

AAPL EXAMINER



American Academy of Psychiatry and the Law

ASK THE EXPERTS

On Hold for Attorney Clearance

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Neil S. Kaye, MD, DFAPA, Graham Glancy, MB, ChB, FRC Psych, FRCP (C), and Ryan Hall, MD, 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. Is it okay for the retaining lawyer to write the first draft of a report or affidavit, or to insist it be formatted in a specific way?

Kaye:



Fellowship training teaches us how to write reports, and we are often encouraged to stick with a traditional forensic medical report style. In general, over the last 40 years I have followed such teaching and find it works well, keeps me organized, and that most lawyers appreciate and even come to rely on my easily followed chronological review of the records provided. I find that the chronological approach makes it easiest to tell a clear story. However, I am mindful that the retaining lawyer is also my “customer” and so long as my opinions are not altered or truncated, I am open to rearranging things after a discussion of why this is desired.

When I first discuss my services with the lawyer, I explain that I will review the materials (and that I need everything) and then see the evaluatee if they are available and it is required for my work. Then I call the lawyer to discuss my initial impressions and ask whether they want a report, and, if so, what type. Most often, the lawyer wants a full report in the usual style, but some don’t want a report or prefer a one-page summary in letter form. I prefer to lay out the chronology and end with a formulation and an opinion that will flow from the facts although I have worked with lawyers who prefer the opinion

or conclusion come first, believing that the trier of fact is too lazy to read the whole report.

However, there are times, based on my opinion or perhaps based on legal strategy and that particular state's discovery rules, that a "one page" opinion is all that is desired or required. Some venues allow a deposition or a report, but not both, so a lawyer may not want either. Often this will lead to an affidavit.

While I would never allow a lawyer to draft a report, generally, the lawyer will draft the affidavit as it is a legal document, and I will review it and make changes as I feel are necessary. Changes are always made in consultation with the lawyer and rarely is this a protracted process. Affidavits tend to be more conclusionary in content and, by nature, brief. An affidavit should never be considered a report or a substitute for a report, although I have seen lawyers attempt to claim that the affidavit is the expert's report.

As for "customer satisfaction," I recently had the unusual experience of a well-known lawyer with over 50 years in the profession insisting that I redo my report to comply with their arrangement of the copious legal materials in a complex civil case. They wanted the history and review of records to be segregated into material that supported their position and material that supported the opposing position, and, within each of those headers, to be further segregated by source, while keeping the material within each source chronological. I tried my best to explain why I thought this made little sense and would be more difficult to work with in depositions and in court but they insisted. Their rationale was that they knew the judge well and that this was how that judge liked things and that it would be easier for that specific judge to follow and thus be more persuasive. As none of the rearranging changed any of my opinions, I agreed to produce the report in this style, charging my usual hourly rate for the time required to reorganize all of the material.

Glancy:



Where I practice, it is not common for lawyers to include an expert opinion in an affidavit. An affidavit is a written statement confirmed by [oath](#) or [affirmation](#), for use as evidence in court. They are most commonly used for a motion or a pretrial matter. An example where affidavits have been used in my experience is for a request for the plaintiff's medical records, especially in cases involving allegations of sexual assault. (1) Using an affidavit may be a faster and more concise way to summarize an expert's qualifications and opinion, rather than requesting a full report. This may save the lawyer from having to pay for a full report. Sometimes, affidavits are used to narrow the expert's opinion to the essential issue of the subject of inquiry. From the lawyer's point of view, there are strict rules for swearing and affidavits,

and codes of conduct governing these rules in each jurisdiction. As a result, forensic psychiatrists should not feel overly concerned that they are being unduly influenced by the lawyer. The affidavit may be drafted based on a conversation about the expert's opinion before the expert has actually drafted a full report.

It seems almost redundant to state that the expert must be exceptionally careful to ensure that the information in the affidavit actually represents their opinion. Before signing an affidavit, the forensic psychiatrist must read it very carefully and be comfortable that the affidavit reflects what they may have said in their initial verbal or written opinion and does not misrepresent the forensic psychiatrist's opinion. Therefore, it may be necessary to have more than one version of the affidavit before it is suitable for signing and swearing.

Regarding reports, it is permissible for a forensic psychiatrist to send a draft report to counsel for comment on certain issues. For instance, has the report answered the question that the lawyer wanted the expert to address? It is also useful if the lawyer checks certain facts relied on and then shows that the dates in the report are incorrect. I often find that evaluatees may say they left University in 2000, but due to the circumstances of the assessment, their statements may be inaccurate. If these areas are left in the report, the other side may use them in cross-examination and, if there is more than one such error, may assert that the whole report is inaccurate.

I am embarrassed to say that lawyers often catch proofreading errors, which, although really irrelevant to the final opinion, can make for an uncomfortable cross-examination. It is not permissible for the lawyer, on seeing a preliminary report, to call the forensic psychiatrist and persuade them to change their opinion on the substantive issue. This can compromise honesty and objectivity, a major tenet of the ethics of our subspecialty. A forensic psychiatrist should be on guard for this maneuver and resist. It is possible that the lawyer will say that they would prefer that the forensic psychiatrist, for instance, does not address where the evaluatee will reside following a finding of NCR-MD or not guilty by reason of insanity, since it may be improper for a jury to consider this at this stage of the proceedings. In this case, it may be reasonable to agree to remove that part of the report, without changing the substantive opinion.

Hall:



I think my colleagues have covered many of the salient points. I also think it is permissible for a lawyer to draft an affidavit after conversations with an expert given the usual nature for how forensic experts' affidavits are used (e.g. providing factual support for legal motions or applications). With that being stated, it is still the expert's obligation and role to make sure that the affidavit reflects

their opinion appropriately and not to sign something that the expert does not think is factually accurate.

I do not think it is ever appropriate for a lawyer to write or do initial drafts of an expert's report. With that said, it may be appropriate in certain circumstances for the attorney to make editorial suggestions if the expert chooses to share a draft report with the attorney. For example, correcting a legitimate typographical error, fixing a grammatical issue, or suggesting making changes to the order of presentation of information, as long as it does not affect the overall opinions reached, may be permissible. Even in some circumscribed situations, suggestions to remove content not pertinent to the legal issue or allowed by rules of evidence or the inclusion of additional information or analysis to make the report relevant to the potential issue before the court, may be appropriate as long as it does not tell the expert what their opinion should be. Ultimately, it is the expert's decision, based on the facts of the case and ethical consideration, if they incorporate these suggestions into the report. In addition, it needs to be remembered that, depending on the jurisdiction, draft reports may be recoverable, and the expert should be able to discuss why changes were made and why the changes do not compromise the expert's objectivity or independence.

Another issue that also often comes up is if it is appropriate for experts to use attorney-generated timelines or abstracts when preparing reports. In general, I think it is okay to review abstracted information provided by the attorney, especially in the early stages of a case to help acclimate oneself to the case. However, I would never use attorney abstracts as the sole basis for writing a report. Ultimately, experts need to generate their reports from the records or information that they have actually reviewed and not just assume the attorney's abstracted information is equivalent.

Sometimes mistakes can be made when records are abstracted or important information is left out under the best of circumstances because whoever abstracted the information may not know what is actually important to the expert. Under the worst of circumstances, abstracts, to put it politely, may be one-sided due to bias. Another consideration is that the abstract may also be attorney work product, so experts need to be aware on how to work with an abstract that has been provided. For example, the attorney may not want you to include parts of their work product in the report. In general, if provided with an attorney-generated abstract of records, it is best to clarify with the attorney ahead of time if that information is discoverable or confidential.

Although a little outside the scope of the original question, another area which experts are going to be facing ever-increasing challenges on is how to incorporate AI information into report writing. At this time, I know AAPL already had talks at the annual meeting on this topic and this field is changing rapidly, so any suggestions or opinions here are just general thoughts that may change with time. In general, I see AI writing a

report or even abstracting records as the same as having an attorney or their representatives perform those tasks. Errors can be introduced and bias may occur without the expert even being aware it happened. Also, there are additional concerns, such as the confidentiality of records or reports if information is put into an open or closed AI system. I have already come across attorneys who, as part of the expert retention contract, included statements that AI will not be used to generate the report. With that said, I do think it is different if a generic term is entered into an AI search and aspects of the results are quoted. If that is done, though, it needs to be clear what information or text was generated and by which specific AI system. At some level, I think experts would need to examine how they handled past technological information-gathering methods to determine how comfortable they are with using AI-generated text and references. If you felt comfortable referencing a Wikipedia article 10-20 years ago, you are probably more comfortable with including AI-generated references. If you see Wikipedia as an unholy abomination, then you may want to hold off on using AI at this time.

No matter where the information comes from, experts need to remember that they are ultimately responsible for the process that led to the formulation of their opinions and the contents of their reports.

Take Home Points:

Psychiatrists must remain ever vigilant of both overt and covert attempts to influence their opinions. One such way this can be done is by an attorney suggesting that they can lighten the workload, save time and money, or hasten turnaround times by doing some of the expert's work. It is imperative that the expert maintain control of the process and be cognizant that they own the report writing process and must be able to vigorously defend the content of any report they sign.

References:

1. Glancy G, Patel M, Borooah M. Participation as an expert in cases involving the production of mental health records. *International Journal of Risk and Recovery* 2022;5(1):44–51. DOI: 10.59703/ijrr.v5i1.44-51.