Forensic Work and Nonforensic Clinicians—Part I

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This month we'll talk about initial contact with a lawyer, deciding whether or not to participate, the attorney-expert relationship, fee agreements, and understanding the legal environment. In the next column, I will address reports, depositions, and trials.

Most psychiatrists and psychologists have an opportunity to do some forensic work. An attorney calls and asks, usually in a flattering way, if you would be interested in taking up a most important cause: that of his or her client. It may be a civil matter, such as malpractice, emotional injury, parental competence, or child custody. It may be a criminal matter, such as trial competence, criminal responsibility, or mitigation of intent. The experience can be professionally and financially rewarding, or it can be destructive for you and the litigant. If you are not careful, your inexperience could make a mess of things and embarrass you in front of lots of people.

A psychiatrist working on his first serious forensic case (a rather public one) was being deposed by several local law firms. As the court reporter typed and five or six prominent lawyers listened intently, he discussed his extensive examination of the plaintiff and family members. When asked why he had not brought his notes from the examinations, as demanded by the deposition subpoena, he said "I shredded them when I received your subpoena."

His inappropriate actions severely compromised the case for the lawyer who retained him, and he spent the next half hour answering rather humiliating (and sometimes frightening) questions related to the crime of spoliation of evidence, other improper behaviors, and whether or not he might be prosecuted.

Let's try to prevent things like that.

What Is an Expert?

When a lawyer asks you to participate in a case, he or she is almost always asking you to be an expert. To a lawyer or court, "expert" means someone who is qualified to give opinions at trial. It doesn't mean superstar or top-of-the-field, but merely a person whose background and experience impresses a court enough to allow him or her to offer opinions about something. That's the gist of "expert testimony," rather than just describing what one has actually seen or heard ("fact witnesses" do that). Some experts are consultants whom the lawyer doesn't anticipate calling to testify; many others never testify because the case in which they are involved is resolved without a trial.

Be Sure You *Are* an Expert

Just because a court allows you to express opinions does not mean you can do a good job developing them. Unfortunately, the lawyer who calls may want you because he or she can't find a forensic specialist or prominent figure who agrees with him. Be that as it may, do not get out of your element. Child custody cases, for example, require child training and highly specialized procedures; general psychiatrists and psychologists are rarely professionally qualified to serve as experts in such cases.

There are more subtle aspects of expertise. If you don't have both the clinical experience required to assess and perhaps support a particular case, and enough understanding of the law and your role in it, then you shouldn't be involved. That's not an insurmountable obstacle—everyone has to start somewhere—just one that you should recognize in order to remain professional and ethical.

A family therapist was called as an expert for the plaintiff in a lawsuit involving a shooting in a rural area. The judge allowed him to testify, and he offered

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his opinion that the shooting was not voluntary and was the result of a psychosis. On cross examination, he had to admit under oath that he had no experience with this kind of violence, was not qualified by training or license to evaluate psychotic patients, had not reviewed certain important parts of the record, and was not sure what the court's standards were for determining voluntary or illness-related behavior. His testimony was thus easily neutralized and the plaintiff's case was severely undermined.

Don't Be an Expert For Your Own (or a Past) Patient

It is often tempting to testify as an expert for your own current or past patient, and the lawyer may try to ease you into it (e.g., by starting out with questions about what you've observed and then asking for an opinion), but you shouldn't do it. There is a substantial conflict of interest between treating and expert roles.

A patient told her therapist that she had been sexually harassed. The therapist suggested that she talk with an attorney-friend and gave the patient the telephone number. The therapist then agreed to be hired by that attorney as an expert witness, used part of the therapy sessions to help the patient with her legal work, and occasionally talked with the lawyer to be sure that certain treatments would not interfere with the patient's case. The therapist was paid by the patient for therapy and by the lawyer for forensic work. The therapist's behavior and fostering of dual clinical and forensic roles, to the probable detriment of both, was brought out by the opposing (defense) attorney and an expert he retained for the purpose, seriously damaging the patient's case.

Attorneys often refer their clients for treatment expecting to have the doctor testify later. Beware of those who would place you in an untenable or unethical position. Once a person is your patient, you must act in his or her interest; you cannot be an objective expert even if you believe you can. When a lawyer sends a patient for treatment, make it clear to the attorney that you will not be available for expert (opinion) testimony. Both you and the patient should be aware that if the referral has anything to do with litigation, the treatment will also be compromised to some degree by the possibility of fact testimony (including subpoena of your records). Any chance that you will become the patient's expert increases the potential for clinical problems.

Beginning the Attorney-Clinician Relationship

Start with a written agreement. It may simply be a letter setting out what you will do and what you expect in return. It should include a statement that your work will be honest and objective, that you expect to perform a complete review of available relevant information, and that you have not yet formed any opinions (and if or when you do, they may not be favorable to the attorney's case). Be sure to include your general fee arrangements. Here is an example of the kind of letter you might use.

Dear _____:

This will follow up our telephone conversation, in which we talked briefly about the above case. I should be pleased to examine the details and consult with you regarding my findings. As we discussed, my review will be objective, and I have not represented to you that my findings will be helpful to your case.

The next step would be a review of relevant medical/psychological records and other facts and litigants' contentions. These may either be mailed to the above address or sent by courier.

Enclosed please find a curriculum vitae and a statement of fees and charges. My retainer in your matter will be $_____, against an hourly rate of $_____. Accounts are billed every 30 days, with payment expected as charges are incurred (except in the case of advances against billings for reports or testimony).

Please note that this letter does not constitute an agreement for services until either a retainer is accepted or such an agreement is established in writing. You ***may not*** list me as a witness in any action in the absence of such an agreement and, once an agreement is established, you ***may not*** represent to others that I hold any opinion which has not been genuinely rendered.*

Cordially,

Be sure the rules are clear at the beginning of your participation. Lawyers understand things like rules, conflicts, and charging for one's time. You will not insult the attorney by putting everything in writing and trying to

*Believe it or not, it is not particularly rare for lawyers to list someone as an expert witness without bothering to notify the person, and even to anticipate that expert's opinions. This is considered unethical by forensic clinicians and is, at best, using one's name and reputation without compensation.

prevent future misunderstandings. Disagreements and misunderstandings are far more trouble to deal with later, especially after the case is over and the lawyer no longer has any reason to flatter you.

Be sure that you are retained by the lawyer or the court, and not by the litigant directly. One may consult to an organizational litigant (such as a government agency or an insurance company), but it is usually inappropriate to allow oneself to be hired as a testifying expert by an individual litigant or his or her family. To do so creates too much duty to the litigant and the impression that you will be less than objective. That's fine for lawyers, but not for experts.

Fees and Charges

Charge for your time and nothing else. Set an hourly rate that you believe is adequate compensation for your time and expect to be paid. Some people charge differently for different tasks (reviewing records, writing reports, examining evaluees, traveling or waiting, testifying). For others (I among them), time is time, and the hourly or daily rate doesn't change. Don't forget that travel, waiting, or staying overnight in a hotel take your time as well, which could otherwise be spent doing something remunerative (or at least pleasant). Time spent in an airport, on a plane, in a car, or waiting to testify is time taken from your patients or family. I recommend that you charge accordingly, but fairly.

A psychiatrist was asked to travel to a prison to evaluate an inmate. When he arrived, after over an hour's drive, the inmate wasn't there. A call to the attorney eventually revealed that the prisoner had not been transported as planned, and was in another prison several hours further away. The lawyer still needed the evaluation, however, and the simplest course of action was for the expert to spend the night in a (rather lackluster) motel and drive to the second prison. A half-day's work became 1½ days, with unexpected expenses involved. The psychiatrist appropriately billed for the entire 1½ days at his regular rate, plus expenses, even though he spent less than three hours actually examining the defendant. (Note that none of the hours billed was spent on other cases or in recreational pursuits. Had that been the case, they would have been deducted from the bill.)

Strongly consider requiring payment in advance. There is nothing unethical about accepting a retainer or requiring a deposit against time and expenses, especially when the lawyer who retains you has a small practice or is working on a shoestring. Plaintiffs' cases and indigent criminal defenses are known for slow (or often no) payment, no matter what guarantees the attorney promises.

There is an ethical component to being paid in advance as well. When the lawyer owes the expert money, the latter may appear likely to testify favorably in order to increase the chances of being paid.

A criminal defense lawyer secured a judge's order allowing her to hire a psychiatric expert in the case of an indigent defendant, with payment to be made from a county defense fund. After spending many hours reviewing, evaluating, talking with the attorney, traveling, and testifying, the psychiatrist sent his bill, in which he had discounted the hourly fee out of a wish to be prudent with government funds. Nothing happened. After several months and several more bills, he received a check for about half his fee. When he protested, the attorney who retained him simply said that this particular judge had a reputation for being stingy with county funds, and that the psychiatrist had no choice but to accept whatever the judge approved.

Do not rely directly on a litigant for payment. As a practical matter, your fee will often come indirectly from a litigant (such as an insurance company), but there are at least two reasons for you to make it clear that you expect payment from the attorney or court that retained you. First, it removes an appearance of conflict. You are the attorney's agent, assisting him or her in working for his client, not the litigant's advocate (again, that's the lawyer's role). Second, by establishing that you expect to be paid by the attorney, it is clear that you must be compensated for your work and expenses regardless of whether or not the lawyer's client pays him, or the case is won or lost. Do not create a situation in which the attorney may refer you to the litigant; your bill should be treated as if it had come to the lawyer from the telephone company.

The next vignette illustrates several of the principles mentioned thus far.

A litigant called a forensic psychiatrist at his attorney's suggestion, searching for a psychiatric expert. The psychiatrist referred him back to his attorney, saying that conversations between them prior to his being retained, if that were to happen, might damage the doctor's usefulness to the litigant's case. He understood; the attorney called and the work began. A great many hours were spent on the matter, involving report preparation,

conferences, travel to the trial, and pre-trial preparation. After several days of final preparation, the attorney eventually decided not to have the expert testify. Coincidentally or not, the litigant lost.

The lawyer didn't pay the expert's final bill, which was substantial, and tried to refer it to the litigant. After several months of trying to collect and being told that he would be paid after the client won his appeal, the expert sued the attorney for payment. The facts that 1) the litigant was not the psychiatrist's client (his duty and his agreement were with the lawyer, regardless of outcome); 2) there was a clear, written agreement about fees and payment; and 3) the charges were not related to whether or not the attorney chose to have the psychiatrist testify all contributed to a rapid settlement in the doctor's favor.

Understand the Legal Issue

As discussed in previous columns, the legal and clinical environments have different purposes, different vocabularies, and different understandings of clinical findings. One doesn't have to be (and should not try to be) both lawyer and psychiatrist, but it is important to have the lawyer explain the relevant legal aspects of the case and how psychological and psychiatric issues apply to, and are defined in, the matter being litigated.

A patient with schizophrenia killed his mother. His psychiatrist, who had treated him for many years, was anxious to tell the court that the patient wasn't responsible for her death. In rather frustrating testimony, the clinician was surprised to find that the diagnosis was not the primary issue (people with schizophrenia are often found to have acted voluntarily and to be responsible for their actions). His confusing a diagnosis with the patient's ability to function in this relatively narrow behavior made his testimony seem vague, and he could not understand why the judge would not equate schizophrenia with legal insanity.

This vignette suggests a further point: be sure the lawyer takes time to prepare you for deposition or trial. Do not accept a situation in which the attorney merely tells you to show up a few minutes before you testify. You will fare better, and the case will be better served, if you go over the rules of your testimony and likely questions and answers beforehand. This does not mean that you are told what to say, or that you change your opinions to fit the lawyer's wishes. Rather, you should be comfortable with the process, understand the structure of the situation, and let the lawyer know your general opinions before testimony so that he or she is not surprised. Understanding nuances of wording, such as understanding what lawyers mean by "possible" or "probable," can allow you to express your opinions effectively rather than having them misconstrued.

The Last Word

Let's review the order in which most forensic consultations evolve. If you are asked to do some of these steps in a different order, be sure there's a good reason.

- Initial contact from the attorney and brief preliminary discussion of the case. Do not offer any opinions at this point.
- Written agreement without any guarantee of your opinions, and without forming them prematurely. Be sure work and fee arrangements are clear.
- Receipt of retainer, deposit against future billings, or other reliable guarantee of payment.
- Complete review of the relevant records. Be sure the lawyer gives you everything.
- Talk with the attorney about your review findings.
- Examination, if necessary. Don't examine a litigant without first reviewing records; beware of lawyers who want a "fresh" opinion without a full review of the records.
- Talk with the attorney about your exam findings.
- Written report, but only if asked. Make it excellent.
- Deposition (usually in civil matters such as lawsuits). Ask for a pre-deposition conference with the attorney.
- Trial. Ditto on the pre-testimony conference.

Notice how often you should be talking with the attorney. Good communication prevents a lot of problems, and lawyers hate surprises.