

How Lawyers View Psychiatric Experts

WILLIAM H. REID, MD, MPH
SKIP SIMPSON, JD

Good lawyers look for integrity in their expert consultants and expert witnesses. They need truthful, accurate information to help them assess and frame cases, win or settle them favorably, and/or withdraw when the case has little merit. Experts should be well qualified to review, interpret, and eventually testify credibly about their portions of the case. They should be able to work with lawyers in the lawyers' own arenas (e.g., courts, hearings) and to convey their opinions to others, such as juries, clearly and without unnecessary distractions. (*Journal of Psychiatric Practice* 2012;18:444–447)

KEY WORDS: expert witness, lawyers, juries

This is the fourth in a series of articles on the practical aspects of forensic work, in part paraphrasing chapters from the upcoming book, *Developing a Forensic Practice*.¹ This material generally assumes that the clinician is a private practitioner who has been—or wants to be—retained by an attorney, court, or other third party in the legal or judicial system (referred to below, for convenience, as a lawyer or “retaining entity”). This month, attorney Skip Simpson helps me discuss what retaining attorneys look for—and expect—in expert witnesses.

Lawyers use experts to help assess their cases, to teach them about some case elements, to assist in framing case presentations, and to increase their chances of winning, settling wisely, and/or conserving resources (including abandoning cases that should not be pursued). Although the expert isn't a direct advocate for the lawyer's client, the expert and attorney routinely become a team. They participate in an “adversarial” system of justice whose advantages have been proved countless times over the years.

For good lawyers, and contrary to what is seen in movies and television programs, the first rule is *integrity*. Integrity means, in part, that you're not primarily interested in yourself but in others and in doing a good, professional job. Regardless of the lawyer's “side” (plaintiff, prosecutor, civil or criminal defense), most look for a sense that the expert believes that the case occupies the moral high ground.

Good lawyers choose and research their cases carefully before filing them. They expect their experts, after appropriate review and contemplation, to conclude that their clients deserve to win, and that the expert is on the “right” side of the case. If that doesn't happen, then either there is something wrong with the case or the lawyer has chosen the wrong expert. *Good lawyers consider both possibilities.* The expert must be objective, but eventually believing that one is on the correct side of a case is a big deal and adds greatly to one's credibility.

Of course, attorneys don't always know whether or not they have good cases. Some rely more than others on the expert's review and opinions in order to decide whether or not to proceed, figure out how to frame the case, or support a case impression. Sometimes the expert disagrees significantly with the attorney; good lawyers question experts about areas of both agreement and disagreement. An expert should not adjust his or her views and opinions just to fit a bad case or to please an erroneous or inexperienced lawyer. That's bad for all concerned, and it will hurt your reputation in the long run. (News travels fast among lawyers. If you want the news about you to be good, you must be highly competent, ethical, and understand the attorney's needs.)

What Can You Teach the Attorney?

Tell the attorney the truth. Understand that one of the best things an expert can provide is the unvarnished truth. Lawyers want to pursue or defend

Dr. Reid is a clinical and forensic psychiatrist and a past president of the American Academy of Psychiatry and the Law. His website, Psychiatry and Law Updates, is www.psychandlaw.org. This column contains general information which should not be construed as applying to any specific patient, nor as any form of legal advice. The material in this series is expanded, with forms and examples, in his forthcoming book, *Developing a Forensic Practice: Operations and Ethics for Experts*. Mr. Simpson is a Dallas-Ft. Worth trial lawyer with national civil and criminal experience. He works regularly with psychiatrist and psychologist expert witnesses.

DOI: 10.1097/01.pra.0000422743.72247.25

solid, meritorious cases. They would much rather decline a case or resolve it early than waste months of time and money locked into an unworthy battle. It is very expensive to pursue poor cases!

Lawyers need their experts' opinions to be solid and easily defensible in court and to uphold reasonable clinical standards. Lawyers have to know, as early as feasible, when to fight, when to compromise, and when to fold up their tents and go home. And they hate surprises. If, after adequate review, evaluation, and contemplation, an expert doesn't think his or her opinions will withstand detailed scrutiny by a vigorous and educated opposing lawyer, that part of the case is probably weak and the expert should quickly let the retaining attorney know.

Help assess the case. Forensic experts can often help lawyers "value" their cases (decide the merits of various case resolutions). The expert should be experienced and knowledgeable enough in the strengths and weaknesses of the psychiatric parts of the case, and in the other side's case, to explain all of that to the lawyer so that the lawyer can use that information in framing the case. If some parts aren't consistent with the lawyer's objective, or they appear to contradict each other, the expert should be able to point those parts out within his or her field of expertise. That doesn't mean the expert is "advocating" in the same way that the lawyer does, but rather that he or she can articulate important aspects of the case for the lawyer to use on behalf of the client.

What Can You Teach the Jury (and How Will You Talk to Them)?

After the expert catalogues and interprets the case information, he or she must be able to present that interpretation to a trier of fact (usually a jury) in a helpful manner.

Frame the issues. The expert helps the lawyer—and eventually the jury—to frame the issues. Technical qualifications are not enough; the expert must be able to concisely and convincingly discuss key issues in the case. For example, in a malpractice matter, the expert needs to be able to discuss standards of care, whether or not there have been deviations from a standard, damages or lack of damages, and any relationship between deviations and damages; in many criminal matters, the expert will need to discuss

competence to stand trial or mental limitations on criminal responsibility.

Understand the concept of "reasonable medical certainty." In the world of litigation, experts almost always must express their opinions to a "reasonable medical certainty" or "reasonable medical probability" (or sometimes reasonable "psychiatric" or "psychological" certainty or probability). *That legal phrase simply means more likely than not.* A great many experts misunderstand this simple, crucial definition, probably because it differs from the way clinicians usually view "certainty." Don't be one of them.

"Possibilities" aren't expert opinions. Expert witnesses must know the difference between expert opinion and "possibility." It is not sufficient to offer mere "possibility" as an opinion; *probability* (defined as "more likely than not") is the requisite threshold for reasonable certainty in most cases. If your opinions in favor of the attorney don't reach probability, *tell him or her long before any deposition or trial.*

Expert Depositions

Most cases are settled prior to trial, and experts' depositions in civil cases often influence settlements. Settlement value corresponds, in part, to how well the expert presents his or her opinions at deposition.

Depositions, a "discovery" device, are taken by opposing lawyers to learn what a witness knows, how the witness knows it, and how the witness communicates what he or she knows. They also preserve testimony. A trial lawyer's main purpose for taking a deposition is usually to lock in the testimony of the deponent, and later to try to impeach the deponent if he or she says something different at trial.

Don't be deposed in your own office. The convenience (and sometimes money saved for whoever is paying the expenses) is not worth the extra advantage for the other side. For example, the deposing attorney is likely to note the books and journals on your shelves and ask—either in the deposition or later at trial—whether or not you have read them. If you say no, you'll sound superficial; if you say yes, you'll be asked about their content (and relevance to the case). If you have exaggerated the extent of your reading, you'll be embarrassed.

Law and Psychiatry

The retaining attorney should prepare the expert for the deposition. You are expected to have reviewed all of the materials furnished and understand that your entire case file (including billing records) will be open to the opposing lawyer. The attorneys for both sides have usually learned beforehand how you have testified in earlier, similar cases. Anything you have written (e.g., journal articles, book chapters) or stated in prior depositions may be compared to what you say in this one. Inconsistency in prior statements, even those of limited relevance, can be gold mines for opposing lawyers.

Your Courtroom Presentation

First, the lawyer must have evidence that the case deserves to win. Then it must be presented in such a way that the jury or other trier of fact *listens* to the evidence. That means the testifying expert must change the trier's often negative expectations about expert witnesses, instill an assumption of competence and credibility, and help the trier remember the information during later deliberations.

The best psychiatric and psychological experts limit their mental health jargon. They talk plainly and to the point. Jurors dislike pretentious experts, and their eyes glaze over when they hear psychobabble.

Trust and believability are key. That's easy to say, but not so easy to implement. The main point is that lawyers don't want experts who *distract* their audiences, whether with appearance, demeanor, speech, or attitude. What is presentable in Vermont may be questionable in Alabama and terminally distracting in a military court-martial. Trial lawyers want to present experts whom their "audience" views as caring about doing the right thing, respected (and respecting the audience in return), and very competent, honest, and fair.

Appearance is the first thing the jury and/or judge sees. Juries start making decisions about an expert's credibility as he or she is walking to the witness stand. They sense, at some level, "believable or not believable" in a second or two. Dress, gender, age, length and style of hair, self-decoration, skin color, and a dozen other factors, some subtle and some not, may be relevant in particular cases and jurisdictions. For example, evolving social mores notwithstanding, most trial audiences *sense* (if not overtly believe)

that an expert who sports visible tattoos, piercings, or lots of earrings (even one can be "lots" in men), or who is significantly "different" from them in some way they believe is negative, is less than credible. *Lawyers cannot let social fairness or political correctness guide their decisions about hiring and presenting expert witnesses. Their objective is to get the trier to listen without distraction, and believe.*

Cultural markers. Like appearance, accents and cultural markers (some not controllable, such as physiognomy or skin color, and some more stereotypical than real) may be distracting to some triers. In large cases, it's not uncommon for lawyers to use focus groups to determine whether an expert will encounter such problems. The lawyer will not present an expert who will be unconvincing or distracting in court (and should not, since the lawyer's duty is to the client's interests). Don't take it personally.

Clarity is very important in engendering trust. If an expert is unclear, uncertain, or ambivalent, the jury will not pay attention to what he or she has to say. Clear, unambivalent statements ring true. Jurors' first impressions, like those of the rest of us, are often based on unconscious, non-deductive factors. For example, many experts feel a need to explain every nuance of their findings, but if the jury senses that an expert is going to great lengths just to *appear* fair, they often suspect he or she is being dishonest (or at least not straightforward).*

Attitude. Attitude conveys volumes. Confidence is important, but if an expert is arrogant in court, his or her testimony will almost certainly be rejected.

Professional Background and Experience

Qualification of experts and application of opinions. State and federal rules require experts to be "qualified" by the court before their opinions can be offered at trial. In addition, the opinions offered must be properly applied to the facts in issue. Rule 702 "Testimony by Experts" of the Federal Rules of Evidence states, in part,²

*Interestingly, the worst impression that can be given about an expert opinion is probably not so much that the expert is lying about something, but that the expert opinion is unreasonable and that no competent expert in the field would hold that view.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

You should be reasonably familiar with the general expert qualifications of the jurisdictions in which you may testify.

Credentials. Your *curriculum vitae* matters, but often not as much as you may think. Juries like clinician-experts who are currently in practice and in touch with their professions. Once the expert is qualified by the judge or other arbiter, the most important thing continues to be the “audience’s” impression of competence, trustworthiness, and credibility.

Professional blemishes. Lawyers rarely hire experts who have a history of significant problems (e.g., licensing board censure, suspensions of privileges, or several lost malpractice lawsuits). Lawyers and investigators are very good at finding such things and, when the chips are down, the other side will attack your background in order to discredit you. *Tell the attorney or other retaining party about such issues before becoming his or her expert.*

Past testimony. As already mentioned, your testimony in earlier cases is relevant. It must be consistent with the testimony you plan to offer in the current case. If it’s not, you’re the wrong expert for the case.

If you have testified only (or primarily) for one side or the other in certain kinds of cases (whether plaintiff, civil defense, criminal defense, or prosecution), or have been retained many times by the same law firm or agency, there should be a good reason. If there’s not, juries may view you as less than trustworthy, or even a “hired gun” (the kiss of death for one’s credibility and reputation).

Office Practices and General Style

Office responsiveness. You and your staff must be prepared to respond quickly to attorneys’ needs.

When the lawyer calls, he or she often needs an answer quickly (for example to meet an unexpected deadline), or at least to know that the expert will be given the message without delay. If you’re not easily reachable, you’re unlikely to be retained (or retained again). It is imperative that deadlines be met and promises kept, and that everything that comes from your office reflects quality and professionalism.

Be able to listen to the lawyer. Mental health professionals are supposed to be good listeners. There are times when the lawyer needs for you to listen, whether about case needs, your testimony style, or something else. Although smart and ethical lawyers will not try to bend your ethics or opinions to their case needs, you can learn a lot—and become a better forensic psychiatrist—by being open to new information, clarifications of the case and your role in it, and constructive criticism.

An easygoing, country-style lawyer once flew several hundred miles to prepare me (Dr. Reid) for an upcoming expert deposition. He listened patiently as I talked (probably a bit patronizingly) about the case and my opinions. Then he leaned back and said with a folksy drawl, “Doc, if you’ll be quiet and listen to me for about 20 minutes, I think the deposition will go much better.”
I did, and it did.

It is good to remember that the case is not about you. You should be able to subordinate “you” in favor of the relevant points of the case.

The Last Word

Understand what lawyers and other retaining entities need from you, what you can offer, and how to interact with them. Be competent, honest, and ethical, and protect your reputation.

References

1. Reid WH. Developing a forensic practice: Operations and ethics for experts. New York: Routledge (Taylor & Francis); in press.
2. Federal Rules of Evidence. Rule 702. Testimony by Experts. December 1, 2010 (available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Evidence.pdf, accessed October 17, 2012).