AAPL: Ask the Experts-2021

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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 questions to nskaye@aol.com.

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Q: I need some advice on how to respond to lengthy detailed discovery requests and do I really need to provide drafts of my reports?

Kaye:

A great compound question! Discovery is a pre-trial procedure in which each party can obtain evidence from the other party or parties by means of “discovery” devices such as interrogatories, requests for documents, requests for admissions, and deposition. In Law, “discovery” is the exchange of legal information and known facts of a case. Think of discovery as obtaining and disclosing the evidence and position of each side of a case so that all parties involved can decide what their best options are before deciding to move forward toward trial or negotiate an early settlement.

Over the last 35 years, the detailed requests for records and work product have become longer and more complex. In a recent case, I was asked to provide: the original or any copy of a writing or other form of record-preserving system including without limitation, anything, either typed, printed, handwritten, visually reproduced, electronically generated including computer files, records, lists, papers, notes, memoranda, correspondence, e-mails, schedules, photographs, charts, reports, inter and intra-office communications, recordings, contracts, agreements, invoices, bills and any other forms or preserved information in my possession, custody or control and/or in the possession, custody, or control of my agents, servants, employees, attorneys, or any person acting on my behalf, or of which I have knowledge, whether or not I my possession, custody or control.

The documents I was “required to produce ”included but were not limited to: all documents I reviewed; all documents to which I might, did, will, or would refer to in writing a report, formulating an opinions or might rely on at any deposition or

testimony; all medical records associated with the examinee or any other person involved in any way with the case; all correspondence and all electronic correspondence including that between me and any lawyer, expert, treater, family member, or party involved in the case; any notes, memoranda, or other materials related in any way to the case; any documents produced by anyone else about any person/party involved or potentially directly/indirectly or peripherally in the case; any and all work product generated by me with any potential relevance to the case; all invoices related to work in the case; all notes taken while evaluating the litigant or anyone else evaluated for any reason; a copy of any tests administered including test booklets and answer sheets with raw scores; all engagement agreements; a listing of all forensic cases in which I have had any involvement at any level in the last five years including but limited to the names of the parties, the lawyers with a designation of who hired me, the judge, court, and case citation, a summary of my opinion and the results of the case; and a copy of any/all articles, journals, texts, treatises, writing, that forms any portion of the basis of any opinion to which I might testify at any level of the case. I was also asked to provide copies of any testimony in any and every case in which I have ever had any role and a copy of every article or publication I have ever authored, co-authored, or reviewed. Of course, a full accounting of any research into the topic of the case was expected and copies of all articles and materials I read regardless of their influence on my opinions.

Finally, I was asked to produce copies of anything that I might use at trial including but not limited to: diagrams, models, photographs, videos, drawings, images, films, scans, X-rays, electronic media, and enlargements of any page pr portion of any record or reference material that may form the any part of the basis of any of my opinions or be used in any way to proffer testimony or to explain any opinion to the trier of fact.

Clearly, this was over-reaching! After catching my breath, I called the retaining lawyer and expressed my dismay at being asked to provide a copy/proof of everything I have ever read in my nearly 40-years of medical education and life-long learning. The patient lawyer, donning her hat as councilor at law, calmed me down, and explained that the rules in the state in which the case was calendared did not allow for such an “overly broad” request and clarified what actually needed to be produced: my notes (if I had any,) my report, and if I had them, any references on which I relied for this specific case. She further clarified that only if the case was to go to forward to trial would we be discussing courtroom exhibits.

So, what must an expert typically provide as part of discovery and how is this best done? Certainly, expect that a copy of any written correspondence, electronic correspondence (if available) and report(s) issued will be discovered as are any test results for tests you ordered or conducted. If you keep billing records for a case these will generally be discoverable but not everyone keeps these records once a bill is paid.

If you relied on or cite specific articles, books, and references you can be asked to provide copies, although I usually don't and tell the lawyer that the other side can obtain these public materials at their time and expense and that I won't, so long as I provide the correct citations. Testing answers are fair game but many test questions or booklets are proprietary and many courts have upheld the right of the expert and testing company to not provide the actual questions or scoring algorithms. I do not generally provide a copy of everything I have reviewed as it all came from retaining counsel so they have it and they can share it with the other side. I also think it's important NOT to give discovery materials directly to the other side (such as *duces tecum* materials at depositions). I almost always give my materials to the lawyer who retained me, for transmittal to the other side as appropriate, allowing them to remove items they believe aren't discoverable.

As for "draft" reports, there are substantial differences from state to state regarding these being discoverable. Therefore, you need to know what are the rules or precedents. Today, many of us don't have drafts as we create an initial document in a word processing or data-based software and simply continuously edit until it is finalized.

Glancy:

Hamlet contemplates the pain and unfairness of life: "To be or not to be? Whether tis nobler in the mind to suffer the slings and arrows of outrageous fortune, Or to take arms against a sea of troubles, And by opposing end them".

One of the facets of a career in forensic psychiatry is that there are times when we must endure the slings and arrows of the various parties of the legal system. To a certain extent we are in the hands of lawyers in the system and we have to accept that this is the case. Sometimes, as Dr. Kaye has pointed out, lawyers try to intimidate and bully us, and one of the ways of doing this is to make unreasonable requests. As Dr. Kaye points out generally speaking the retaining lawyer can deal with these issues and save as from unnecessary burdens.

Nevertheless, it is incumbent upon us to retain all of our records in a psycholegal case. This may include any handwritten or typed written records of interviews with and evaluee or other interested parties. It may also include copies of billing documents or invoices. The issue of draft reports is an interesting one. Whether or not draft reports have to be produced is dependent upon the rules or precedent in each particular jurisdiction. As Dr. Kaye points out many of us in this day and age add incrementally to a report on a word document as various sources of information come into our possession. For instance, when a collateral source contacted me may add a section on that interview. The issue really is whether the retaining lawyer has influenced you to change or report. Hopefully you can be convincing about this issue. It might be possible to get ahead of this and assure the parties that of course he would never change your opinion due to

pressure from the retaining lawyer, but you did add to that report as information came in as we have discussed above. If you have changed the report, it is not unreasonable again to explain that yes you did make some changes because the lawyer pointed out some of the dates or facts were mistaken or not in evidence and so you removed or change certain points. If this is the case would of course have some record to jog your memory of what changes were made and you would have to expect some questions about this in deposition. It may also be helpful to ensure that you retain any billing documents or invoices, which are often raised either in depositions trial, generally with the inference that you would say anything considering the amount that you have been paid. You will of course try to make the point that you are paid for your time, just like everybody else in court, but not for your opinion.

In a recent case, I made some may consider to be a rookie mistake. I was entering the second day of virtual cross examination on a difficult case, which split the cross-examination into one day in December, followed by one day in January, followed by one day in February. In order to keep track of where I thought counsel was going, I made some handwritten notes at the end of the first day and had them in front of me ready for the next day. The perspicacious counsel noticed me shuffling pieces of paper and asked me what was in front of me. Under oath, I had to tell him the situation and of course he demanded to see the notes. Since I was testifying virtually from home, I had to scan the note and send it to the parties and wait for him to cross-examine me, since I was reminding myself on the crucial points that I wanted to hammer home-including the unreliability of the history given by the evaluee, the tendency of the evaluee to control information, and the fact that these issues supported my contention that he suffered from psychopathy and antisocial personality traits. I was, rather cynically, duly cross examined about this but I believe that it only strengthened my position in the end because I was able to repeat these points yet again. There is, nevertheless, a lesson to be learned from this that if you're going to be a forensic psychiatrist you have to learn to suffer the slings and arrows of outrageous lawyers and to ensure that you do not let it get you and through you off your stride.

Take Home Points:

The rules of discovery are determined by each state and codified. Like many things in forensic psychiatry, it is critical to know the rules specific to the jurisdiction. It is appropriate to ask the retaining lawyer about discovery rules applicable to the case and we advise so doing.

Shakespeare W. Hamlet. Act 3, scene 1