

# Law and Psychiatry

## Forensic Practice: A Day in the Life

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Some forensic psychiatrists, including many who read this *Journal*, work for agencies, courts, or correctional facilities. They evaluate defendants or patients on behalf of the agency or court rather than for one side or the other. Their reports and opinions may be used by whichever side finds them useful, usually in criminal proceedings, and they may be subpoenaed to testify in that context. In many litigated matters, however (and most civil ones), the experts are retained by one side or the other or, rarely, by a judge. The material below is related to the adversarial aspects of some form of litigation. I'll omit other kinds of consultations in this column.

I'm not solely a *forensic* psychiatrist; my work consists of forensic tasks, clinical tasks, and many endeavors in which the two overlap. Like many people in private practice, I devote substantial time to continuing education, primarily on clinical topics. I also do a bit of clinical teaching, writing, and limited research. Much of my patient care is done through other clinicians, in clinical consultations, general and case supervision, case presentations, and clinical oversight. These and other clinically related pursuits occupy something more than half of my professional time. That's important when one is asked to review and comment upon clinical topics, but it's also important to note that there is no hard line dividing *clinical* and *forensic* work.

Most of my forensic practice consists of *cases*. They're not my cases, but usually a lawyer's. I am a consultant to the lawyer, court, or other entity. The litigants aren't my clients or patients; my responsibility is to the lawyer or other entity that retains me, and to the relevant court with respect to honesty and objectivity. My fees come from, or through, the lawyer, court, agency, or other entity that retains me (to save my typing fingers I'll just say *lawyer* from now on).

### How Do Lawyers Find Me?

Most of my work comes from word-of-mouth referrals. As in most other practices, clients for whom one has done a good job may return when the need arises and may refer others. That means reputation is a very important part of this kind of practice. Lawyers and

others have a wide choice of expert consultants, many of whom are geographically closer and/or charge less per hour than I. They rarely "shop" blindly for private experts. They aren't required to use someone from a preferred-provider panel or someone who lives nearby. They are interested in—and obligated to find—the best feasible expert for their clients.

Successfully "marketing" a forensic practice is thus much more—and much less—than simply getting one's name before the public. Doing good work and meeting the needs of the case are the best marketing strategies (but see below for the difference between *real* needs and false ones). Advertisements or paid listings in expert directories are, in my experience, unlikely to result in many attorney contacts. Lawyers, like sophisticated patients and referring physicians, rely on personal experience, reputation, and trusted colleagues to find the person most likely to do a good job.

### What Kinds of Cases Are Most Common?

The most common litigation in my practice is related to malpractice allegations. Most of those cases have to do with a death of some sort, often a suicide (the most common topic of psychiatric malpractice lawsuits). Some of the other civil actions are related to serious boundary issues such as doctor-patient sex and a variety of other topics (e.g., emotional damage, clinician impairment, workplace conditions, civil rights, disability, competence/capacity, or contracts). Defense and plaintiffs' cases arrive in about equal numbers.

About a third of my practice involves criminal matters. Private criminal cases usually involve something very serious, most often an accusation of murder. They almost always require evaluations related to trial competence, criminal responsibility, or mitigation or appro-

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priateness of sentence (including the death penalty). Many forensic psychiatrists work with mental health systems, courts, or jails (often in salaried positions) to perform competency and responsibility evaluations of defendants with misdemeanor or relatively minor felony charges. Those tend not to come my way, however, unless the prosecution or defense is willing to expend additional resources for some reason.

I also consult to facilities or government agencies, usually about clinical treatment, and do a little bit of media consultation. That work generally doesn't involve lawyers or courts, but may be related to the clinical standard of care. Some treatment consultations or reviews are of forensic patients; others address ordinary clinical standards or risk management (e.g., violence or suicide risk) for nonforensic facilities or organizations.

### How Do Cases Begin?

The first step in a new case or task is usually a phone call or email asking me to review the matter. Most such calls come from lawyers. Sometimes I'm contacted by a litigant, potential litigant, patient, or patient's family. When that happens, I politely decline to discuss the matter except through a clinician or attorney. From a forensic viewpoint, it is important that I not form any relationship with the person which could create either a doctor-patient relationship or some other conflict of interest that could interfere with my objectivity, and thus with my usefulness as an expert witness. Sometimes I then hear from the person's lawyer, and sometimes I don't.

The initial telephone conversation with the attorney is designed to help me determine whether or not I might be helpful and to give the lawyer a chance to decide whether or not to retain me. I don't charge for the call. The lawyer understands that I may not end up working for him or her and that there is a (usually slim) chance that I could end up working for the other side. About a third of such calls result in my being retained. In others, I may suggest other experts (e.g., because the issues are outside my expertise; I have a conflict of interest; I can't meet the scheduling requirements; or the lawyer needs a more convenient or less expensive expert). I may also suggest that the case doesn't sound good from my perspective and thus that retaining me would be a waste of time and money. Of course, the lawyer may simply decide that I'm the wrong expert for his or her case.

Assuming I am willing to become involved, our office then sends the lawyer three things: a letter expressing my willingness to participate if retained, a curriculum

vitae, and a sheet detailing my fees and billing procedures. The letter states quite specifically that I will be honest and objective; I will not form any opinions without appropriate review or other assessment procedures; any opinions I do form may or may not be helpful to the lawyer's case; and my participation is predicated on the financial arrangements in the fee sheet.

Fees are a part of professional life that must be clearly understood from the beginning of the relationship. The fee sheet is essentially a contract that expresses the ground rules for my compensation, including my retainer, hourly and daily fees, advance deposit requirements (for reports, travel, or testimony), and what items and services will be billed to the client. I have routine hourly and daily fees which apply to most clients, but I charge some (such as the Texas Medical Board, our state correctional system, and some criminal defense lawyers with indigent defendants) less for work that I can often do on a "space-available" basis.

I'm sometimes surprised at lawyers' expectations early in the contact process. Some ask for an examination or report during the initial call. That's usually putting the cart before the horse. I'm happy to do evaluations, but I don't want to mislead the lawyer and I have no wish to waste anyone's resources in the process. In addition, I'm reluctant to work unless the lawyer has a clear understanding that my findings may or may not be helpful to his or her case.

A few attorneys, particularly some civil plaintiffs' and criminal defendants' lawyers, have the mistaken assumption that expert witnesses should be willing to jump to whatever conclusion the lawyer wants. That is rarely true (and not true of any of my friends, I hope). That assumption gives us all a bad name. Once I explain how I work, and that most ethical experts work similarly, the process can proceed (or the lawyer can look elsewhere).

Attorneys often get a bum rap as well. The great majority of those with whom I work are knowledgeable, ethical folks. They don't deserve bad lawyer jokes any more than most of us deserve bad shrink jokes. Others, however, do.

### Case Review and Assessment

**Review.** After receiving the retainer (or, occasionally, agreeing to proceed without one), the next step is receiving and reviewing all available, relevant materials. A great portion of the "glamorous" life of a forensic psychiatrist is spent slogging through records and long legal documents such as depositions and trying to decipher

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other people's handwriting. It is not just reading—it's critical reading, taking notes, trying to separate the important from the irrelevant, and trying to keep everything organized for a case that might not go to trial for years. The material routinely includes medical records, clinician notes, law enforcement records, insurance or administrative records, depositions, interrogatory responses, other people's reports, court filings, journals or other personal writings and drawings, photos, audio- and videotapes, and/or background information (e.g., media reports). I sometimes perform literature searches as well. Some of this activity can be delegated to, or organized by, an experienced assistant, but I eventually look at every page myself.

**Examination and collateral information.** Unless the litigant or patient is unavailable for examination (such as in cases involving suicide), most matters that get beyond the review stage eventually include some sort of examination or assessment. When a litigant is available, an in-person assessment (or more than one) is the norm. Even when the litigant is not available, it is often important to speak with family members, friends, or others relevant to the case.

**Other expertise.** Many cases involve factors outside my knowledge or experience, which vary from legal issues to criminalistics and other sciences, to mental health topics that require expertise outside my own. I often recommend psychological or neuropsychological testing, neurologic review, nursing experts, or other help relevant to the questions being asked. Sometimes I lead a sort of expert team; in other cases, I'm a member of such a team or the lawyer works with other experts individually.

**Discussion with the attorney.** After review of the available information, it's time to talk with the attorney about preliminary findings. Sometimes I do this before any in-person examination, since I want the lawyer to know the general direction of my thinking thus far and have an opportunity to stop my work on the case if he or she wishes. That may sound odd, but good, comprehensive, in-person assessments are expensive, often \$5,000–\$10,000 or more if travel is involved. Sometimes record review suggests that proceeding further would be a waste of resources. If an examination is warranted, such a discussion with the lawyer helps plan what is necessary, explains my reasons for suggesting further assessment, and allows the lawyer to notify the litigant. I rarely contact the litigant directly, but prefer to set up the examination through the appropriate attorney.

**Reports.** In civil cases, when the work has proceeded to a point at which I am able to offer opinions, the lawyer is likely to want a report. Some reports articulate opinions that form a basis for going to trial or settling the case; others are more preliminary. Many states require an early expert report or affidavit supporting a plaintiff's case before a medical malpractice lawsuit can be filed. All reports should be carefully written and completely defensible with currently available data (not just the lawyer's allegations or rationale).

If the attorney wants a report, I talk with him or her about several things before writing it. Does the lawyer clearly understand my findings and opinions? What's the best format? I usually recommend brief reports that address specific questions posed by the attorney. Many experts recommend lengthy, exhaustive reports that cover every nuance of the review and examination (I've seen reports over 60 pages long, addressing every subtlety of both sides of the matter). I disagree, as do most attorneys. The important points are best expressed concisely; it's not an academic discourse.

By discussing the relevant questions and appropriate format before writing the report, one avoids answering questions that have not been asked (and either diluting the importance of the main points or inadvertently damaging the case). Still, the report must be scrupulously honest. If the questions the lawyer asks appear to mislead the reader, or lie by omission, it is my responsibility not to allow the reader to construe my opinions in that way. Part of the lawyer's job is to get the expert to support his case; however, experienced, ethical experts try to spot inappropriate efforts to influence reports or testimony, and avoid giving opinions they can't defend completely with the available data.

**Communication.** As I write this, I'm reminded of how closely I communicate with the attorney during a case. Excellent communication is one hallmark of good practice. There may be long periods of inactivity—sometimes years go by while the wheels of justice grind away (or simply stop for awhile)—but when things are happening, the lawyer needs to know exactly what I'm doing and to be informed of any changes in my opinions.

### Discovery and Depositions

In civil cases that have not been resolved by this stage of the process, the other side's attorneys are likely to want to question me in detail about my opinions. They have gotten a copy of my report, but they'd like to know what else I may be thinking, and what I may say at trial.

They're entitled to "discover" everything I know or think that is relevant to the case and any future testimony, as well as lots of personal information about my methods, background, and expertise. It's a pretty formal process, designed to prevent surprises in court (and to help settle the case without a trial if both sides can agree).

I sometimes look upon depositions as a kind of oral exam, even though they aren't really a test of the expert's knowledge or memory. They usually take several hours. I'm expected to have studied my part of the case thoroughly and be able to express my findings articulately. One has to be alert for misleading or trick questions to some extent, but I don't try to figure out the other side's strategy or engage in gamesmanship. I'm just someone who has formed some opinions about the mental health aspects of the matter being litigated, and I'm there to answer the other side's questions as honestly, concisely, and consistently as I can.

Incidentally, I always recommend that the lawyer with whom I'm working spend time preparing me for the deposition, discussing what questions to expect and learning how I'll answer certain questions if they are asked. The lawyer who doesn't do that is sending his or her expert into an adversarial arena with no hint of the possible outcome. And lawyers hate uncertainty.

### **Trial Preparation and Testimony**

Although one must always be prepared for trials, they are uncommon for most private forensic psychiatrists (one exception is those who do large numbers of criminal trial competency evaluations). I've been to court 35 or 40 times in the past 10 years, and have given something over 60 depositions. Most of my forensic time is spent reviewing records, followed by interviews with litigants and collateral sources and attorney conferences. Fewer than 10 percent of civil matters go to trial (and I may not be asked to testify even when they do). Criminal matters involving mental health issues often get to trial, but may not include psychiatric testimony.

When trials do occur, they take precedence over almost everything else in life. The attorney's personality changes to some combination of intense focus, complex choreography, compulsivity, and hypomania. Some lawyers worry themselves into a tizzy. I recall one who barricaded himself in a Cincinnati hotel room for the duration (except when he was in court), surrounded by the case files, with large Do-Not-Disturb signs on the door and a loud snarl for any housekeeper who tried to get in to change the sheets. I do my work, remain available, and stay out of the lawyer's way.

The lawyer is the star of the show at trials, not the expert. He or she must juggle many things on his client's behalf. I'm responsible for reviewing my part of the case carefully and being very prepared for both direct and cross examination. Direct examination is fairly straightforward. The attorney who retained me asks questions that have usually been discussed beforehand. Cross examination is the hard part, when the lawyer for the other side does his or her best to pick my opinions apart or, failing that, to attack my credentials or style.

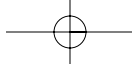
I often travel long distances for that privilege, and my portion may be over in less than a day. In other cases, I spend days studying other testimony or simply waiting to testify (schedules are fickle things, even though judges are generally quite nice about getting experts on and off the witness stand). To make matters even less predictable, it is not unusual for a case to settle (or the lawyer decide not to have me testify) after the trial has begun. One must remember not to take such things personally.

### **Practice Practicalities**

A lot of staff and office time is spent on things that are very important to all cases but not directly related to any single one. In addition to attending to patient care issues, charts, rules, and the like, my forensic practice creates an entirely different category of client (whose special needs must be met) and professional work (whose special rules must be followed). It all comes down to the ability of my office support system to provide excellent service to the person or entity that retains me.

Mine is a solo practice, and operates on a smaller scale than some others. My work is highly individualized for (often) complex, geographically diverse cases. In larger practices, one would expect to find lots of support staff, perhaps overseen by an office manager, but our size and my practice style make it impractical to delegate broad authority to others. First, some of our office records and procedures are so critical and specialized that they must be carefully monitored, and I'm the compulsive guy who sees that it gets done. Second, and somewhat related, it is impractical for our office to maintain the system controls necessary to delegate many important procedures, work priorities, and client contacts to staff. I oversee those things myself, with help from one or two employees. My clients expect me to take personal responsibility for their cases, and I do.

In any private practice, one is personally obligated to his or her employees. They get paid before I do; their salaries, benefits, and office conditions come first. They



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are the foundation of the business, without which I couldn't practice my profession as I do.

Being in private practice also means being responsible for one's family's income and benefits. I like the independence and self-reliance, but it comes with a price. It may sound a little materialistic, but my income is a little like real estate commissions. Instead of a steady flow of smaller payments (such as one receives in a general practice) or a predictable salary check each month, the money arrives in less predictable amounts, at less predictable times. Many of the checks are large ones, which demand self-discipline and budgeting for things like taxes, retirement, and less productive periods. Since much of my work is done under a retainer or deposit against future billings, I must also budget for prompt refunds in case the work doesn't materialize or the case is resolved early.

Finally, solo practitioners must deal with the potential for professional isolation and the need for continuing education and professional validation. Doctors who

do a lot of forensic work risk being out of the clinical mainstream. This must be countered with some combination of continuing medical education (in nonforensic areas), clinical consultations, clinical teaching, patient care, and the like. Those who move farther and farther from the clinical mainstream as they pursue forensic work do a disservice to those who rely upon them for clinical expertise—especially when they are asked to assess other doctors' care—and are in danger of losing their clinical identities. My forensic work comes from a *medical* perspective, not a *legal* one.

### The Last Word

Now you know something about one forensic doctor's professional life. If anyone had told me 30 years ago that I'd be making a living studying for the equivalent of final exams and writing the equivalent of term papers, and having to get an A every time in order to keep my reputation, I wouldn't have believed it for a second.