'You are instructed to prepare a report . . .' How to make sound decisions about whether to accept or decline medico-legal work†

Anne E. Thompson[1]

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[1]Lincolnshire Partnership NHS Foundation Trust

Correspondence to Anne E. Thompson (annelizthompson@aol.com)

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Summary Medico-legal training received during core and specialist training in psychiatry may not equip a consultant psychiatrist newly appointed in the National Health Service with an ability to decide whether to accept or decline requests to prepare medico-legal reports. This paper draws together some of the key principles, legislation and knowledge which will help guide such decisions.

Declaration of interest None.

Higher training in all specialties of psychiatry includes mastering the competencies involved in medico-legal work. Other than in forensic psychiatry, medico-legal work forms only a small part of most National Health Service (NHS) consultants' workload and so opportunities for trainees to be involved in this work under the guidance of their clinical supervisors are relatively scarce. Most trainees therefore readily seize any chance to become involved in medico-legal report writing or attending court.

The imperative, as a trainee, to become involved in whatever medico-legal work is available can distract both trainees and trainers from the need to learn about the decision-making process surrounding the question of whether or not to undertake this work at all. These decisions have to be made by most psychiatrists from time to time once appointed as a consultant in an NHS post. Most psychiatrists receive occasional requests from solicitors to prepare psychiatric reports, either in respect of people known to them as patients or for those who are not their patients. The latter may occur quite frequently when a newly appointed consultant starts work and local solicitors make approaches, perhaps hoping that the new specialist might regularly prepare medico-legal reports for them.

Receiving a solicitor's letter can cause anxiety. The letter may be written in language which conveys a sense of obligation and urgency. Our recall of our medico-legal training may be patchy as it is not part of our everyday work, and we may be concerned that this work may be detailed, time-consuming and difficult. We may feel some obligation to help the person who requires a report, especially if they are our patient, tempered with our competing job plan pressures.

This article provides a framework to guide decision-making about how to respond to requests for medical information from solicitors and the courts. It aims to complement training in medico-legal report writing and court skills, and to give newly qualified consultant psychiatrists the confidence to make sound decisions about whether or not to undertake work in this area of practice.

Requests you must respond to

Requests from solicitors to access case notes

With the written consent of the patient, solicitors may request access to the patient's case notes. These requests are most frequently made because the solicitor is preparing a case for compensation after an accident, but requests may be made in respect of other civil law actions, matters being addressed in family courts, or because the solicitor is defending a client who is being prosecuted for a criminal offence.

Written requests, enclosing the patient's consent to disclosure, should be passed to the trust's records manager or equivalent, who will process the request in keeping with the Data Protection Act 1998 and the NHS confidentiality code of practice.[1] Access to case notes needs to be permitted or declined within 21 days, if the file has been active in the preceding 3 months, and within 40 days, if the file has not been active in the past 3 months.

The psychiatrist as well as other practitioners who have made entries in the case notes will be asked to agree to the disclosure of a copy of the case notes. You can refuse when:

- you consider that part of the record, if disclosed, could cause serious harm to the mental or physical health of the patient or other individuals; or
- you consider that the patient is incapable of understanding the nature of the application and valid consent has not been provided by an authorised representative.

These requests remind us that information recorded about our patients in their case notes should have been

†See commentary, pp. 272–274, this issue.

shared with them, as far as possible.[2] If a psychiatrist feels that it could cause their patient serious harm for them to see an entry in the case notes, then this should be recorded in the case notes at the time that the entry is made. If this has been done, when a solicitor requests to access records, such entries should be easily identifiable in the case notes and the judgement to withhold information because of possible serious harm can be made confidently and transparently.

Younger children, people with significant intellectual disability and adults with cognitive impairment may not be able to understand the purpose of a solicitor using information from their case notes. Parents and others with parental responsibility can give consent for a solicitor to see case notes of a child under 16. The only adults who could give this consent on behalf of an adult who lacks capacity to understand this decision are those with legally appointed status to act on their behalf, for example a guardian appointed in accordance with the Mental Health Act 1983 or someone with lasting power of attorney appointed under the Mental Capacity Act 2005.

Requests from courts to access case notes

Courts have the legal authority to request confidential patient information from medical records if this information is considered to be relevant to the legal question at issue in court proceedings.

Such requests are issued by letter. If you receive or are made aware of such a letter, you should work with your trust's medical records officers and legal department to manage the ensuing process. It is also advisable to seek advice from the organisation providing individual professional indemnity if you have one.

As a psychiatrist, you have the following duties.

1 To release clinical information only as far as is specified in the court order and only to those people/agents specified in the order. Third-party information must be removed from case notes.
2 To seek legal advice from the trust if you believe that complying with the statutory obligation would cause serious harm to the patient or another person.
3 To seek legal advice from the trust if it appears that clinical information is being requested that is not relevant to the legal issue at stake.
4 Unless the court order is modified in the light of ethical concerns put before the judge relating to items 2 or 3 above, psychiatrists and trust officers must work towards releasing the information as promptly as possible.
5 The psychiatrist's duty of patient confidentiality is not automatically waived by a request from court. A patient could make a complaint to the General Medical Council (GMC) that their confidentiality has been breached and the Council would investigate the circumstances. Therefore clear decision-making and documentation of actions taken is essential. Unless specifically told not to by court officials, you must make efforts to explain to your patient that their confidentiality is being broken in these circumstances and this explanation must be recorded clearly in the case notes.

Requests for psychiatrists to attend court

Still commonly known as being subpoenaed, the Civil Evidence Act 1995 calls this process 'being served with a witness summons'. The intention will be that the psychiatrist attends court and is questioned on the clinical care of one of their patients. Typically, the court will have also requested access to the patient's case notes as above.

The summons will specify a time to attend court and indicate for how long attendance is required. Failure to comply with a witness summons is regarded as contempt of court. This is a criminal offence and could lead to a doctor being reported to the GMC. Therefore, if you feel you have a pressing reason not to attend court as directed, you should raise this as a matter of urgency with your trust legal department and your professional indemnity organisation.

Requests you may respond to

Requests to provide clinical information about known patients

Solicitors acting for someone who is a psychiatric patient may, with the patient's written consent, request that the treating doctor provide information about the person's mental healthcare. This information may then be presented as part of proceedings in a court case.

In this situation, the consultant psychiatrist is being asked to act as a professional witness, also known as a witness of fact. Most consultant psychiatrists in the NHS will not have medico-legal work specified in their contract or job plan, and in this situation it may be helpful to remind oneself (and solicitors, if they are exerting pressure for a report to be produced) that one's contractual obligations are to the NHS only.

Nevertheless, declining to provide clinical information to a patient's solicitor may increase the risk of the solicitor suggesting to the court that information about a person's mental healthcare is important to the legal issue in question. If the judge is persuaded of this, then the court will request access to the case notes and may summon the consultant psychiatrist to answer questions about their content (as discussed earlier). The advantage in providing the information to a solicitor may be that a short report suffices and the matter is closed as far as the psychiatrist is concerned.

When a consultant psychiatrist agrees to act as a professional witness, they will only be providing information gathered during the course of NHS work. In this situation, psychiatrists should not agree to comment on witness statements or other professionals' reports. If these are sent with the letter of instruction by the solicitor, they should be sent back.

It is important to remind oneself that the clinical information available from NHS case notes is unlikely to be adequate to fully answer solicitor's questions or the legal issue at stake. For example, in family court proceedings there may be a question about whether a patient receiving mental health treatment can provide adequate care to their child. The psychiatrist treating the patient will be able to give information about the nature of their mental disorder, the care plan being offered, their progress during treatment,

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issues of risk and likely prognosis. It will be unlikely, however, that the patient's NHS treatment has specifically addressed their capacity to be a parent and so this will not be addressed in detail in the report. On receipt of the treating psychiatrist's report, the solicitor will realise that the entire question of parenting capacity cannot be construed from the clinical report. If this issue is important, the solicitor may decide to instruct an independent mental health professional to answer this specific question. This professional will then be acting as an expert witness.

Reports prepared as a professional witness are unlikely to be as lengthy and comprehensive as a court report prepared by an expert witness or a consultant psychiatrist working in forensic settings. The author includes paragraphs and phrases taken word for word from previous clinical letters in order to maximise transparency for the patient and minimise effort. This is not the place to introduce new formulations or ideas about the patient. Producing a short report which is merely a factual account of known clinical information may not be as daunting as first imagined when a solicitor's letter is received. The author does not request a fee for these reports.

Requests new NHS consultants should probably decline

Requests for psychiatric reports on people who are not your patients

In the professional lifetime of the current generation of consultant psychiatrists, professional attitudes and regulations about doing medico-legal work while working in the NHS have become more stringent. The two issues to be considered are probity and the requirements of being an expert witness.

Probity

Consultants working in the NHS and doing private medico-legal work in NHS or other (non-NHS) facilities are subject to the Department of Health's *Code of Conduct for Private Practice*.[3] Principles of this code of practice include avoiding conflict of interest between a consultant's NHS and private work, avoiding disruption to NHS services, prioritising agreed NHS commitments over private work and only using NHS facilities, staff or services for private work with the prior agreement of one's employing NHS trust.

Using NHS premises to see private patients, using trust computers or stationery, asking secretarial staff to take telephone calls about your private work and of course doing private work in your NHS working day are all breaches of your trust contract and this behaviour could lead to disciplinary proceedings. Where an NHS trust has agreed that a consultant may use NHS facilities or other NHS staff to prepare medico-legal reports, the trust will charge for the use of its facilities and staff. Private medico-legal work (whether or not this utilises NHS facilities) needs to be disclosed during one's job planning process, and be included in one's appraisal.

If you are an NHS consultant doing private medico-legal work, you must make clear arrangements to ensure that your private commitments do not disrupt NHS services. Being available to attend court is highly likely to disrupt routine NHS work.

Income and expenditure from this work must be declared in your annual tax return. Even if income is subsequently donated to a research or educational fund which benefits your NHS team, if the payment was first made directly to you then this remains taxable income. If a new consultant intends to develop this area of practice, it would be advisable to seek early professional advice about the financial and business aspects of private medico-legal work.

Working as an expert witness

In contrast to professional witnesses, who give evidence about the facts of the clinical care they have given a patient, an expert witness assists the court on specialist or technical matters within their expertise.[4] Since the late 1990s, there have been a number of national inquiries and committees attempting to standardise and improve the quality of expert witness work. Nowadays, expert witnesses are expected to comply with a number of standards in order to satisfy a court that they may act in the expert witness role (Box 1).

In addition, the Royal College of Psychiatrists expects consultant psychiatrists who work as expert witnesses to undertake ongoing expert witness training as part of continuing professional development (CPD) and to be part of a CPD peer group able to review their performance in the expert witness role.[5]

It is important for new consultants to be aware of these standards and not to simply drift into this work because

Box 1 Standards expected by courts of an expert witness

May be fulfilled by new consultant:

- the doctor is engaged in active clinical practice
- the expert is giving evidence about an area of practice familiar to them
- the doctor is in good standing with their medical Royal College
- the doctor is up to date with continuing professional development (CPD).

Standards which require a specific CPD activity:

- the doctor has recently seen cases similar to the case in question in their own clinical practice
- the doctor's view is widely held
- the doctor has received training in the role of the expert witness in the past 5 years.

Standards which will be difficult for a new consultant to fulfil:

- the doctor has an area of expertise
- the doctor is an expert in the subject to which they are testifying.

Adapted from the Academy of Medical Royal Colleges, *Medical Expert Witnesses. Guidance from the Academy of Medical Royal Colleges* (2005).

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solicitors have asked them to. Although new consultants working in the NHS will readily satisfy some of the prerequisites for expert witness work, they are unlikely to have the necessary expertise, clinical experience and professional recognition to warrant the status of an expert witness. For this reason, such work should be declined by the new consultant.

Declining to prepare reports

If a consultant decides not to agree to prepare a report for a solicitor, this decision should be conveyed promptly. You should return the letter of instruction and all enclosures, with a brief covering letter. If the request was in respect of a person not known to you, you may take the opportunity to declare your future availability or to explain that you do not wish to be approached again for such cases.

Conclusion

Knowledge of the good practice expected of consultant psychiatrists working in the NHS in respect of contractual obligations, confidentiality, sharing information with patients and private practice, together with clarity about the differences between professional and expert witnesses should allow the new consultant to make timely informed decisions about whether to accept or decline a request for a medico-legal report.

About the author

Anne E. Thompson is Consultant Child and Adolescent Psychiatrist at the Horizon Centre in Lincolnshire, UK.

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Medico-legal work of psychiatrists: direction, not drift

Commentary on . . . 'You are instructed to prepare a report'†

Keith J. B. Rix[1]

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[1]The Grange, Cleckheaton, UK

Correspondence to Keith Rix (drrix@drkeithrix.co.uk)

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Summary Newly appointed consultants should not 'simply drift into (medico-legal) work because solicitors have asked them to'. They should already have had expert witness training. This is a challenge for training scheme organisers and consultant trainers. There should be no shortage of training opportunities. Core training should include the preparation of 'ghost' reports drafted by trainees but owned by the consultant. Higher training should provide opportunities for trainees to prepare reports in their own right albeit under supervision. Background reading and experience of court are also needed. Such training should avoid newly appointed consultants having to decline solicitors' requests to prepare psychiatric reports.

Declaration of interest None.

A specialty registrar recently asked me how trainees can get started preparing and giving expert psychiatric evidence. I hope that Dr Thompson's paper[1] does not deter trainees and newly appointed consultants. In the introduction she identifies one of the problems – if all higher trainees in psychiatry need to master the competencies involved in medico-legal work, how can trainees acquire such competencies, outside forensic psychiatry, if opportunities are so scarce?

Of course trainees and consultants, whether or not newly appointed, need to decide whether to accept or decline medico-legal work, and Dr Thompson's analysis of

†See education & training, pp. 269–272, this issue.