When To Consult a Forensic Expert *and* **Malpractice & Being Sued for It – PART 1**

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When To Consult a Forensic Expert

Have I mentioned that ***I'm not a lawyer***, and none of this should be construed as "legal advice"? In fact, although I describe my understanding of some legal concepts and won't knowingly mislead you, don't rely "legally" on anything I say!

Expert and informal consultation (*not related to malpractice lawsuits*). First, let's understand what forensic experts—forensic psychiatrists in this case—do, and what we don't do. We aren't your first call in emergencies, nor do we take the place of lawyers or solely clinical consultants (unless we also have the relevant clinical expertise). *Don't call a forensic psychiatrist for legal advice.*

If we wanted to be lawyers, we'd go to law school and buy ads on bus benches & daytime TV. Very few of us are lawyers as well, and those who are usually practice one profession or the other rather than being mediocre in both. (There are exceptions, mostly in academia.)

We may, however clarify clinical risk management issues, give informal comments on how to respond when lawyers call you, let you know how we might view an issue from a malpractice viewpoint, perform formal second opinions or independent evaluations, and things like that.

Talking about a "problem." I talk with lots of clinicians about how to work with (or deal with) attorneys, risk management (such as suicide or violence risk and other common malpractice topics), doing part-time forensic work, etc. I don't charge for that (nor do most forensic colleagues). Sometimes I talk *informally* with clinicians are worried about a case, are already being sued, or have licensure issues (again, at no charge).

Consulting *professionally* about your (or a family member's) lawsuit, likely lawsuit, licensing board issue, criminal charges, or your spouse's alleged mental illness in your latest divorce proceeding. I *don't* talk with a colleague if he or she is already involved (or likely to become involved) in a legal matter in which I'm a consultant or expert, or if I *might* become an "expert witness" in the case, *unless the conversation is through, or with permission from, his/her lawyer*. The reason has to do with protecting the colleague: I don't want to create a conflict of interest that would preclude my being an expert witness in the case. In order to help you, my (and any forensic expert's) relationship with the lawyer—and the court, if it comes to that—must be free of the bias that is implied by such conversations.

That doesn't mean you can't call me to discuss something about your case if I'm *not* going to become your expert witness. I'm happy to talk with colleagues informally and to a limited extent (particularly if I know them), but I don't want to get into a role that might damage your case. Informal clarification, sympathy, even off-the-cuff advice are fine (and often good things), but they usually preclude your lawyer from retaining me later as a testifying expert in your case. In addition, if I know you reasonably well, or was significantly involved in your training or supervising, I will not knowingly become formally involved in a plaintiff's case against you, nor

am I likely to be retained in any testifying role by your own lawyer (see Part 2 of this seminar, **Malpractice and Being Sued for it**).

We (forensic specialists) are usually engaged/retained by lawyers, judges, government agencies, administrators or private organizations, and almost never by clinical colleagues. If you should need an expert for a legal matter, such as a malpractice suit or licensing board issue, *do not* talk to prospective experts without going through a lawyer experienced in that field. It's fine to help your lawyer locate an appropriate expert, but *the expert should not develop any outside relationship with you or other litigants or potential litigants*. If you're a litigant, all interaction with experts should be arranged by your lawyer, to avoid any impression of conflict of interest (bias). That keeps your expert credible for the judge and jury, and *credibility is the expert's greatest asset*.

Consultations in your clinical practice. It is often a very good idea to consider either a forensic specialist or a respected non-forensic colleague for second opinions or independent examinations/evaluations for things like *suicide risk, violence risk, complex civil commitment assessments/certificates, complex patient disability* matters, *competence to consent to or refuse something*, clarifying the *standard of care (SOC), facility risk management,* and *complex ethics matters*. I strongly suggest second opinions and independent evaluations when you're concerned about suicide or violence risk (especially if you're tempted *not* to admit or restrict a patient whom you think might be a risk), or about whether or not some activity you're contemplating might be below the SOC.

When such matters involve significant risk, they usually should not be dealt with in an informal phone call, text or email. (Think about that the next time you're on call and you or your attending wants to decide a clinical risk matter—such as denying an admission—by phone.) Although you may need a clinical consultation rather than a "forensic" one, ***carefully and completely document the conversation****, the pros and cons of the actions that you are considering, and* ***your judgment process***. *Do not* simply write things like "discussed," "assessment completed," or "No SI/HI."

Private forensic consultants charge for most of those things, such as forensic second opinions and independent evaluations (not the same as friendly curbstone consults for general advice), sometimes at two or three times the common clinical billing rate. Large facilities, agencies and training programs often have salaried forensic consultants who do not charge the consultee or patient. In legal situations, we bill the "retaining entity" (hospital, agency, lawyer, court, etc.); we almost never bill the subject of the evaluation or litigation (whom we call an "evaluee," not our "patient," though we may refer to the person evaluated as *your* patient).

Don't try to convince us to bill the patient or health insurance company by saying something like "The patient has good insurance" or "The patient can afford an independent violence risk assessment." *Any financial agreement with the subject of an evaluation makes the evaluation no longer "independent,"* and creates a conflict of interest, even if the examination is paid for by the patient's insurance carrier.

Want Further Info?

Trainees and clinicians are welcome to call my office (830-596-0062) or email me at reidw@reidpsychiatry.com. You may also find my website useful (300+ searchable pages at

www.psychandlaw.org). Remember, *I'm not a lawyer and will not knowingly give you legal advice*. (Never call a shrink when you really need a lawyer!)

The handout for Part 2 of this seminar, **Malpractice and Being Sued for it**, will be distributed at our next session.