In this new column, Neil S. Kaye, MD, and Bob Sadoff, MD 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. I examined a man for the defense and felt that the injuries sustained, including a brain injury and PTSD were directly caused by the auto accident in which he was involved. I called the lawyer who retained me to discuss my opinions. He thanked me, said he did not want a report, and paid my bill. Now, a year later, the plaintiff's lawyer called me, is aware of my seeing his client and that no report was produced (information provided by defense lawyer to plaintiff lawyer). The plaintiff's lawyer would like me to testify on behalf of his client. What do I do?

A. Sadoff: Examining for the defense is different than examining for the plaintiff. As plaintiff's expert, you have a duty to the man and to his attorney. When examining for the defense, no such duty exists except to minimize harm by being respectful and seeking truth and justice as outlined in the AAPL Ethical Guidelines. You should not respond or agree to testify for the plaintiff without first consulting the defense lawyer who originally retained you. He or she may wish you not to testify and may seek prohibition from the judge. The plaintiff attorney may subpoena you, but the defense attorney may go to court to quash the subpoena. The court may order you to testify in which case you are protected by the court's immunity. Always seek protection before knee-jerk response. Always consult the retaining attorney for advice.

I have had such conflicts many times in the past and always sought advice before proceeding. Beware, sometimes the retaining attorney will allow or even encourage you to testify for the plaintiff so that she/he may cross examine you and get more from that method than from direct examination if you were her/his witness. We are guests in the court and must abide by their rules, which may prohibit or allow us to testify in such cases.

A. Kaye: This is a common situation, and one that always makes me uncomfortable. In the more common scenario, one attorney does not know I have been involved for "the other side" and so I simply decline the case and reveal nothing of my involvement. It is a good practice to provide the names and phone numbers of other appropriate AAPL members as a referral.

But, in this case, one attorney already has shared my involvement with the other attorney. It is fairly obvious that my opinion is not going to be helpful to the side that has retained me, as no report was generated. However, that doesn't make

me a “free-agent,” as it is possible that I have learned information in consultation with the retaining attorney that would be considered privileged. Such knowledge of legal strategy may remain privileged and this issue should be addressed.

First, I would call the retaining attorney and ask if she/he has any objection. If no objection exists, I ask the attorney to send me a letter so stating, and then I will proceed. The attorney should specify that there are no restrictions on what I share.

If an objection exists, I ask that a court order be obtained specifically addressing my potential involvement. While a court order may bar my testimony, my records and any raw data from my testing/evaluation, may still be obtained through subpoena, and I would want that issue addressed as well. The expert needs to be protected from legal adversary adventures. A court order protects you, in case the defense attorney later decides to file suit against the expert.

Sadoff/Kaye: Take home point: The expert may be employed by either side but should remain vigilant for potential slippage causing her/him to feel they are “on” one side or another. An expert’s role is to teach the judge or jury though clear and scientifically sound testimony. Attorneys keep track of wins/losses; good experts don’t.