

Staying Ethical Under Pressure

WILLIAM H. REID, MD, MPH

Many readers, regardless of their forensic interest, will at some point be asked to become an expert witness in a civil or criminal matter. In this column, I focus on a few subtle ethical issues that sometimes arise in the communications between attorney and expert.

The Initial Contact

During the initial call, the lawyer will be reasonable and polite. He or she will mention in passing that the primary goal is a fair hearing for the client. At this early point, in one telephone call, the lawyer will recognize the value of your time, your intelligence, experience, and expertise, and your unique opportunity to prevent a terrible miscarriage of justice—very perceptive.

It's natural for an attorney to start the relationship by putting the case's best foot forward. Although many lawyers will try to guide you toward their viewpoint, even just a little, they rarely want to eradicate your objectivity—they need accurate opinions in order to evaluate cases accurately. Nevertheless, it helps them to have you "on the same page" as you begin your work. Don't take everything that's said at face value. Keep an open mind, but be sure it's merely open, not downright malleable.*

Lawyers often ask what I require in order to come to an opinion about a case. My answer is almost always "everything available," including a chance to interview the relevant parties when feasible. This is often troublesome and expensive, and even with "everything available," it may not be possible to come to an opinion.

If the attorney balks at sending things that superficially seem irrelevant, we discuss it. Most lawyers agree that it is better for me to quickly skim all the material and decide for myself what's important. My opinion is thus more likely to be valid, reliable, and less vulnerable to allegations that it is based on incomplete or misrepresented data. Consider withdrawing from the case—and at least provide a clear disclaimer to any opinions—if you believe you are being unreasonably prevented from seeing potentially important material or performing necessary examinations of relevant parties.

*In speaking of comedy audiences, Johnny Carson once said "If they'll buy the premise, they'll buy the bit" (i.e., go along with the routine). Don't be too paranoid, but have some healthy skepticism when a lawyer offers you the "premise" of a case.

Attorneys sometimes send a summary or "chronology" along with the review material. It may be offered for convenience or expeditiousness, but it may also be an attempt to slant your view. I suggest you review the records yourself *before* looking at the lawyer's summary.

Budget Reviews

Lawyers often say they can't afford a comprehensive expert review or consultation (and sometimes they really can't). You may hear "My client has been terribly wronged, but he can't afford to pay a lot for a forensic consultant whose opinions might not help anyway." "The court is only paying me (the lawyer) \$35 an hour (so how can you charge much more than that?)" "The court (county, state) has always been good about paying consultants; just send them the bill." Or the ever-popular, "I felt so sorry for this (plaintiff, victim, defendant), and so convinced of the miscarriage of justice, that I'm taking the case for nothing."

These heart-rending pleas do not merely raise the issue of whether or not you wish to discount your usual fee (which is fine with me, and done all the time), or go through the hassles of collecting from a court (be *sure* you have a court order for payment before you begin, preferably one that specifies the hourly rate and services expected). There are other issues here as well, some of them ethical.

There is nothing wrong with providing a brief review of *representative* documents and discussing *tentative* findings with the attorney. If the entire consultation is "budget," however, you should acknowledge that its quality and usefulness may be compromised. When a lawyer says something like "We have \$1,000 to cover your review, report, and testimony, doctor," or "What can you tell me for \$500?", I become concerned that my preliminary comments may somehow be translated into "opinions." Such statements may also portend that the lawyer will try to

Dr. Reid is a forensic and clinical psychiatrist in Horseshoe Bay, Texas, and a past president of the American Academy of Psychiatry and the Law. He maintains an educational website, *Psychiatry and Law Updates*, at <www.reidpsychiatry.com> and his most recent book, *A Clinician's Guide to Legal Issues in Psychotherapy*, is available from Zeig, Tucker & Co, Phoenix, AZ. 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.

avoid paying for additional review or examination later in the case. On rare occasions, he or she is simply trying to prevent my being retained by someone on the other side of the case.

Don't believe a lawyer who says "This will only require an hour or so of your time, a quick report, and maybe a half-hour of testimony." I've read a few "quick reports" by other doctors. They might pass muster as a chart note, but they are almost always woefully inadequate as forensic reports. Remember—your report and testimony reflect you and the quality of your work, and sometimes they may end up in the local newspaper. They may not be perfect, but they shouldn't be embarrassing.

"I Need Your Opinions By Next Week (. . . Tomorrow . . . This Afternoon)."

We all have deadlines, and lawyers have more than most of us. If you can meet the deadline and still do a proper job, fine. But don't let the attorney's schedule force an inadequate review or report. I'm no longer surprised, after I refer a lawyer elsewhere because I can't meet his or her deadline, that the case comes back to me a week or so later, with a much more reasonable schedule.

"Please Don't Take Any Notes, Doctor."

Take notes. You don't have nearly enough brain cells to review records, evaluate litigants, talk with lawyers, and then remember everything accurately during the months (sometimes years) between review, report, deposition, and trial. Reassure the lawyer that you take notes routinely and professionally, without offhand remarks, and that you keep in mind that they will probably become available to the other side. Be familiar with *all* the records. You needn't do the opposing attorney's work for him or her, but don't always limit your notes to items that support the retaining lawyer's case.

Lawyers may be trusted to follow the law regarding what must be disclosed; having them make the decision removes any danger that you, the non-lawyer clinical expert, will inadvertently provide too much or too little.

Experts sometimes misunderstand the "work product" rule that protects lawyers' files from disclosure. If you are going to offer opinions in a case, the process by which you

came to those opinions is generally "discoverable" by the opposing lawyer. If you made notes which you think are harmful to the case (or perhaps embarrassing), *do not* hide or destroy them without the lawyer's approval. When your records are subpoenaed for discovery, consider sending your entire file through the lawyer who retained you. He or she can then go through the file and determine everything to which the other side is entitled. Lawyers may be trusted to follow the law regarding what must be disclosed; having them make the decision removes any danger that you, the non-lawyer clinical expert, will inadvertently provide too much or too little.

"Could You Word Your Report a Little Differently, Doctor?"

It is neither dishonest nor unethical to consider rewording your opinions, so long as you do not alter or misrepresent, by commission or omission, what you believe is the truth. Sometimes one has inadvertently left out something important, or failed to touch upon a useful topic. Sometimes the legal system requires a particular style or format. If you are sure your words are not being shaped unfairly, consider amending them.

Remember that discussions about your report or testimony may be "discoverable" by the lawyer on the other side of the case. Be suspicious if the lawyer who retained you wants you to destroy something you have created, or (pretty rare) suggests that you hide some part of the process. You may generally destroy drafts of reports, so long as they have not already been requested in the discovery process. *Do not* destroy anything after that time unless you are certain it is both legal and ethical. If in doubt, ask the lawyer who retained you for advice; he or she is unlikely to tell you to do anything illegal, and it is nice to be able to say you relied on that advice if someone accuses you of impropriety.

"We'll Draft the Affidavit (Or Report) for Your Signature."

This magnanimous offer is nearly always followed by "assuming you agree with it, of course." Nevertheless, I don't like using lawyers' words or drafts. They sometimes cite deadlines, your convenience, or a particular need for legalistic wording, but that's often poppycock. What they usually want is more control over your words (which thus become less "yours"). I would much rather start with my own words and then discuss the need for a particular format.

Once You Send a Report, It's Usually Both Permanent and Public.

I once reviewed another "expert's" report regarding whether or not a defendant was criminally responsible for a rather heinous killing. The wording went something like this:

Based on comprehensive review and evaluation of the material in this matter, it is my firm belief, to a reasonable medical certainty, that the defendant did not know what he was doing at the time of the killing, and did not know the consequences of his acts.

When the report was drafted, the expert, a psychiatrist, had not seen the defendant, reviewed any materials regarding the arrest and alleged crime, or talked with anyone about the defendant's behavior around the time of the killing.

Although he had been diagnosed with depression, the defendant had neither sought nor received treatment for several years. He had a long record of convictions for violent crimes, with no indication that he had ever raised the insanity defense. The arrest and investigation reports indicated that he planned the crime for some time, executed it methodically, derived benefit from it (money and pleasure), tried to cover his guilt, and made several purchases with the victim's credit cards.

At the trial, the defense psychiatrist admitted that all he had seen were old medical records which included a diagnosis of major depression. He had "discussed" an insanity defense with the defendant's lawyer and, after a lengthy conversation in which the lawyer pressed him for a firmer stand, agreed to sign a lawyer-drafted report with the understanding that "it can always be withdrawn if you change your mind after further review." As the trial drew near, however, the lawyer didn't give him that opportunity and the defense psychiatrist felt (erroneously) that his testimony should be consistent with the report.

Situations like this impede justice and embarrass both professional and profession. Fortunately, they are rare (except perhaps on TV shows like *The Practice*).

Although attorneys rarely ask professionals to do anything improper, staying ethical is your responsibility, not theirs.

Asking One To Use Different Words During Testimony

Although attorneys rarely ask professionals to do anything improper, staying ethical is your responsibility, not theirs. When discussing reports or testimony, don't be surprised if a lawyer presses you to use language that supports his or her client. Sometimes the pressure is obvious. More often it is subtle, but nonetheless focused

on influencing you, your words, and sometimes your opinions.

My advice is to keep it in your own words. It will be closer to what you understand to be the truth and will come across as genuine and credible. Expert testimony is complicated enough without having to remember some artificial "script."

Implications That the Attorney May Withhold Payment If One's Opinions Are Not Helpful

I was once retained by the plaintiff's lawyer in a lengthy malpractice action. The lawyer knew that I saw some merit in his case, but also some drawbacks. The jurisdiction was in a faraway state, and travel to testify would take some preparation. As trial approached, I had my usual discussion about advancing the costs of travel, preparation, and testimony. I sent a letter requesting advance payment (against billings), since, like most forensic clinicians, I have experienced late- or non-payment from other lawyers in the past.

The attorney, who had been pleasant during the two years the case had been pending, rapidly became less pleasant. He did not like the idea of a deposit, and reminded me that he had paid past bills promptly. Then he said, in effect, "if I advance you all that money, how do I know your testimony will support our case?" I politely told him that my testimony would be the same regardless of payment and that, as he knew, most of my opinions supported his case but some did not. While part of the conversation was about the deposit, there was a disturbing suggestion that if he was paying for me to come and testify, he wanted to be sure I understood what I was supposed to say. (*Note the difference between this concept and the perfectly legitimate one in which the expert tells the lawyer his or her opinions and then the lawyer decides whether or not to allow the expert to testify.*)

There are two messages here. First, one is generally obliged to testify (truthfully) if asked, so long as the consultation conditions are met (for payment as agreed, in this case). Try not to back out at the last minute, even if the relationship sours. Second, and also important, being businesslike about billing reduces the chance that you will not be paid appropriately for your work.

Postponing Payment Until After Trial or After the Lawyer Gets Paid

Most lawyers know that it is unethical for an expert to await payment on a contingency basis. Two permutations of that scenario may not be strictly unethical, but may be questionable from both practical and "subtle influence" viewpoints. In the practical sphere, the lawyer, often for a civil plaintiff, promises that you will be paid but asks you to wait until the case is over for payment. The idea is that if he or she wins, you'll be paid promptly; if not, the lawyer will find the money somehow. Even if the case is

won, however, one may not be paid. The damage award may be small, appealed, and/or withheld for a long time. Lawyers understand the payment problem and (I assume) plan their financial lives accordingly. Doctors usually don't, nor do our landlords and grocers.

Sometimes lawyers do this without telling you. When you send that last bill (usually a substantial one, since it involves trial preparation, testimony, and often travel), they say they'll pay just as soon as they are paid by their client. This interesting variation of "the check is in the mail" often portends a very long, often disappointing wait for one's legitimate compensation.

In the ethical or "subtle influence" sphere, having an understanding that one will be paid by the client or, worse, that one will be paid from the proceeds of the case creates a real or potential conflict of interest between your testimony and the outcome of the case. That's fine for the lawyer, who is required to act in the client's interest, but not for the expert, who is expected to remain objective.

Of course, it is not unethical to bill the lawyer after, rather than before, trial. Not doing so (i.e., requiring a deposit against billings) is merely a business practice, and supports one's appearance of having nothing to gain or lose from the outcome of the case. It is, by the way, unethical in my opinion to charge merely for expressing an opinion (as contrasted with an hourly fee), or to keep a deposit for which either no work has been done or nothing of value has been lost. (The latter refers to things like non-refundable travel expenses and late trial cancellations which keep one from other billable activities.)

Preparation For Testimony

As the case moves closer to deposition or trial, the lawyer will probably want to discuss your opinions and learn how you plan to answer questions during testimony. Such conversations can be pretty intense, but it is perfectly legitimate—and very important—to have a pre-testimony discussion of the current state of the case, your place in it, and the questions you are likely to be asked. The lawyer who has retained you may suggest wording, or respond to your wording, and give you the reasons for his concern.

Don't be offended if the attorney asks some piercing questions about your own background and any doubts

you have regarding the case (the background questions are often asked much earlier in the case). Answer honestly, and not simply to please him or her. The decision to present you for testimony is the lawyer's alone; if your answers are likely to hurt the case more than help it, you may be withdrawn. Don't take it personally.

The decision to present you for testimony is the lawyer's alone; if your answers are likely to hurt the case more than help it, you may be withdrawn.

You may feel a bit tense during this process, but you should not feel pressured. If you feel the meeting shifting from "preparation" to "woodshedding,"[†] speak up. Most lawyers will apologize for the misunderstanding and respect your integrity.

How Subtle Is Lunch?

Little courtesies and perquisites are nice in any profession, but there are some situations in which I won't allow the attorney who retained me to pay for things such as my lunch (unless it is clearly billable). I know most of us wouldn't be swayed by dinner at the Explorer's Club, but we don't need the *appearance* of conflict of interest that accompanies expensive meals, a round of golf, or other special treatment. The above having been said, it's silly to split the check at the local Burger King.

The Final Word

Most interactions with lawyers are reasonable and ethical. Just don't, by commission or omission, misrepresent the truth.

[†]Considerable pressure to convince you to see things his way, often in a small room with more than one lawyer present. A bright, hot light in your face is a dead giveaway that you are being woodshedded.