

Avoiding (or Fixing) Problems with Lawyers and Courts

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Clinicians who do work for attorneys and courts sometimes encounter problems in defining their roles, with access to records or litigants, with unexpected changes or additions to their tasks, or with being compensated for their work. Understanding the context of the forensic consultation and the processes commonly employed by lawyers and the judiciary can prevent many problems. Be cautious about “informal” requests from attorneys, particularly if they involve your own patients. Maintain solid business practices and make sure your role, relationship, and financial agreement with the person or entity retaining you are clear, ethical, and well documented before you begin work on a case. (*Journal of Psychiatric Practice* 2013;19:152–156)

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Introduction

I recently received an email about a clinician who had just begun to do forensic work.

While working on a large malpractice case for a fairly small law firm, a young forensic clinician noticed that his bills weren't being paid. He had done a lot of work at the attorney's request, and had sent statements regularly, but the firm owed him nearly \$15,000 and had not paid anything for months. After several polite communications (which were largely ignored), the clinician told the lawyer that he would have to suspend review and report preparation until the bill was brought up to date.

The attorney responded angrily, saying that she had never heard of such a thing (stopping work just because one is not being paid). Then her tone changed. “My client is running out of money,” she told the clinician. “I think we can settle the case favorably, but the litigation expenses have been so high that there's not going to be much left for her. Do you think you could reduce your bill? She really needs the money.”

The clinician believed the client was deserving and had been through a lot over 3 years of litigation. He felt chastised by the lawyer (an experienced litigator) and a bit sorry for the client. He wondered what he had done wrong, cut his bill in half, kept working on the case, and chalked it up to learning an expensive lesson.

The lawyer eventually settled the case. After a long time, with the bill in arrears, she finally paid only a portion of the reduced bill, telling the clinician that it was his (the clinician's) fault that the case hadn't gone to trial and he should accept what he had received as payment in full. (In reality, attorneys settle the vast majority of civil cases without going to trial, and rarely divulge the details of settlements.) The clinician felt disappointed and angry but did not pursue the matter further.

This was not the first time I've heard such stories, sometimes in time to make a constructive suggestion, but often after the damage has been done.

Money isn't the only potential source of problems (see below), but it's one of the most common, and often the most contentious. We'll discuss several others, and leave you with general recommendations for spotting the portents of several potential problems, communicating early and often, clarifying your role(s) and expectations, and fixing things when they get off track.

Common Problems and Misunderstandings

Money. Be clear, in writing, about your fees. Having an established fee schedule and billing procedure will short-circuit most arguments, but even so, your charges, billing schedule, expectations regarding pay-

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ment, and so on, may be misunderstood, or be purposely misconstrued by the occasional unscrupulous lawyer. (Most lawyers are ethical and trustworthy.)

Lawyers understand the value of outside expertise. They are accustomed to things like hourly billing and retainer agreements, and they are usually quite amenable to discussing them early in the consulting relationship. (Avoid those who are not so amenable.) If your understanding about fees is not crystal clear, mutual, and written, expect problems. (For specific suggestions, see my May, 2012, column in this journal.¹)

Your role with the retaining entity. What are the parameters of your involvement in the case or legal matter? Are you agreeing to become an expert witness or consultant (one who can offer opinions and is free of the conflicts of a treating clinician)? Or is the lawyer “informally” asking for help (for example, concerning one of your own patients; see below)? Is your role narrowly specified, as in the case of many pre-trial competency evaluations, medical licensing board reviews, or (in some states) pre-suit affidavits in malpractice allegations? If so, are you expected to be available for additional roles as well, such as additional review or assessment or future deposition or trial testimony?

Sometimes, experts who have been pursuing one line of review and investigation are asked to opine in a new area outside of their ability or expertise (such as special pharmacology, child- or geriatric matters, or assessing damages to a litigant who lives in a far-away city). Many lawyers don't realize that areas such as psychological testing and detailed psychopharmacology are subspecialties that lie outside most general psychiatrists' expertise, that damage assessment (unlike many reviews of negligence per se) often requires in-person examination, that brain injury per se (although addressed in the psychiatric lexicon) usually requires diagnosis and clarification by a neurologist or neuropsychologist, or that assessing trial competency is a very different task from assessing criminal responsibility. One should clarify the limits of his or her expertise, and the likely needs of the case, very early.

Are you expected to help the lawyer with case strategy (sometimes a dicey proposition and sometimes not) in addition to offering opinions? Are you expected solely to be a consultant, and not to offer opinions in reports or testimony? Does the lawyer

understand that you cannot treat the client and still remain available for expert (opinion) testimony? Do you understand that you are an agent of the attorney (or other retaining entity) rather than the client's advocate?

“Informal” consultations. Residents' and other clinical trainees' first interactions with lawyers are often telephone calls about their patients.

Dr. A., a psychiatry resident, had been treating a woman with borderline personality disorder for several months (Ms. B.), beginning when she was hospitalized for an overdose and continuing in weekly psychotherapy. One day, with no prior warning from the patient, he received a call from the patient's attorney, who had just faxed a signed information release to Dr. A. The lawyer said that Ms. B. was trying to regain custody of her small children, whose custody had been awarded to her ex-husband. She was currently allowed only supervised visits, because of a history of absconding with the children, impulsive outbursts, and substance abuse.

“I just need a statement that she's competent and won't harm her children,” the lawyer said. “She loves them very much and is devastated that the court isn't letting her be the mother that the girls need.”

The lawyer continued, “Her ex-husband has been telling the kids wild stories about her, and she's afraid he'll hurt them. She's in my office now, if you want to talk to her. She's upset and crying, and panicked that if something isn't done right away, he'll take them out of state.”

Calls such as this can be very seductive. Therapists have heard only the patient's side of the story and are often primed to “help” the patient in his or her effort to regain custody, obtain disability payments, avoid jail, or “fix” whatever the current problem may be. The lawyer may have heard only one side of the story as well, and he or she also has an obligation to act in the client's interest (usually regardless of the interests of others, such as spouses or children).

It's hard to say “no,” but that's exactly what the doctor or therapist should do in most such situations. Your patient, and sometimes a court, may be entitled to copies of your records, your diagnosis, and a summary of your observations of the patient, but you probably have not observed the overall situation and

Law and Psychiatry

are not in a position to comment on anything except what you've seen with your own eyes and heard with your own ears. Your role is one of clinician, and your usefulness to the patient is as her treater, not as her temporary advocate in some legal or administrative proceeding.

Dr. A. listened politely for a while, declining to talk with the patient while she was in the attorney's office. He said that he would be happy to forward his records to the lawyer, and that he understood that he could be called as a "fact" witness in the custody matter, but he encouraged the attorney to examine the records before deciding whether or not his testimony would be useful.

The lawyer asked again for a statement or report that would outline Ms. B.'s ability to be a safe and loving parent. Dr. A. reiterated that any report he might provide would simply summarize the clinical record. He said that he could not offer an opinion about her parenting ability or the safety of her children, since he had not evaluated Ms. B. in that context, had never observed her parenting, and had not interviewed her children or examined any corroborating materials. He added that he was not in a position to offer opinions about Ms. B., since his role was one of treating clinician and, in addition to his opinions being unreliable in the context of the custody matter, offering opinions would be likely to interfere with her care. He again suggested that the lawyer review the psychiatric records for himself, since Ms. B. had released them for that purpose. The attorney, who may have been speaking with Ms. B. in the room, seemed to understand.

At her next appointment, Ms. B. didn't bring up the lawyer's call. When Dr. A. asked her about the situation, she was irritated that he had "brushed off" her lawyer and tearfully said "You don't think I'm a good mother for my girls." Her comments and feelings were discussed as part of her therapy. The attorney did not call or ask for a letter again.

Similar scenarios present in many different guises. Some therapists who write legitimate letters (i.e., factual rather than offering opinions) or complete reporting forms (e.g., disability) for patients allow their patients to review, or even edit, them before they are sent. Although this practice is recommended by a few teachers and supervisors, and patients may be entitled to know what one is saying about them, it is often a mistake to allow the patient to review letters and reports beforehand, and it is

almost always inappropriate to have the patient dictate the content. Discussion is a good thing, in the context of the treatment, but colluding with a patient to shape a document that will be used in a legal or administrative action is a misuse of treatment, has substantial transference and countertransference implications, and may be unethical.

"Just a quick review, doctor" (or a "simple" independent medical exam [IME]). Many attorney relationships begin with deceptively simple requests, which unsuspecting clinicians trust will be as they seem. Unfortunately, lawyers may not reveal all of the information necessary for complete assessments and/or may underestimate the complexity of their cases. One should talk with whoever asks for the forensic service at some length to clarify the task, be sure that sufficient materials and time are available for it, and consider potentially time-consuming (and expensive) consequences (such as opposition from someone who disagrees with the findings, or testifying at a hearing or trial).

Operating without adequate records or access.

Even in cases expected to be complex, one sometimes has to press for adequate information, such as complete medical records, other background information, deposition transcripts, and the other side's version of the facts. One should not be shy about requesting the necessary materials and access to litigants for examination, and not proceeding when the information isn't adequate. Sometimes important records are not available, or one is simply unable to examine an affected party (e.g., one who is deceased). In such cases, if you believe it is prudent to express opinions or make comments, be sure to offer caveats or disclaimers (e.g., in reports or testimony) about their reliability.

The retaining lawyer's role. *The lawyer for whom you work is not "your" lawyer.* Although it is rare for attorneys to knowingly get their experts into trouble, one should not rely on them for legal advice. You may (and often should) notify the retaining lawyer of concerns (for example, about *Daubert** matters, conflict of interest, or an issue of your licensure in a

*A U.S. Supreme Court decision that governs whether or not one's opinions have sufficient scientific foundation to be admissible in court. (Some jurisdictions use different case standards.)

particular state), or ask questions about the way you should respond to discovery requests or court rules, but *you* are responsible for your behavior and ethics. If you don't understand something about the forensic process, such as whether or not you may destroy records or drafts of reports, or how to respond to a *subpoena duces tecum*, the retaining lawyer may be a good resource, but feel free to get a second opinion. In particular, be aware that any *opinions* attributed to you are your responsibility; be sure you write them (or at least review and approve them) yourself.

Working for pro se litigants. I don't do it anymore. Working with or for a litigant who is acting as his or her own lawyer creates a minefield of practical and ethical issues, especially if one is expected to develop and express opinions about the *pro se* individual him- or herself.

It is impossible to avoid having a "relationship" with a litigant who is employing you, which, in turn, immediately creates some level of conflict of interest for anyone who is expected to form and express objective opinions. When one is retained by a lawyer, one's agency is to the attorney, not the legal client. Working for *pro se* litigants introduces far more subjectivity and opportunity for bias.

From a practical viewpoint, if your findings do not support the *pro se* litigant's case, the litigant may misunderstand, discount the findings or advice, try to cajole you into changing your mind, and/or become angry. Any of those reactions decreases your ability to work effectively with that person. Lawyers, although caring greatly for their clients' interests, are much more dispassionate about adverse findings and assess or modify their cases accordingly. They need to know the truth, since it helps them assess and plan their cases, and they are not unreasonably enmeshed in their clients' feelings (or their own).

In my experience, *pro se* litigants usually don't think or act like attorneys (even, sometimes, those who are lawyers themselves). They may ask the expert for legal advice (do not give it), miss (or misunderstand) important aspects of the facts, and/or base important decisions on wrong or subjective factors. Judges often give *pro se* litigants procedural leeway and advice, and they sometimes assign an attorney to oversee a litigant's work. That doesn't make your role any easier, however, since you do not work for the supervising lawyer.

Finally, most *pro se* litigants don't realize how expensive litigation can be and how much experts charge. They often ask how much your work on the entire case will cost. The right answer is almost always "I don't know." When quoting an hourly rate, one should not give a false impression that the eventual cost will be particularly low (for say, a simple review and report), since it is common for additional records to come to light, testing or other examination to be required, reports to be rewritten (e.g., because the litigant did not specify the appropriate format), discussions and explanations to be unexpectedly lengthy, testimony to be required, and/or appeals to be considered.

It should be obvious that if you do agree to work with *pro se* litigants, it is doubly important to help them understand your role, limitations, fees, and the fact that, as a forensic expert, you will act as an advocate for your findings but not for the litigant him- or herself. It's also reasonable to expect more than the usual number of practical problems along the way.

Principles for Avoiding Problems

- Stop being neurotic about your business practices. Psychiatrists and psychologists are often conflicted about business interactions, especially those that involve money. Attorneys are not. Maybe it's in our genes, but our common characteristics of wanting to help, being empathic, avoiding aggressive behaviors (ours and others')—and maybe an unresolved oedipal complex or two—often get in the way.
- Develop consistent business and office practices and stick to them. Fee and expense arrangements are the most common bones of contention when there is no written agreement. Fees and billing schedules, source of payment, what items or services are billed or not billed (e.g., waiting time, travel time), expense specifics, avoidance of "contingency" fees, consequences of nonpayment, handling of missed appointments and cancelled appearances, and the like should be meticulously detailed.
- Send clear, written documentation of your understandings and expectations to the attorney or other retaining entity at the beginning of every case and don't begin work until they have been agreed to. Be sure your role, fees, tasks, and limi-

Law and Psychiatry

tations, and the lawyer's expectations, are clear. Also include your expectations about such things as receiving and reviewing all relevant records, having control over opinions attributed to you, other representations the lawyer may make on your behalf (e.g., regarding your qualifications), and the objectivity of any opinions you may reach.

- Don't allow misunderstandings to fester (or bills to mount). If disputes arise, resolve them early and document the resolution in writing.
- When in doubt about proper forensic practices or business issues, get advice from a reliable source. Asking the lawyer for whom you're working may be useful, but note also that experienced colleagues are usually happy to help, and there are organization guidelines for some ethical quandaries (e.g., from the American Academy of Psychiatry and the Law or the American Psychological Association). Occasionally, it's a good idea to consult a lawyer of your own, but be sure that he or she understands the nuances of forensic work.

Principles for Resolving Problems

- Lawyers are not shy. They are rarely reticent about getting what they want. Psychiatrists and psychologists can be both, at their peril. Understand that you must stick up for yourself if you want to have your needs met. That doesn't

mean being unreasonable; it means being assertive about being reasonable.

- Use resources such as forensic training, colleagues' advice and, when necessary, an attorney of your own.
- Be fair to yourself. Understand your role and your worth; don't expect others to do it for you.
- Be reasonable. The world of lawyers, insurance companies, courts, and government agencies is your professional arena (and market). Do what it takes to maintain a reputation for credibility, reliability, and respect.

The Last Word

This is my last article as the forensic contributing editor for *The Journal of Psychiatric Practice*. A replacement will probably have been appointed by the time this issue appears; I'm confident that you'll like him or her and benefit from a fresh set of topics and viewpoints. It's been a great ride, and I thank Editor-in-Chief John Oldham, the rest of the Editorial Board, Lippincott Williams & Wilkins, and especially Ruth Ross, Managing Editor, for their unflagging help and support.

Reference

1. Reid WH. Doing forensic work, II: Fees, billing, and collections. *J Psychiatr Pract* 2012;18:208–12.