

Why Nonforensic Clinicians Should Decline Forensic Referrals

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A few months ago, three of these columns offered tips for non-forensic clinicians who wish to engage in forensic work.¹⁻³ This month, I'd like to present the other side of the story—reasons to be cautious about accepting forensic referrals, even to decline them altogether, when one is not trained and experienced in the field. I see lots of forensic consultations and expert reports, depositions, and trial testimony in my practice. Unfortunately, some of the “expert” work is less than adequate, and much of the poorer work is done by psychiatrists and psychologists who lack subspecialty training or experience in the field.

Many forensic professionals, including myself, and organizations such as the American Psychiatric Association and the American Academy of Psychiatry and the Law, offer continuing education in forensic work for nonforensic clinicians. There may be a problem, however, with being overly egalitarian about what we do and perhaps trivializing the complexity of the forensic subspecialty. And forensic psychiatry and psychology *are* true subspecialties. Forensic psychiatry, for example, has extensive training requirements, an American Board of Medical Specialties certification process, and fellowship and examination mandates for that certification. *Forensic practice is not simply an extension of clinical expertise and experience.*

It is a mistake to suggest that any competent clinical psychiatrist or psychologist can do proper forensic work, unsupervised, after simply reading a few books or articles or taking a weekend course. That's not enough to make one a safe, competent forensic professional. One might envision a general surgeon reading a book on neurosurgery in order to start accepting referrals in that subspecialty.

But being a forensic consultant or expert witness isn't really brain surgery, is it? For those readers who believe the comparison with neurosurgery is a bit over the top, let's consider for a moment psychiatry itself as a medical specialty. We (psychiatrists) have for years encouraged general physicians to diagnose and treat psychiatric patients, largely in an effort to broaden awareness of mental disorders and increase access to care for those who suffer from them. Pharmaceutical manufacturers actively market psychotropic medica-

tions to primary care physicians. Family doctors regularly team up with counselors of various kinds to treat psychiatric and psychological problems. Can there be anything wrong when so many doctors seem to be helping us stamp out mental illness?

Well, yes. Access issues aside, general physicians and/or their patients often have problems when they don't consult psychiatrists. Many primary care patients with psychiatric problems are underdiagnosed or misdiagnosed and/or undertreated or erroneously treated. Some of them eventually make their way to psychiatrists, and some of those patients have lost only time (and suffered unnecessarily during that time) as a result of their delayed care. A few lose far more.

The point is that psychiatry really is a specialty, and psychiatric practice really does require more than a course or article on treating depression in primary care. Much of that dilemma is alleviated by helping nonpsychiatrists to *recognize* mental disorders and problems, and encouraging referral to appropriate specialty (psychiatric) practitioners. Seeking consultation or referral is a great way to help patients—and knowing when to do so is not only important, it is part of the standard of care.

The same principles apply to a psychiatrist or psychologist who is contacted by a lawyer or court looking for an expert witness. In fact, a case can be made for two additional reasons to refer forensic matters to a forensic specialist: 1) legal cases have time limits, and 2) there is usually only one opportunity to get them right. Many forensic mistakes are irreversible.

An earlier column described a general psychiatrist who had taken a short course in forensic work

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and was retained by the plaintiff's attorney in a civil lawsuit. The plaintiff was suing several prominent companies for emotional damages. In due time, the psychiatrist was subpoenaed for deposition by the various defendants' attorneys. Like most such subpoenas (called a subpoena duces tecum), it included a demand for the psychiatrist's notes in the case.

During the deposition, one of the lawyers asked if the psychiatrist had taken notes during his review and interviews. The psychiatrist acknowledged that he had indeed taken many pages of notes and the attorney asked to see them. The psychiatrist replied that he had destroyed them "as a matter of office policy, right after I received your subpoena." Needless to say, the plaintiff's case was badly damaged by the psychiatrist's inappropriate behavior.

When is Subspecialty Experience Important?

I could say "all the time," but that would be too easy. Nevertheless, unless the psychiatrist or psychologist has considerable forensic experience, the lawyer's case (for which he or she has just retained you as an "expert") may be largely a professional "learning experience" instead of an expert consultation. Here are a few areas in which inexperience is a drawback for everyone concerned.

When one is contacted by a litigant or patient about a medicolegal matter. The point here is that many inexperienced potential experts talk with people who call or email them for forensic help (often about malpractice allegations) in the same way they might interact with a patient asking for a clinical consultation. In doing so, they make a significant error before the forensic consultation has even begun. Experienced forensic consultants know that it is almost always a mistake (and can be a costly one) to discuss forensic matters with a litigant (or potential litigant) without first speaking with that person's attorney.

During the initial contact with the attorney. The first few minutes of contact with an attorney are important and complex. The lawyer may need to know whether or not psychiatric issues are important to his or her case or may need specialized help in assessing psychiatric issues that have already been raised. The decision to begin a consultative relationship is usually made on the basis of this conversation. It is very helpful to be able discuss the issues presented in the con-

text of past forensic experience, so that both you and the lawyer can understand whether or not you are the best choice for the task at hand.

When receiving and reviewing records and other materials. Lawyers often need help deciding what records are important for psychiatric or psychological review. The clinician's forensic experience—both general and related to the case at hand—helps guide that decision process.

Once records are received, the clinician must be able to prioritize and interpret what he or she reviews, and should know what additional materials may be necessary as he or she tries to develop opinions in the matter. Knowing what to look for and how to make the review efficient saves time and money and increases the potential for recognizing useful information.

When examining or interviewing litigants and other persons. Forensic interview techniques differ from clinical ones in many ways. The *objectives* of forensic interviews are also usually different from those of clinical ones, and the evaluation process takes place under very different conditions.

When talking with the attorney about one's findings and preliminary opinions. This is a very important conference. Your comments may be critical to the ways in which the lawyer deals with the case. Will he or she file a lawsuit or not? Mount a vigorous attack or defense or set low settlement expectations? Negotiate a plea bargain or demand a criminal trial? An accurate, realistic expert assessment is often crucial; a poor one is useless or, worse, may cause the attorney to waste time and money and unnecessarily endanger the case.

When writing a report. The forensic report is a primary vehicle for describing the strengths of a case, first to the retaining lawyer and then (generally during the civil discovery process) to the opposing counsel. Reports thus may be very important to legal strategy and settlement efforts (or plea discussions in criminal matters). Reports also shape much of the expert's testimony at deposition or trial. Poorly written reports, such as those that overstate or understate the case or do not meet format or procedural requirements, can be costly for both lawyer and litigant.

When preparing for deposition or trial. Depositions and trials are a little like mid-term and final exams—they have a significant impact on case outcome. One

should prepare for them carefully. Adequate preparation includes knowing what to expect, efficiently going over notes and records, and reviewing previously expressed opinions (e.g., those in one's report or earlier testimony, if any). The way one answers deposition and trial questions (truthfully in any case, of course) can greatly affect the case. The retaining attorney should help prepare you, but it's nice (and reassuring) to have testified several times before.

No one expects perfection (whatever that may be) in any form of testimony; truth is the most important thing. After all, if your opinions and the truth were not likely to be helpful to the case, the attorney wouldn't offer you for testimony. It is important, however, that the way in which you communicate your opinions be articulate, clear, and convincing to the jury (or judge in bench trials). Good preparation, training, and experience decrease the probability that either the opposing attorney or your own errors will dilute your effectiveness in that communication task.

When there is pressure to behave unethically. Experts experience both external (e.g., from the retaining lawyer) and internal (e.g., from one's own impulses) pressures that affect the ethics and accuracy of our work.^{4, 5} A few attorneys, for example, may ask experts to stretch the truth or otherwise behave improperly in the service of their cases. Knowing the principles by which one should practice and recognizing many of the (often subtle) pressures that may appear are the first steps toward remaining ethical. Being able to resist those pressures is the next step. Both get easier with experience (and sometimes consultation with a colleague).

Who May Be Harmed By Your Forensic Inexperience?

When a forensic expert misses things on review, doesn't understand the issues of a litigation, doesn't recognize important opinions that can or cannot be reached, works or communicates poorly with the retaining attorney, overstates his or her opinions, misrepresents facts, or allows himself or herself to be unnecessarily nullified at deposition or trial, bad things can happen to the litigant(s) and others. Sometimes information is lacking, the expert is misled by the attorney or someone else, or it is otherwise unreasonable to expect complete and accurate information and helpful testimony. But when the shortcomings of a case are largely related to the consultant's errors—made more likely by

lack of training or experience—the expert may have to accept at least some responsibility for the outcome.*

Litigants. Experts are not expected to be perfect, and they should remain honest and ethical in any event, but when a consulting or testifying expert makes errors that reasonably trained and experienced experts would not be expected to make, the litigant's case may suffer. A deserving civil litigant may lose or have to settle poorly; a criminal defendant may be unfairly convicted (or set free); or the disposition of a child in a child custody matter may be unjust. In addition to the direct consequences of the case resolution, litigants may suffer unnecessary emotional loss, wasted time, and increased stress related to the case and its outcome. Occasionally, a precedent set by the case also has an impact on potential future litigants and others.

The lawyer who retained you, and others who finance litigation. Lawyers devote enormous time and energy to their cases, and plaintiffs' lawyers often spend large amounts of their own money developing and pursuing their clients' litigation. The attorney needs the best information available in order to make decisions about whether or not to file or otherwise pursue the case, how to assess settlement or plea opportunities, and how to prepare the case for trial or hearing. If the forensic expert does not provide accurate and adequate information, the lawyer's decisions are likely to suffer. Financial losses to attorneys, insurance companies, government agencies, and litigants may be substantial. The lawyer may also lose time and reputation as a result of choosing inappropriate strategies, not settling or pleading well, and the like, and may occasionally be exposed to malpractice risk.

You. First, I believe that most professionals are personally harmed when they do something they know they shouldn't have done. Call it conscience or guilt or ethics, most professionals are bothered by the awareness that they have done a bad job (and those who *aren't* bothered may have even greater problems).

On the other hand, *not* being aware of one's shortcomings brings damage of another kind. The bliss of ignorance is likely to be short-lived if that ignorance allows one to make the same mistakes over and over again, in case after case, before the source of the errors becomes obvious.

*Occasionally, lawyers unfairly blame their experts for bad outcomes. That's unfortunate, but it's not the topic of this column.

Vulnerability to allegations of malpractice, other legal exposure, and professional censure related to forensic negligence or inexperience is substantial. The likelihood of such criticism is probably greater for non-forensic professionals who accept forensic referrals (and who thus represent to the attorney or court that they are adequately trained and experienced) than for those with appropriate forensic credentials and backgrounds.[†] Legal exposure depends largely (but not entirely) on one's performance within the subspecialty standard, but one's inexperience alone might raise suspicions of error.

"Malpractice" is only one of the causes of action that may be brought against a forensic consultant or expert witness. Misrepresenting one's qualifications could be construed as fraud. Ethics complaints and civil litigation have been brought against physicians for forensic fee irregularities (e.g., involving contingency arrangements) and testifying outside their expertise. Failure to reveal or properly deal with a conflict of interest (e.g., between being a treating clinician and an expert witness)⁶ is a significant stumbling block for many forensic consultants.

Those with forensic training and experience are arguably in a better position than inexperienced colleagues to recognize such concerns before they become problems and/or to deal appropriately with them before damage is done. Case examples abound; some may be found in recent columns.⁵ Here's a new one.

A psychiatrist who was a friend of a civil plaintiff became an expert witness on her behalf. After several years of expensive litigation, it was revealed that while the psychiatrist was treating the plaintiff, he had loaned her money in a process known as "factoring" a potential future judgement. Such a loan is not repaid unless the plaintiff gets a substantial award or settlement. It is thus a form of contingency compensation and a source of considerable conflict of interest for any witness. This and other irregularities—not all related to the psychiatrist—caused the plaintiff's case to be dismissed.

Our profession. Forensic psychiatry is an honorable but often criticized profession. Many of those who practice it go to great lengths to try to assure our expertise, assess our professional behavior, remain ethical, stay within

[†]It seems clear that such would be the case in the neurosurgery example above (i.e., if a general surgeon led a patient to believe he or she could practice as a neurosurgeon, and then the patient had a poor outcome).

our training and experience, and practice well within the applicable standard of care.

What do we get for our trouble? Our work and motivations are often misunderstood. We are often viewed in the same category as the few unscrupulous "experts" who offer themselves as "hired guns." The rest of psychiatry and psychology suffer, too, since media reports and cocktail party conversations usually identify the expert witness simply as a "psychiatrist" or "psychologist."

Poorly trained and inexperienced forensic experts are rarely unscrupulous or purposely unethical, but the errors they may make can leave a bad taste in the mouths of litigants, lawyers, and the public. We don't deserve that, and it limits our ability to do what expert witnesses are supposed to do—help courts and litigants arrive at the truth when they must deal with matters that require special knowledge.

The Last Word

It is good to acquire new skills and interests, but that doesn't suggest that one can practice well after reading a book or attending a weekend course. A clinician who is approached by a lawyer should strongly consider referring him or her to a forensic specialist, especially if the matter is complex or outside the doctor's forensic experience. Accepting such a consultation may be unfair to the litigant and attorney, and could be embarrassing (or worse) for the clinician.

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[‡]These columns can be accessed at www.reidpsychiatry.com

Call for Forensic Topics. I want to make this column as interesting and useful to readers as possible. Please send suggestions for future column topics to P.O. Box 4015, Horseshoe Bay, TX 78657, or e-mail them to reidw@reidpsychiatry.com.