

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 just received the opposing expert's report in a case. In the report, the other expert not only attacks my opinion but also goes on to say that I must not have read the records and suggests that that the lawyer wrote my report? How do I get any recourse?

A. Sadoff: Fortunately, this kind of personal and professional attack in the adversarial nature of our judicial system has become less frequent than in the past. Unfortunately, there are still those "experts" who have such low self-esteem that they feel the need to attack their adversaries. It is one thing to rebut the scientific and professional opinions of one's adversary through evidence-based comments, but another to personally attack one's adversary. There is no place for that, in my opinion, in a respectful profession as we experience it.

Having said that, there are also those "experts" who do have the reports dictated or written by the attorney, or, in some cases, the final version is suggested by the attorney who has a particular need in her case. We do know that attorneys write the affidavits or declarations that are submitted. However, the expert has the option to modify or change the wording of the document if it is not in keeping with her professional opinion.

The writer asks about recourse. The best recourse is in the courtroom, where one can professionally defend one's opinion by pointing out, to the court, the weakness of the adversary's argument and the strength of one's own proposition. One type of recourse occurred when I was accused by my adversary of not having a "mental status examination" in my report. I, in fact, had a mental status examination, but I did not label it as such. However, in court, with my adversary sitting in the audience, I pointed out the clarity of the mental status examination and made the comment that if he needs to have a title with neon lights, I could do that, but a clear reading of the paragraph showed that, in fact, it was a comprehensive mental status examination. His comment attacking me for not having it showed the weakness of his opinion and the jury showed him no mercy. Judges and juries are very astute in picking up the attack mode of a person whose own opinion is weak and, therefore, the expert has to bolster his opinion by inappropriately attacking her adversary.

My new book, "Ethical Issues in Forensic Psychiatry: Minimizing Harm." In that book, I point to the vulnerable populations that we serve and how we may minimize harm within a harmful adversary system. We should not be aggravating the harm to each other, but rather helping the legal system in the least harmful way. One chapter points to the expert witness as a vulnerable person within the system. We should be able to work effectively, professionally and with dignity in presenting our opinions, even when our adversaries disagree. According to the old adage, we should be able to disagree without being disagreeable.

A. Kaye: I too have had to endure scathing attacks of a very personal nature that are clearly unprofessional at best and libelous at worst. In my experience, these reports invariably come from an expert who works almost exclusively for one side, a point worth discussing with the retaining lawyer who can use this to show bias during voir dire.

I am proud to say that rarely do these attacks come from other psychiatrists and it is especially rare for such attacks to come from trained forensic psychiatrists and AAPL members. However, it is not infrequent for a non-psychiatrist to attack me for rendering "medical" opinions, especially in the areas of traumatic brain injury, neuropsychiatry, pain, somatic disorders, and dementia. Too many medical colleagues still believe that psychiatrists are not "real" doctors and there are numerous cases where judges have limited testimony by a psychiatrist to only the non-medical issues. Many doctors, judges, and jurors need to be reminded that I am fully capable of ordering and interpreting imaging studies, labs test, and other functional assessments even though I am "only" a psychiatrist. I make it a point to discuss how this is exactly what I do daily in my clinical practice.

I strongly advise against any type of engagement with the other expert, or as we would advise a patient in couples therapy: "Don't take the bait." Avoid the temptation to write a stinging and pithy reply. Rather, carefully examine the other expert's criticism, critiques, and comments and see if there is any validity to any of what has been claimed. Understanding the opposite vantage point can significantly strengthen your hand as you prepare for cross-examination. Usually, if the other expert is stooping to character assault it is because that expert has no better evidenced based medical/science to best your written opinion.

Do discuss your feelings and conclusions again with retaining counsel so that this issue is in the open. This allows for any weaknesses to be addressed as part of direct examination. Also, keep a file of such reports, so that when you cross paths with this "expert" again, you have prior written opinions for you and the lawyer.

I agree that the best recourse is in the courtroom. For me this requires ample preparation time with the retaining lawyer and being certain that during the credentialing process, an adequate basis for my medical expertise and subsequent testimony is laid. I ask the lawyer to have me admitted not simply as an “expert in psychiatry” but as a medical doctor, a pain expert, a neuropsychiatrist, a psychopharmacologist, or whatever moniker will assure my ability to testify across the full spectrum of diagnoses and conditions are expected to arise during the case. Of course, these areas must actually be within my true expertise, but being “blessed” by the court as an expert in advance is important.

In one case, an attorney tendered me simply as an “expert” and opposing counsel never objected. The judge approved the request and for the first and only time in my life I can say I was legally approved as a “know-it-all.”

Sadoff/Kaye: Take home point: There is no place for unethical behavior in the medical-legal system and we have a duty to practice to the highest standards possible in order to preserve the dignity and decorum of our profession. When an opposing expert fails to live up to the expected professionalism required in our work, we must continue to show the way by example and resist the temptation to lower ourselves. Juries are insightful and they can easily tell which expert is more credible. Let the facts do the talking. Lastly, as experts, we are there to teach and should have no stake in the outcome of the litigation. Let your neutrality be empowering.