Forensic Work and Nonforensic Clinicians Part II: Reports and Depositions

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This month I will continue discussing some of the nuts and bolts of forensic work encountered by nonforensic clinicians. I'll focus on circumstances under which you offer opinions, which is the point of being a testifying expert. As you may recall, last month's column covered things like deciding whether or not you should become involved in a case, initial interactions with attorneys, and some ground rules for participation. In this column, I will talk about opinions, reports, and depositions, and finish up with trials and hearings in the next issue. If you haven't already done so, you might take a look at my Psychiatry and Law Updates website (www.reidpsychiatry.com) for more information on lawyer-expert roles and relationships.

You are an expert because you have the special knowledge and experience which allows you to offer opinions to a court. Those opinions should come only after you have gathered sufficient information through review, interviews, evaluations, research, and/or other means to form them. It is important to be certain that you have enough information, from relevant sources.

Your opinions may or may not support the retaining attorney's case. Nothing in the Big Book of How To Be an Expert says you should agree with a lawyer or litigant, and plenty of passages in the Big Book of Law and Ethics for Experts obligate you to honesty and objectivity. The lawyer who retained you understands this. If he or she suggests you act otherwise, be very suspicious. Indeed, negative opinions may be as useful as supportive ones, since they help the attorney see and plan for potential weaknesses in the case.

AFFIDAVITS AND DECLARATIONS

Your earliest published opinions may be offered in the form of an affidavit or declaration. Some states require, for example, that an expert outline preliminary opinions about alleged malpractice before a malpractice lawsuit can be filed. An attorney may ask you to review some records and, if appropriate, offer a notarized statement that you believe someone's care is likely to have been below the applicable standard. You might also be asked to opine about the need to examine a litigant or have access to certain otherwise confidential records when the other side tries to obstruct a complete evaluation.

These items must often be in a special format for the court. The lawyer may offer to draft some of them for you (especially when specific legal language is required). I like to do the writing myself, following the recommended format provided by the attorney, but there are times when it is acceptable to review and sign, for example, a brief declaration or affidavit. Be sure you do review, understand, and agree with the content before you sign (that's your name at the bottom); use your own words for clinical content and don't make legal-sounding proclamations (e.g., "the plaintiff acted with reckless indifference and gross negligence") unless you know exactly what they mean.

REPORTS

Reports are a distillation of the findings and opinions you are prepared to offer at trial. If you are to testify, any report you offer will eventually be provided to lawyers for the other side. It should be prepared with specific instructions from the attorney in mind, not just what you think is important about the case.

Reports are a written, and thus a rather permanent, reflection of your work, your professionalism, and how much you studied in 12th-grade English class. Preparing them is a little like writing a term paper, and you absolutely have to do "A" quality work. It is very important that reports be carefully conceived and

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meticulously written to communicate complex material to a lay reader clearly and accurately. Such reports are used in settlement negotiations or plea bargains and help shape both sides' deposition and/or trial strategy.

Neatness Counts

Some reports may be in letter form, but the purpose is quite formal, and the report should be formal as well. Occasionally, an attorney will ask for a quick report, usually to meet some deadline (or to get you to write without thinking too much), saying "Don't spend too much time on it, doctor… it's the words that count; don't worry about how it looks."

Don't believe it. Would you send your child to school with a dirty face or mismatched socks? I've read reports that would make an English teacher gasp, full of grammatical and typographical errors, misspellings, and even *non sequiturs*. One (admittedly a last minute amendment) was scrawled in ballpoint pen on lined paper.

That's not the way you want to communicate to anyone who matters, and in forensic work, *everyone* matters. Use nice stationery, a formal font (not script or anything "hip"), and be very clear. Don't add informal, snide, or gratuitous remarks, and don't send the lawyer a separate note with "off-the-record" comments. Nothing you send the lawyer is off the record (including email). Don't just use a spell checking program; proofread your report carefully. Consider asking someone you trust to review your reports before they are sent; I do.

General Format and Contents

There is no single acceptable format for reports, although cases and jurisdictions often have rules about what must be included. Most forensic expert reports contain the items shown in Table 1.

Some sort of brief introduction is usual, with identifying information and the purpose of the report. This should be followed by a brief statement (one or two sentences) about the methods used and any caveats to be applied (e.g., to note that one has not interviewed a relevant party or to state that one's opinions are based on available information and could change if further information becomes available). Your opinions and supporting data may come next (I like to put them near the beginning, where they're easier for busy readers to spot). A list of the materials on which you relied in forming your opinions must also be included. Some jurisdictions also require a list of cases in which you have testified during the past few years. A *curriculum vitae* is usually attached separately.

Table 1. Usual contents of a forensic expert report

- Identifying information
- Brief introduction
- Concise description of methodology and disclaimers/caveats
- Opinions and supporting information
- Sources relied upon
- Past cases in which one has testified (if required)
- Attached *curriculum vitae*

When lawyers ask what you relied on in forming your opinions, they are not referring to a single item but rather to all of the things that contributed to your findings. Thus one should list, in some detail, the records and other materials you reviewed, any materials you created yourself, interviews, testing, examinations, and relevant research (e.g., online, in the library). In addition, your past training and experience in the relevant fields no doubt contributed to your ability to form the opinions; list training and experience in so many words. Opposing attorneys sometimes ask about textbooks and journals. I list them individually if they were specifically consulted for the case; otherwise, they're lumped into "past training and experience."

Writing Styles

There are two basic ways to write forensic reports. In one, the attorney simply asks for the expert's written opinions and the expert is free to use his or her own format. In the other, the report answers very specific questions, with only as much explanatory data as the court requires.

Writing a report in the first style is usually quite comfortable for the expert, who is already accustomed to communicating in this way with colleagues. Such reports often end up looking much like clinical write-ups or consultation or testing reports. Unfortunately, they suffer from several problems. For example, such loquacious reports often provide far more information than necessary, information not required in a report that the other side will see. Remember that although you are honest, objective, and ethical, ours is an adversarial sys-

tem and you must work within that context. In addition, long, unfocused reports may never get around to the questions the lawyer needs answered.

The second style of report is my favorite. I ask the lawyer what questions he or she wants answered, and then I answer them. The opinions are concise, with one or two brief paragraphs of explanation (most report formats require that the expert supply support for his or her opinions; one can't merely pontificate). This often means that the lawyer and I discuss questions and answers orally before the writing begins. If the answers don't serve the attorney's needs, he or she may ask a different question. Note that the expert opinion does not change, merely the question to be answered. Make it clear that you will not answer it dishonestly or unethically.

Submission Styles

Lawyers are by nature nervous beings—which I suppose is only natural when large amounts of money, prison time, or professional reputations are on the line. They are likely to fret over reports, and often want to know what you are writing and why you aren't finished yet. I offer attorneys several options for monitoring my work and usually let them choose the option they prefer.

1. I can listen to the questions to be answered and write the report, sending the finished product to the attorney on time. There are only two advantages to this process: The lawyer doesn't bother you, and when you are later asked if the lawyer monitored the report process, you can smugly say no.

2. I can listen to the questions to be answered, draft the report, call the attorney for an oral conversation about the draft, and then send (only) the finished product to the attorney on time. The advantage of this process is that the lawyer has an opportunity to know what you are writing and to suggest format or wording (which is ethical as long as the lawyer doesn't put inappropriate words in the expert's mouth and the expert doesn't lie by commission or omission). Note that oral conversations such as this are, strictly speaking, probably discoverable by the other side, but as a practical matter the other side is unlikely to ask about it, since one rarely remembers exact content of conversations months later.

3. I can draft a report and send it to the attorney for review, then change some things at his or her request if it is honest and ethical to do so and the final product reflects my true opinions. Then I send the report to the attorney on time. The problem with this process is that once a draft (or anything else, generally) is sent to the attorney, it may well become discoverable, warts and all. Even if the drafts are not available later, the fact that they have gone to the lawyer may harm the report's credibility.

The lawyers I deal with almost always choose number two.

Did you notice how I repeated the phrase "on time" in each of the options listed above? By the time an attorney requests a report, he or she is likely to be up against a deadline. They are deadly serious about deadlines, and a late report may be useless, or even eliminate the opportunity for you (or any other expert in some cases) to testify. If you don't think you can get the it done on time, tell the lawyer in advance.

Finally, what about all those drafts? It is probably legal and ethical to destroy drafts *so long as it is your usual office routine and you do it* ***before*** *your records are subpoenaed* (see below). Modern computer word processing eliminates most such decisions, since the computer writes over the last draft.

DEPOSITIONS

Almost all depositions in which you are likely to be involved are discovery depositions. They are an opportunity for the other side to "discover" what facts you have considered and what opinions you have. The discovery process, which isn't limited to depositions, is designed to bring strengths and weaknesses out into the open, so that many cases can be resolved without a trial (or so that trials can be more efficient).

Schedules and Subpoenas

The lawyer for whom you are working will probably talk with you about convenient deposition dates, then make you available to the other side on those dates. Even though these things are politely scheduled, you will receive a subpoena; it's all very official. The subpoena will specify the date, time, and location, and is also likely to include a list of the things you are required to bring with you (a subpoena *duces tecum*).

I recommend holding the deposition somewhere other than your office. There is something to be said for the comfort and convenience of familiar surroundings, but it may be unwise to have items such as your non-request-

ed files, schedules, library, and so on, so easily available to the other side (who may or may not be entitled to look at them). In addition, depositions (especially videotaped ones) can be disruptive, and you may not wish to entertain the litigant(s) (who are often present at depositions) on your private turf.

Most of the items demanded in the subpoena are simple to obtain: your notes, all the records you have reviewed, a curriculum vitae, and perhaps your billing records. Others may not be so simple, and the other side may not be entitled to them (e.g., a copy of everything you have ever published on a particular topic or recent tax returns). You may decline to bring things that are either onerous (or impossible) to obtain (such as all those publications) or personal and unrelated to the case (such as tax returns); however, be certain that you voice any refusal to bring such items in advance, through the attorney who retained you.

It is my practice to pass the files and other materials that have been subpoenaed to the lawyer who retained me, for transmittal to the deposing attorney. This allows the former to examine the file for things to which the other side is not entitled, and remove them if appropriate. Let the lawyer make that decision, not you.

Consider making a complete copy of your case file and billing records in advance for the deposing attorney (including little scraps of paper and the front and back of the file folder). That small convenience saves everyone time, and you are more likely to keep control of your originals. When the court reporter "marks" your materials as exhibits, try to have the copies marked rather than the originals (because you won't be able to keep whatever is marked). Don't leave your originals with the other side or court reporter unless absolutely necessary. You need them for your records and to continue to work on the case. Court reporters are very good about returning things they keep for copying; lawyers, in my experience, aren't. In either event, it may take a long time.

Another tip: If you make copies for the discovery process or deposition, keep track of what has been copied. Otherwise you'll get confused if additional discovery requests are made at a later time.

Whatever is requested or demanded, do not destroy it after you have received the subpoena without consulting an attorney. I have discussed this issue in earlier columns. If you have drafts on your computer, or drew tasteless cartoons on case-related telephone messages, too bad. Removing or destroying them after they have been requested (and sometimes before) may well be unethical and/or illegal.

Deposition Process and Testimony

First, expect the lawyer who has retained you to prepare you for the deposition. It may take half an hour or half a day, but depositions are very important to legal cases and you should be as prepared as is feasible. Remember, you are giving an expert deposition, not merely being asked what you remember about a case.

Sometimes the lawyer doesn't offer to prepare the expert (most often when the former is working on a shoestring). I think that's a mistake. Sometimes the expert doesn't think he or she needs preparation (after all, you're the doctor). That's an even bigger mistake.

Once, after some 20 years of forensic experience all over the country, I found myself sitting with a small-town (but very experienced) attorney to prepare for a deposition. He didn't care very much that I had done this before, and he said, "If you'll listen to me for an hour, you'll give a much better deposition." He was right.

The atmosphere is usually quite friendly just before the deposition. Once you are sworn in by the court reporter, the lawyer for the other side will begin asking questions. Most start politely, and most remain polite throughout the deposition, but don't forget that the point of the exercise for the other side's lawyer(s) is to strengthen his or her case by learning what you know and by getting you to say things that will support the opposing cause.

Occasionally, the attorney becomes rude, or even threatening. If this occurs, don't rise to the bait. Keep your voice down, but try not to allow yourself to be bullied. The lawyer who retained you will probably intervene, but may not (remember, he's not there for you, but for his or her client). If questions become too personal, you may decline to answer (provided they are not reasonably related to the case). Judges take a dim view of lawyers who harass or threaten witnesses; most such saber-rattling is pretty hollow.

Depositions are public records. Consider declining to provide such personal data as your home address or social security number, or information about your family or non-case-related finances. If a judge requires it, don't argue, but there's no judge at a deposition.

Your deposition testimony should be extremely accurate. Listen very carefully to the question, then answer it as briefly as you can while still being complete. "Yes" and "no" are often best, even if you would like to explain your reasoning. You will have ample time to expand on your answer if one of the attorneys believes it is necessary. Sometimes, however, the lawyer will demand that you answer "yes or no" when neither would be correct or

complete. You are not obligated to give such a short answer if it is incorrect or misconstrues the truth, no matter what the lawyer says.

If you don't know an answer, say so. Don't guess or speculate. And don't be embarrassed if you don't remember something; depositions are not memory tests.

Don't try to figure out the lawyer's strategy or where the lawyer is going with his or her questions. In most cases, you'll be wrong, and it takes valuable attention away from the question at hand.

Resist talking about a particular record or resource without having it in front of you. If the lawyer refers to a document, you are entitled to see it and examine the context for your answer. It is often important to limit your answers to a particular context (e.g., "Is Zoloft an acceptable antidepressant, Doctor?" . . . "Under some circumstances.")

Try not to answer questions too quickly. Take time to think (and to allow the lawyer who retained you time to object to the question if necessary). Limit your answer to the question that was asked; don't assume or anticipate anything. Some lawyers delight in asking a series of "no-brainer" questions which the deponent (that's you) answers almost without thinking, then slipping in a more important one at the end—often referred to as leading you down the "primrose path."

Lawyer: Are psychiatrists, by and large, pretty good at recognizing severe depression, Doctor?
Deponent: Yes, pretty good.
Lawyer: And severe depression should be treated whenever possible—is that reasonable?
Deponent: Sure.
Lawyer: Your profession could prevent a lot of misery if everyone with serious depression came to a psychiatrist, couldn't it?
Deponent: Probably so.
Lawyer: And a mainstay of that treatment is proper diagnosis, wouldn't you agree?
Deponent: Yes.
Lawyer: So missing signs of impending suicide just shouldn't happen, should it?
Deponent: …

Your deposition testimony is permanent. If the case goes to trial, your answers are likely to be read back to you in court, so be sure you say what you meant to say (and be sure to review your deposition before trial).

You will be asked whether or not you wish to "read and sign" your deposition. Say "Yes." This gives you an opportunity to review the deposition before it is officially published to the attorneys and catch typographical errors, things that were misheard by the court reporter, or things that should be clarified. If there is a reason to change an answer after you have signed your deposition (such as in response to new and influential information), discuss it with the lawyer who retained you and, if asked, correct it in writing (e.g., in an amended report).

Practical Matters: Who Pays?

Depositions involve a lot of time for review, conference, the deposition itself, and reading and signing afterward. Talk with the attorney who retained you about who is responsible for paying for your time (it is often the other side), and make clear arrangements for compensation. It is not unusual for forensic experts to require a deposit against the number of hours likely to be billed, plus expenses if travel is required. Indeed, it is arguably more credible to be deposed after receiving a refundable deposit than to offer opinions while one of the lawyers owes you money.

THE LAST WORD

Make your forensic reports formal and craft them carefully. Accept guidance (but not control) from the attorney who retained you. Expect preparation and guidance for the deposition process, and be aware that you are testifying as if you were at trial.

In the next column, I will discuss testifying in trials and hearings.