with the retaining entity about progress and findings is important; written findings or opinions should be created or communicated only if the lawyer (or other retaining entity) requests them. Opinions should not be rendered without adequate review of complete and credible records and/or other sources, and even then caveats or disclaimers may be ethically or legally required. The forensic work routine almost always begins with record review, and may or may not include examining a litigant or other person. (*Journal of Psychiatric Practice* 2012;18:122–125)

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This is the first of several articles on the practical aspects of forensic work. The general concepts come from an upcoming book on developing and operating a successful, ethical forensic practice. This material generally assumes that the clinician is a private practitioner working with an attorney, court, or other third party (often simply referred to as “lawyer” to save space). We’ll start with what, in my view, you should do at the beginning of a case. In the next issue, we’ll tackle fees and billing.

What’s an “Expert”?

When you agree to work with a lawyer, court, or other party and anticipate offering an opinion of some sort, you become an expert for that party. It doesn’t matter whether you view yourself as an expert or not (although you shouldn’t accept cases in which you don’t truly have expertise); the law defines “expert” as anyone qualified to offer an opinion. If you are expected to testify in any way (in person, or by report or affidavit), you’re an “expert witness” (a legal concept). If you simply work with the lawyer party without expressing your opinions to anyone else, you’re a “consulting expert” (an informal term).

Forensic Practice Relationships

When acting as an expert witness, your relationship should be with a lawyer or other retaining entity, not the litigant himself/itself. If someone other than a lawyer or judge calls or emails you, particularly to inquire about a personal or family forensic matter, *do not* do anything that might form a clinical or business relationship with that person. Don’t discuss the situation, express opinions, or make any agreement. Simply say politely that you work only through third parties (e.g., attorneys, courts, insurance companies) and that talking with a (potential) litigant may interfere with any future involvement. Don’t suggest that the person might or might not “have a good case,” and refrain from recommending specific lawyers.

Your initial contact may be with an assistant of some kind. Be sure that your eventual business agreement is with a person who is authorized to contract with you, and that the retaining firm or agency

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is a party to the agreement and guarantees your fees. Although payment may ultimately come from a third party, such as a litigant or insurance company, I strongly recommend that you not rely on any litigant for payment, either directly or indirectly. That is, it should be clear that you will bill, and expect payment from, the attorney or other retaining entity, not a litigant or insurance carrier (unless you have contracted with the carrier itself, such as in the case of a disability evaluation).

Initial Attorney Contact

Cases usually start with a phone call or email from an attorney asking if you would be willing to review some records or examine a client. I like to talk directly with the lawyer, not simply respond by email (see below).

Ascertain possible conflicts of interest early, and discuss them with the attorney. Ask for the name(s) of the litigant(s). You should not be an expert in forensic matters that involve your own patients, whether current, past, or reasonably anticipated future ones. To do so almost always creates both clinical and forensic conflicts of interest, is often unethical, and may in some cases be illegal. If a malpractice case involves a colleague with whom you work, a friend, or a facility in which you practice, you probably should refer the attorney elsewhere (even if you believe you can be objective).

Don't believe everything the lawyer says about the case. The attorney usually wants to "get you on board" with his or her case and have you see it from his viewpoint. Some lawyers are more straightforward than others. Take the comments with a grain of salt and get your facts from your own review and/or examination. It's not a bad idea to indicate in your telephone notes that what you are writing comes from the attorney (implying that it is not necessarily accurate or complete).

Understand that your notes are probably discoverable should you be retained, and anticipate that they will be seen by the other side. Don't be cavalier when writing things down. Incidentally, it is the *information* you receive or exchange that is discoverable, not merely your written notes, recordings, or physical things the lawyer sends to you. You proba-

bly will not be able to remember the content of a conversation months or years later, but if you do, you must disclose it, if asked to do so, during testimony.

Avoid discussing so much in the initial call that you can't ethically work with the other side if the first caller doesn't retain you. It is fairly unusual to be called by both side of a case, but it can happen under at least three circumstances, two of which are innocent and the third a real pain in the neck: If you practice locally, both sides' lawyers may know of you. If you are somewhat well-known, both sides in cases outside your locale may coincidentally call. Finally, a lawyer for one side may contact you in an attempt to preclude your being retained by the other (or, occasionally, to intimidate the other side), with no intention of really using you. A few shady lawyers "list" experts in their court documents without bothering to hire them at all (see "phantom expert," below).

Don't offer opinions based on an initial call, or even represent that your participation will support the lawyer's side. Remember, (a) you have only heard one side of the story, (b) in brief summary form, (c) usually early in the the case. (d) You probably haven't received any written records, and (e) you haven't put much thought into the case.

If you are not a good expert for the matter at hand, you cannot participate for some reason, or you simply don't wish to become involved, consider recommending other experts or providing other referral information. Be polite, not just self-serving, even if you are not retained.

What You Need From the Lawyer Before Proceeding

Before beginning work, or even agreeing to participate as an expert consultant or potential expert witness (an agreement that should always be in writing), be sure you have all of the following.

- An accurate case description, with the official "styling" (name) of the case if it has been filed
- A clear understanding of your role (sometimes you define it, so be sure it's clear and ethical)
- A clear and binding agreement for your fees and expenses
- An expectation that you will receive all available and relevant records (not just summaries or "chronologies")

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- The time and freedom to review those records and do other necessary work
- A general schedule of the case, in order to be prepared to meet relevant deadlines
- The attorney's understanding of your work procedure and ethics (e.g., how you review, how you will communicate, and your statement that you will be honest and objective and will not render opinions that are not justified)

Are you a “phantom expert”? That means being listed or declared to the other side without your knowledge, for example when an attorney lists you as his or her expert after contacting you, but without an agreement, declares that you hold opinions that you've never formally rendered, or even lists you as his or her expert without ever contacting you. When this occurs, it's a big problem.

- It misrepresents you and your opinions.
- It keeps opposing lawyers from contacting you.
- It often cheats you out of legitimate fees.

Using “phantom experts” is not as unethical for lawyers as one would think. Forensic clinicians who have had the experience often complain about dishonest practices or being listed without compensation (assuming they somehow discover the dastardly behavior). One can contact a judge or consider legal action for use of one's name without consent (or for “restraint of trade”), but it's tough to get satisfaction. In my experience, judges rarely side with experts in such circumstances.

Typical Case Process

Have an initial conversation with the lawyer or other potential retaining entity. Spend some time learning about the case, getting to know the attorney, answering his or her questions, deciding whether or not you want to participate and can be useful, and agreeing on the process. Take notes and get relevant identifying information. I recommend that you not charge for this initial call. (You'd be surprised how many colleagues start charging as soon as they pick up the phone.) At this point, you have not been “retained” (see below) and probably owe no duty to the caller.

I do not recommend that this step be completed by email. One can learn far more, and make better decisions about being retained, in a telephone or in-person

meeting than by email or letter. If you get an email offering to send records, retain you, or asking for detailed information, I suggest that you politely decline and offer to speak by telephone. Do not offer opinions or specific advice based solely on an email contact.

Establish a written agreement/contract. If you wish to participate, send a clear letter indicating your willingness and requirements (such as fees, procedures, and schedule). I use real paper; email is acceptable, but be sure the wording is correct and your grammar and spelling are impeccable (every communication represents your professionalism and credibility). Lawyers use letters or emails, but many agencies and companies use contracts; be sure you understand what you are signing, and that your requirements (see above) have been met.

Receive and review records. Request, and expect, all available and relevant records. “Records” often include clinical, school, employment, legal, corrections, and other materials, forensic reports, and depositions and statements by litigants or other parties.

Do not offer opinions without adequate review of the relevant records. And don't be bullied into expressing opinions in a report or affidavit, or in testimony, if you don't have all the information you believe is important.

Lawyers sometimes ask for a “preliminary” review of some kind. That's not always a bad thing, and some records may not be available when you do your review, but be sure you have enough information to come to any conclusions you may reach. If you do express opinions, include disclaimers when they seem necessary. For example,

Although I have reviewed detailed records of past hospitalizations and clinic visits, I have not examined the plaintiff. Such an examination could provide information which would change the opinions below.

or

My review to date has necessarily been limited to the clinical record; vocational records are not available to me at this writing. Although some inferences may be drawn based upon his diagnosis and the clinicians' progress notes, specific

opinions concerning Mr. _____'s actual work performance cannot be rendered without credible information about his workplace functioning and behavior.

or

It should be noted that the comments and opinions in this preliminary report are based upon the assumption that the events in question happened essentially as Ms. _____ described them to her psychiatrist and in her deposition. I reserve the right to change or withdraw any opinion should additional, credible information suggest otherwise.

It is reasonable to perform an initial, limited review for the purpose of preliminary discussion with the attorney. Talking with the lawyer after a preliminary review helps the attorney, may focus your role in the case, or may even suggest to the lawyer that your work is not likely to be helpful to his or her case (don't take it personally).

Communicate with the lawyer or retaining entity.

Communicate *orally* with the lawyer or retaining entity about your review, any need for further records, and/or next steps in the process (such as client/litigant examination, report, or testimony). *Do not send, or even create, a letter, email, or report about your findings unless the lawyer requests it.*

Although forensic work often includes writing reports and giving testimony, many cases (especially civil ones such as lawsuits) end here. Many are resolved one way or another before reports are written or expert depositions taken; the great majority of civil cases (and many criminal ones) never go to trial.

Perform relevant examination, interviews, and/or testing. Did I forget about examining the litigant or other party(ies)? No; there's a reason those aren't part of this article.

Lawyers often call saying they just want to schedule an "independent medical examination" (IME). However, scheduling such examinations before adequate review and discussion often leads to unnecessary or premature evaluations (and not a few scheduling headaches). With the exception of disability reviews, I rarely schedule in-person evaluations without at least some review of the records and dis-

ussion with the attorney. For several reasons, most of my civil cases (and some criminal ones) do not involve IMEs. Nevertheless, examinations and evaluations are an important part of many forensic cases and will be discussed in a subsequent column.

Write a report, provide testimony. These come later, when they occur at all. Several earlier columns in this journal have addressed these topics¹⁻⁴ and they will be discussed again in a future issue.

References

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