

Considering work as an expert witness? Look before you leap!

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Department Editor

Dear Dr. Mossman,
I am retired, but an attorney friend of mine has asked me to help out by performing forensic evaluations. I'm tempted to try it because the work sounds meaningful and interesting. I won't have a doctor-patient relationship with the attorney's clients, and I expect the work will take <10 hours a week. Do I need malpractice coverage? Should I consider any other medicolegal issues before I start?

Submitted by "Dr. B"

One of the great things about being a psychiatrist is the variety of available practice options. Like Dr. B, many psychiatrists contemplate using their clinical know-how to perform forensic evaluations. For some psychiatrists, part-time work as an expert witness may provide an appealing change of pace from their other clinical duties¹ and a way to supplement their income.²

But as would be true for other kinds of medical practice, Dr. B is wise to consider the possible risks before jumping into forensic work. To help Dr. B decide about getting insurance coverage, we will:

- explain briefly the subspecialty of forensic psychiatry
- review the theory of malpractice and negligence torts
- discuss whether forensic evaluations can create doctor-patient relationships
- explore the availability and limitations of immunity for forensic work
- describe other types of liability with forensic work
- summarize steps to avoid liability.

Introduction to forensic psychiatry

Some psychiatrists—and many people who are not psychiatrists—have a vague or incorrect understanding of forensic psychiatry. Put succinctly, "Forensic Psychiatry is a subspecialty of psychiatry in which scientific and clinical expertise is applied in legal contexts...."³ To practice forensic psychiatry well, a psychiatrist must have some understanding of the law and how to apply and translate clinical concepts to fit legal criteria.⁴ Psychiatrists who offer to serve as expert witnesses should be familiar with how the courtroom functions, the nuances of how expert testimony is used, and possible sources of bias.^{4,5}

Forensic work can create role conflicts. For most types of forensic assessments, psychiatrists should not provide forensic opinions or testimony about their own patients.³ Even psychiatrists who only work as expert witnesses must balance duties of assisting the trier of fact, fulfilling the consultation role to the retaining party, upholding the standards and ethics of the profession, and striving to provide truthful, objective testimony.²

Special training usually is required

The most important qualification for being a good psychiatric expert witness is being

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Disclosures

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DO YOU HAVE A QUESTION ABOUT POSSIBLE LIABILITY?

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a good psychiatrist, and courts do not require psychiatrists to have specialty training in forensic psychiatry to perform forensic psychiatric evaluations. Yet, the field of forensic psychiatry has developed over the past 50 years to the point that psychiatrists need special training to properly perform many, if not most, types of forensic evaluations.⁶ Much of forensic psychiatry involves writing specialized reports for lawyers and the court,⁷ and experts are supposed to meet professional standards, regardless of their training.⁸⁻¹⁰ Psychiatrists who perform forensic work are obligated to claim expertise only in areas where their knowledge, skills, training, and experience justify such claims. These considerations explain why, since 1999, the American Board of Psychiatry and Neurology has limited eligibility for board certification in forensic psychiatry to psychiatrists who have completed accredited forensic fellowships.¹¹

Malpractice: A short review

To address Dr. B's question about malpractice coverage, we first review what malpractice is.

"Tort" is a legal term for injury, and tort claims arise when one party harms another and the harmed party seeks money as compensation.⁹ In a tort claim alleging negligence, the plaintiff (ie, the person bringing the suit) asserts that the defendant had a legally recognized duty, that the defendant breached that duty, and that breach of duty harmed the plaintiff.⁸

Physicians have a legal duty to "possess the requisite knowledge and skill such as is possessed by the average member of the medical profession; ... exercise ordinary and reasonable care in the application of such knowledge and skill; and ... use best judgment in such application."¹⁰ A medical malpractice lawsuit asserts that a doctor breached this duty and caused injury in the course of the medical practice.

Table 1

Avoiding improper behavior as an expert witness

Do not accept contingency fees (payment that depends on the outcome of the case)

Request and review all relevant records

Communicate about the case only through the retaining party

Have evaluatees sign a consent form that includes an agreement to waive confidentiality

Learn the purposes and nuances of giving depositions

Avoid bias, and tell the truth

Source: References 3,4,34,37-40

Malpractice in forensic cases

Practicing medicine typically occurs within the context of treatment relationships. One might think, as Dr. B did, that because forensic evaluations do not involve treating patients, they do not create the kind of doctor-patient relationship that could lead to malpractice liability. This is incorrect, however, for several reasons.

Certain well-intended actions during a forensic evaluation, such as explaining the implications of a diagnosis, giving specific advice about a medication, or making a recommendation about where or how to obtain treatment, may create a doctor-patient relationship.^{12,13} Many states' laws on what constitutes the practice of medicine include performing examinations, diagnosing, or referring to oneself as "Dr." or as a medical practitioner.¹⁴⁻¹⁷ State courts have interpreted these laws to further define what constitutes medical practice and the creation of a doctor-patient relationship during a forensic examination.^{18,19} Some legal scholars²⁰ and the American Medical Association (AMA)⁹ regard provision of expert testimony as practicing medicine because such testimony requires the application of medical science and rendering of diagnoses.

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Table 2

Steps to reduce medicolegal risks of practicing forensic psychiatry

Have proper licensing in the state in which the evaluation takes place
Check your malpractice policy to see whether it covers court evaluations, licensing board complaints, and civil claims of damages. If not, ask for a special policy rider
Maintain American Psychiatric Association and American Academy of Psychiatry and the Law memberships
Be aware of appropriate ethics codes
Remain aware of the stress of your evaluation on the evaluatee’s psychological condition and adjust accordingly
Maintain careful records
Do not advertise a result
Do not take cases outside your scope of expertise
Source: References 1,2,9,41,42

Immunity and shifts away from it

For many years, courts granted civil immunity to expert witnesses for several policy reasons.^{8,9,13,20-22} Courts recognized that losing parties might want to blame whom-ever they could, and immunity could provide legal protection for expert witnesses. Without such protection, witnesses might feel more pressured to give testimony favorable to their side at the loss of objectivity,^{23,24} or experts might be discouraged from testifying at all. This would be true especially for academic psychiatrists who testify infrequently or for retired doctors, such as Dr. B, who might not want to carry insurance for just 1 case.²¹ According to this argument, rather than using the threat of litigation to keep out improper testimony, courts should rely on both admissibility standards^{25,26} and the adversarial nature of proceedings.²¹

Those who oppose granting immunity to experts argue that admissibility rules and cross-examination do too little to pre-

vent bad testimony; the threat of liability, however, motivates experts to be more cautious and scientifically rigorous in their approach.²¹ Opponents also have argued that the threat of liability might reduce improper testimony, which they believe was partly responsible for rising malpractice premiums.²⁰

Courts vary in how they consider granting immunity and to what extent. For example:

- Some courts will not grant immunity to so-called “friendly experts,” while others have limited immunity for adversarial experts.²⁰⁻²²
- Some courts have applied immunity to general fact witnesses but not to professional experts.^{21,24,27}
- When immunity is considered, it is usually regarding actual testimony. Yet, some courts have included pretrial services.^{21,28-30}
- Some courts have considered the testimonial issue at hand when deciding whether to extend immunity. For example, immunity may not apply if the issue is loss of profits^{21,31} or if an experiment is conducted to demonstrate the extent of a physical injury.^{21,32}

If you plan to serve as an expert witness, find out what, if any, immunity is available in the jurisdiction where you expect to testify. If you do not have immunity, you may be subject to various malpractice claims, including alleged physical or emotional harm resulting from the evaluation¹ (perhaps caused by misuse of empathic statements³³), an accusation of negligent misdiagnosis of an evaluatee,⁸ or failing to act upon a duty to warn or protect that arises during an assessment.³⁴

Other liability

Dr. B also asked about medicolegal issues other than malpractice. Although negligence is the claim that forensic psychiatrists most commonly encounter,¹⁰ other types of claims arise in practice-related legal actions.

Potential causes of action include failure to obtain or attempt to obtain informed consent, breach of confidentiality, or not responding to a psychiatric emergency during evaluation. The plaintiff usually must show that the expert's conduct was the cause-in-fact of injury.⁸

Besides civil lawsuits, forensic work may generate complaints to state medical boards.¹⁰ Occasionally, state medical boards have revoked psychiatrists' licenses for improper testimony.²⁰ Aggrieved parties may allege violations of the Health Insurance Portability and Accountability Act of 1996, such as mishandling protected health information. Psychiatrists also may face sanction by professional societies—for example, censure by the American Psychiatric Association^{9,10} or the AMA¹³ for ethics violations—if their improper testimony is considered unprofessional conduct. The theory behind this is that judges and jurors cannot be technical experts in every field, so the field must have a mechanism to police itself.^{20,35,36} Finally, forensic experts can face criminal charges for perjury if they lie under oath.⁸

Table 1^{3,4,34,37-40} (page 45) lists ways forensic psychiatrists can avoid actions that constitute improper expert witness work.

How to protect yourself

Even when legal claims against psychiatrists turn out to be baseless, legal costs of defending oneself can mount quickly. Knowing this, Dr. B may conclude that obtaining malpractice insurance would be wise. But a malpractice policy alone may

not meet all Dr. B's needs, because some policies do not cover ordinary negligence or other potential causes of legal action against a psychiatrist.¹³ Some companies offer these extra types of coverage for work as an expert witness at no additional cost, and some offer access to risk management services with specialized knowledge about forensic psychiatric practice.

Table 2^{1,2,9,41,42} (page 46) lists steps to take to reduce medicolegal risk in forensic psychiatric work. As a final thought, a wise fellowship training program director once passed on some sage advice from Mark Twain: "When in doubt, tell the truth."⁴³ It's a useful maxim not just for forensic practice, but for life in general.

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continued

Bottom Line

Forensic work involves practicing in a subspecialty that requires skills and knowledge that lie beyond the psychiatrist's standard clinical acumen. A psychiatrist's risk of actual liability for forensic work is low, but defense costs can be substantial, even when claims lack legal merit. If you plan to do forensic work, get appropriate insurance coverage.

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Find out if immunity is available in the jurisdiction where you expect to testify or you may be subject to malpractice claims

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