

AAPL: Ask the Experts-2014

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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. 1. In doing an independent medical exam, it is clear that the stress of the litigation is the primary stressor. How do I address this in the report and can I let the evaluatee know that she would be better off dropping the case?

2. I was asked to evaluate an employee for a disability stress claim. The stress/disability arises from illegal activity (embezzlement) in which the employee has been engaged. There is no criminal case pending, nor is one expected. Do I reveal this in my report, and if so, how?

Sadoff:

Both questions have similar issues on the stress of litigation for the plaintiff and ethical issues for the forensic psychiatrist.

The forensic experts asking these questions appear concerned about the ethics of commenting in their reports about the stress of litigation on the plaintiff and the toll it is taking on her. Does her right to sue become any less important because the process is extremely stressful and is causing her emotional pain? Should she not be involved in this litigation because the stress outweighs the rewards? Perhaps there are other emotional issues she has in suing the defendant that far outweigh the stress or the monetary award. I strongly recommend that when faced with such a dilemma where one may not get the full picture during a single examination that the expert has several options: a full battery of psychological tests, a follow up exploratory session, refer to a treating psychiatrist for more clarification, or, ideally, all 3 options. It is not for the forensic expert to tell the plaintiff to drop the lawsuit unless the stress is so severe that

in consultation with the plaintiff's attorney, the decision can be made that her mental health trumps her legal issues.

With respect to the second question, I also see the ethical issue for the expert in skirting the illegal behavior that resulted in the disability claim. What should the forensic psychiatrist put in his report that would be accurate and helpful to the decision maker that is not harmful to the examinee? Does the reporter have to go into detail about the illegal behavior or can he focus on the effects of such behavior on the examinee?

I recommend that the forensic expert needs to document the symptoms he observes and obtains by history and medical records that resulted in the person's disability.

Recall that there are 4 steps to the evaluation:

- 1) there is a stress, incident or accident
- 2) that results in an injury
- 3) that leads to impairment
- 4) that may result in a finding of disability

All four are separate and distinct but related by cause and effect. In this case, the embezzlement is the stress that causes the anxiety and depression (anticipated loss of job and/or freedom) and must be considered for all the emotional effects it has on the employee that impairs his ability to function that may result in a finding of disability. It is not unethical to mention it in the report because it is relevant and germane and is known by others. It is an essential link in the chain of events leading to the assessment. To ignore it would not be helpful and could reveal bias on the part of the examiner.

Kaye:

These two related questions each involve the issue of the stress of litigation. In my experience, plaintiffs often underestimate the psychological cost of litigation. It is easy to focus on the potential financial gain associated with a civil suit, and even to approximate the actual cost of the litigation itself. However, the emotional costs both in terms of time and psychological stress are often not really appreciated until the litigation is well underway and the litigants face deadlines, depositions, cross accusations, and perhaps even the shame of personal information being made public in the legal proceedings.

Regardless of my role in the litigation, I make it a point to ask the evaluatee about the effect of the litigation and how she is handling this stress. When the plaintiff's counsel hires me, I try to make certain that the person has considered the non-financial costs associated with litigation and also how she will feel if the outcome is less than what was desired. This could include a question such as "Is it worth it?" On some occasions a plaintiff has decided to drop the litigation, commenting that no one else had ever discussed this important issue.

If acting as a defense expert, it would be inappropriate for me to suggest that someone drop a lawsuit, but it is still necessary to inquire as to how the stress of the litigation affects the person's symptoms.

The second question is quite interesting and I have been involved in this type of case. The focus of a disability examination is very different from the usual criminal or civil forensic evaluation. The standards for disability are very different than those for Worker's Compensation, criminal law, or even civil tort actions and are often idiosyncratic, being derived solely from a private insurance policy. The first thing is to make sure that you understand the definition of disability being used to decide this matter. Also, remember, you are not making the decision. That decision is the discretion of the hiring/referring entity. This is the time to try to stick to clear descriptions of a person's capacity to perform the requisite activities/behavior of life and employment.

In this specific case, anxiety and fear associated with criminal behavior should be included, because it is an identified trigger and may well be compensable under a disability policy. There is no reporting requirement to the police because that is not part of our role as defense medical examiners. As always, prior to starting a forensic evaluation, I provide the usual and required disclaimers. When an evaluatee begins to disclose this type of material, it is reasonable to remind her of that warning.

Sadoff/Kaye:

Take home point: It is often difficult to apportion the psychological stress of the litigation from the associated alleged injury or tort itself. However, it is appropriate to inquire about this issue in a neutral manner and to include this information in a forensic report. The use of quotes from the evaluatee often do a good job of conveying this information.