

The Top 19 Things to Remember When Working with Lawyers and Courts

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If you're considering undertaking forensic consultations, you need more information than I can put into this column. There are some good books out there, and at least one practical guide on audiotape (see "The Final Word," below). Specialized training and experience are critical to anyone headed for a forensic career. However, nearly all psychiatrists and clinical psychologists have an opportunity for occasional forensic work (and some have it thrust upon them). If that describes you, keep this column handy. The case examples are real—don't become one.

My comments here are limited to clinicians who are being retained by a lawyer. I won't be discussing the uncommon situation of being retained by the court itself, nor will I address juvenile cases.

1. The legal system needs good doctors who understand basic legal concepts, not pseudo-lawyers with clinical degrees.

You have been called because of your clinical expertise; don't act like an attorney. You should, however, know the relevant differences between clinical and legal concepts.

2. Accept the adversary system.

You are a consultant to the lawyer who retained you, not a "friend of the court" (which means something else anyway). Almost every forensic situation is adversarial, and the other side has ample opportunity to seek its own expert. Note that you're not an advocate for the litigant, either. That's the lawyer's job. You should, however, expect to defend your opinions.

3. Know the players and refer to them properly.

Always refer to the lawyer who retained you as "the lawyer who retained me," and correct anyone who implies otherwise. He or she is not "your" lawyer. Similarly, evaluators and litigants are not your "patients" (see 4, below).

4. Don't mix the roles of fact and opinion.

Your usefulness is partially determined by your objectivity. You should not have any clinician-patient relationship with a litigant or family member, nor should you have a conflicting interest in other participants in the case. Treating clinicians may give factual information about

their patients (that is, what they see or know) but should not offer "opinions." The difference can be subtle.

5. Be available for all stages of the legal process.

Forensic work may include reviewing records, conducting interviews, preparing reports, and giving testimony at depositions, hearings, or trials. Some cases require substantial travel and/or schedule changes. If you can't accommodate the case schedule and commit the necessary time, refer the lawyer elsewhere.

6. Your agreement, your relationship, and your "agency" should be solely with/to the lawyer (or contractee, such as a disability insurer) who retains you.

Do not consider yourself to be "working for" a litigant (plaintiff, defendant), malpractice carrier, or government, no matter who is ultimately paying the bills.

The lawyer or contracting agency should be your only source of records and other information (except what is gained from interviews). If a litigant or family member wants to provide records or other materials, these should first be sent to the attorney. Do not interview litigants or other parties without the attorney's permission (but do request interviews with anyone you think can provide relevant information).

From time to time, a potential plaintiff, rather than a lawyer, may contact you about a case. Politely tell him or her that you cannot discuss such things with anyone except an attorney, and *do not* allow yourself to be pulled into further conversation.

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This column contains general clinical and clinical-forensic opinions which should not be construed as applying to any specific case, nor as any form of legal advice.

7. Your agreement with the attorney should be made in writing, in advance.

Don't be shy about this. The lawyer will not be offended. The agreement should clarify your role, note that you will be objective and cannot guarantee any opinion in advance, specify that the lawyer (or, in some cases, an insurance company or government) is the retaining entity (not any litigant or other third party), and clearly state your fees, who is expected to pay them, and when they are to be paid.

8. Prevent payment disputes, so you won't have to cure them.

Payment disputes are almost all preventable provided you do all of the following, in writing. If you don't, expect problems, especially when dealing with small law firms, rural courts, and/or unsuccessful litigants.

- Specify all your fees (e.g., for work, travel, and waiting) in advance.
- Charge by the hour or day, not by the case (and never on any contingency basis).
- Specify who is expected to pay.
- In cases in which a court or agency must approve the fee, get an order for future payment that acknowledges the rate (not just that you will be paid).
- Request a retainer (not the same as a contingency fee) to cover the first several hours' work.
- Bill regularly. It may be unethical, and financially disastrous, to allow an attorney to wait until a case is over to pay you. Prepayment for time spent testifying or creating a report suggests objectivity, since no one is then holding money over your head.
- Don't let overdue statements mount up. If necessary, refuse to proceed until past bills are paid.
- If you have a cancellation fee or policy, specify it in advance.

9. Don't work from inadequate data.

A few lawyers may try to save money by supplying only part of the records (or even summaries they have prepared themselves). There are two good reasons to be sure you review everything available. First, that's the best way to come to a valid opinion. Second, even if you're not sure a particular part of the record is relevant, you are likely to be criticized by the opposing side for not reviewing it. If you think job records (or arrest records, military records, family interviews, old correspondence, etc.) are relevant, ask for them.

This also applies to interviewing. Always ask to interview the plaintiff, injured party, or criminal defendant. If the lawyer says the opposing side won't make the person available, suggest a formal request for an interview. If it's declined, the other side can't then say, "You didn't even try to examine Ms. Jones, did you, doctor?"

10. Don't do brief evaluations.

This is an "inadequate data" item, but it deserves its own paragraph. Try to avoid single-interview or very brief evaluations. I like to see people for at least 3 hours (and often for much longer), divided into at least two sessions (not counting necessary psychological testing). If the attorney balks at the cost, simply say that you need to have a sufficient foundation in order to be able to swear to your opinion, if one can be formed.

11. Understand the legal rules about what you can and can't do.

When in doubt, *ask*.

During a deposition, an inexperienced forensic psychiatrist was asked if he had taken notes during several hours of litigant interviews. When he answered, "Yes," the lawyer for the opposing side asked why there were no such notes in the doctor's file, which had been subpoenaed. The doctor then said he had destroyed all notes after he got the subpoena. The next 15 minutes of his testimony were spent answering very difficult questions about his office routines, his experience, the subpoena instruction to turn over "all notes," and the possibility that he had committed a crime. His credibility and the plaintiff's case were ruined.

12. Be scrupulously objective with the attorney who retains you.

Don't say "good" things about the case just because you think that's what he or she wants to hear. Lawyers need *all* your findings and opinions in order to litigate cases well (but don't put them into a report unless asked).

13. Understand forensic report-writing.

If you are asked to write a report, be aware that it will probably be very important to the outcome of the case. It summarizes your findings and opinions, helps the lawyers on both sides understand the strengths and weaknesses of their positions, and may even be used to settle the case. It also represents *you*, your expertise, and the quality of your work. All this demands that you *give it the time it deserves*. It will often take hours to re-review your notes, frame your comments, organize the report well, and convey your meaning accurately and directly. Use excellent grammar and your best stationery, and *proofread* the report before submitting it.

Format. A few forensic experts prefer lengthy reports that outline the entire review and interview process. I think this is usually a mistake, in part because all the extraneous material opens up topics for the opposing side that may not be relevant to your opinions. You should just summarize the foundation for your opinions, which can

usually be done in a paragraph or two. I sometimes suggest that the attorney ask me specific questions to which I can respond concisely in writing, rather than allowing me to assume what I think is relevant. There may be specific format requirements (such as listing the resources on which you relied, your qualifications, and/or cases in which you have testified). Discuss the alternatives with the lawyer.

Attorney contact and drafts. Don't let the attorney write your report. Some lawyers, especially when time is short, may suggest that they send you a draft for review and signature (this often happens with affidavits, which must be in a particular format). Be very cautious about such "suggestions" when they go beyond format alone. When the opposing lawyer asks "Did attorney Jones draft part of your report, doctor?" it's nice to be able to answer "Of course not."

There are three ways to handle communication with the attorney about report drafting. All are ethical; they differ only in the amount of lawyer participation.

1. You may complete the report with no input from the lawyer. The advantage of this approach is that the report is completely pristine, untouched by lawyers' hands. The disadvantage is that you may have misunderstood something important. If there's a problem, you can amend it later, but the original is usually available to the opposing side (it's not a "draft;" don't destroy it).
2. You may complete a "draft" and discuss it orally with the attorney (e.g., over the telephone). You may consider his or her suggestions (e.g., about format or something you may have forgotten), but be careful not to let the lawyer alter your opinions. The content of your discussion is probably discoverable later if you remember it, but as a practical matter most of it will be forgotten by the time you testify.
3. You may send a draft to the attorney—prominently marked "draft"—so that it may easily be reviewed and discussed before the report is finalized. The draft may still be destroyed (under the circumstances noted below), but you are obligated to acknowledge, if asked, that the lawyer had a chance to study a draft before the report was completed. This distinction is merely strategic, in my view, and allows the opposing side to suggest that the lawyer had a hand in the report. It does not imply anything unethical.

Drafts of reports may legally and ethically be destroyed, *provided* they have not been requested by the opposing side prior to destruction. Anything that exists at the time of subpoena or information release—on paper, on your computer, or on a dictation tape—must be made available for discovery.* If you're going to destroy drafts, do it immediately.

14. Protect your credibility.

Assuming first that you are a competent, honest clinician, nothing else is more important than your credibility.

Have a clean background. You will probably not have to reveal much about your personal life, but your professional background is fair game. Tell the lawyer at the very beginning if you have ever lost your license, had privileges refused or revoked, or been arrested for cattle rustling. Don't be surprised if he or she declines to retain you; it's better than working on a case for months and then being embarrassed (and useless to the case) at deposition or trial. Some things are not serious, such as being disciplined for overdue discharge summaries, but be sure the lawyer knows about them in advance.

Learn how to testify effectively. Your honesty and brilliance are not enough to convey your opinions. You must be able to communicate to the judge and/or jury clearly, without obfuscation. Talk with the lawyer about style of testimony, what will be asked, what will happen in the courtroom, and even dress and deportment.

15. Do not lie.

Ever. By commission or omission. It's not right, and it's illegal under oath. Remember, the lawyer for the other side probably already knows the answer to the question he or she just asked.

Opposing side's lawyer (in trial): "Are you Board certified, Doctor?"

Psychiatrist: "Yes."

Lawyer: "You are a Board-certified psychiatrist?"

Psychiatrist: "Yes, I am."

Lawyer: "Can you explain to the jury why the American Board of Psychiatry and Neurology says you *aren't* certified, doctor?"

Psychiatrist: "Oh, I'm not certified by *that* Board. I'm certified by (a mail-order 'pseudo-board' that sends certificates to any clinician for a fee)."

Lawyer: "And that's a mail-order 'pseudo-board', isn't it, doctor, that sends certificates to just about anybody for a couple of hundred bucks?" (strongly suggesting that the doctor was a liar, not really Board certified, had purposely misled the jury, and, as shown later, had not even completed psychiatric residency).

*There may be legal exceptions to this, but the decision is not yours to make. I suggest giving your entire file to the lawyer who retained you, who can then assess whether or not everything must be provided to the opposing side.

16. Don't get in over your head, go out on a limb, or testify beyond your knowledge.

Feel free to say you don't know or refer the attorney to an experienced forensic colleague.

Lawyer: "You say that Mr. ____ (defendant in a sensational murder case) is a paranoid schizophrenic?"

Psychologist: "Yes, in my opinion."

Lawyer: "And would you tell the jury, just what is a 'paranoid schizophrenic'?"

Psychologist: "Well, let me give you an example . . . Richard Nixon is one."[†]

17. Don't take it personally.

Most attorneys are polite, but some aren't. All are working for their clients, who are (and must be) their primary concern. If you or your opinions are in the way of their clients' success, expect criticism (and occasionally *ad hominem* criticism). Don't get testy or raise your voice; it just makes things worse (remember, you're in the lawyer's world, not yours). The lawyer who retained you, or the judge, should intervene when appropriate.

Don't be surprised if you aren't asked to testify. Your findings and opinions may have been helpful, but may, in the lawyer's view, do more harm than good if you testify. The attorney is not obligated to offer your findings to the court (but you *are* entitled to be paid for your work; see above).

18. Have a pre-trial or pre-deposition conference.

The attorney should bring you up to date and tell you what to expect, and may "rehearse" with you a bit. Lawyers hate surprises. Don't show up at the last minute and testify "cold."

19. Don't be a *prima donna*.

We all know you're busy and important, but if the case goes to trial, you must understand that everything will probably revolve around the court's schedule (not yours) and the lawyer's coordination of the case. If you're polite, they may cut you some slack.

The Final Word

The top 19 things to remember are summarized on the right. If you're really serious about this stuff, contact me for information about our audiotape workshop on developing and operating a forensic practice. It costs \$299 plus postage, handling, and applicable tax, and all proceeds go the Texas Depressive and Manic Depressive Association.

[†]This happened, honest; I have the transcript.

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