AAPL: Ask the Experts-2015

Neil S. Kaye, MD, DFAPA
Graham Glancy,

Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send question to nskaye@aol.com.

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Q.: Should I ask the referring attorney who else has already evaluated the case?

This is a very challenging question and we are certain there are as many answers as there are AAPL members. Nonetheless, we will not run from an attempt to address such an important and controversial topic. For educational purposes, Neil will address the "pro" side and Graham will address the "con" side.

A. Kaye:

There are many reasons why knowing if the case has already been "shopped" around can be helpful. First, it tells you something about the lawyer. While I know some lawyers who routinely do this to help them assess the real value of a case, more often it appears to be an effort to find an expert who will be "helpful" after a prior expert has either turned down the case or reached an opinion that is not helpful or supportive of the lawyer's theory or strategy.

Second, it puts you on notice that there are problems with the case and could lead to an even more thorough review of the materials. While I routinely consider what an expert on the other side might opine, this would make me even more critical as I undergo the process of review.

Third, it helps an expert to learn more about a colleague. One of the rarely talked about parts of expert witness work includes our personal knowledge of a colleague, information that can be helpful when "the battle of the experts" erupts in a more public setting.

The last issue this raises is what I refer to as "personal minimums." I am not only a physician, I am also a helicopter pilot. While the FAA sets certain parameters ("minimums") for flying, each pilot must know her/his own "personal limits" in

terms of safety and comfort for any given flight. I believe the same concept can and should be applied to forensic work. My knowledge and experience may rightfully allow me to reach an opinion when a colleague could not. My ability and willingness to reach a conclusion could be greater or less than another equally respected expert. Knowing that another expert (especially if it's a colleague I know, respect, and trust) has declined a case, serves to remind me of where my personal limits are and can help me to be sure that I am not over-reaching.

A. Glancy:

This is a difficult situation and thankfully, in my practice, does not arise frequently. There are always two sides to every argument and I will review with you three points on the "con" side.

Firstly, this may be an opportunity to come to a case with a fresh viewpoint using unique forensic skills. Confronted by, what is likely a dead end at which your colleague arrived, you may pursue a different avenue altogether, which may result in a helpful forensic opinion. For instance I was once referred a case of a university student who had stabbed his roommate after being bullied. The defense theory was of an attenuation of battered woman's syndrome. A respected colleague had assessed the client and rejected this argument. When I saw him, I believed that this brilliant computer student met the criteria for a diagnosis of Autism Spectrum disorder and that certain known characteristics of this disorder contributed to his anxiety and paranoia at the material time, thereby mitigating specific intent. If I had simply looked at my colleague's report I may just have been tempted to agree with his reasoning.

Secondly, I believe that most attorneys will usually disclose that another expert has reviewed the case and allow you to read her/his report. When the attorney doesn't do so, suggests that there may be specific reasons that they do not want you to see a report. This might involve the fact that the other expert had a serious conflict of interest, or that they made serious errors that could be embarrassing. In other cases sometimes there have been interpersonal problems between two of the parties or the expert herself may have had personal problems. In these types of cases, if the attorney has not revealed the issue to you, it is probably better not to know.

Thirdly, this material may be covered by the umbrella of attorney-client privilege; to know it may make you vulnerable to the legal issue as follows: When on the stand if you were asked "doctor, are you aware of anyone else who reviewed this case and what they thought?" you would be put in an invidious situation. This would add a complication to the case, which could have been prevented. In this situation you should trust your retaining attorney to understand both the law and

courtroom procedure. Most frequently lawyers are trying to protect their experts not to trick them.

Sometimes as forensic psychiatrists, when we get together, we get into a mindset that the attorneys as a group cannot be trusted. This myth should be dispelled. Most lawyers are honest, ethical, and knowledgeable of the law. In 30 years of practice of forensic psychiatry I can count one hand those who have tried to trick me or have been blatantly dishonest or unethical.

Take Home Points:

Knowing your personal limit and biases is important and can influence your decisions in accepting or refusing to take a specific case. While honest experts can in fact disagree, it is important to strive for objectivity and impartiality in reaching an expert opinion. In forensic pathology, while manner of death is usually classified as natural, accidental, suicide, or homicide, there is also a category called “undetermined,” to be used when the evidence isn’t clear enough or strong enough to support a more precise answer. Perhaps it’s time for forensic psychiatrists to get more comfortable with saying “I’m not able to reach an opinion to a reasonable degree of medical/psychiatric/scientific” certainty.

Secondly, in general you can trust that attorneys may have a good reason not to reveal information to you. Most attorneys are ethical and knowledgeable of the law and you can generally accept that there are perhaps things that you do not need to know in a case for good reasons. Unless there is something about the attorney that makes you suspect something nefarious, you should accept the conditions of the retainer in good faith.