"Just Say No": Experts' Late Withdrawal From Cases to Preserve Independence and Objectivity

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An expert's decision to withdraw from a case at a late stage is an important and serious step with both forensic and ethical consequences. Preservation of a mutual right to terminate services at will is an essential (but all too often neglected) element of forensic work that can aid in immunizing the expert from threats to independence and objectivity. The authors examine the foundations of such a right, the potential obstacles to exercising it, the factors that might enter into such a decision, and the possible consequences of late withdrawal.

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In the complex and sometimes problematic negotiations between the expert witness and the retaining attorney that are an inevitable part of forensic work, the expert may find it necessary to withdraw from a case at midcourse or even late in the game. This late decision by the expert to withdraw must be distinguished from other earlier "withdrawals": deciding not to take on a case viewed as meritless after careful review, or informing the attorney after an opinion has been reached that the case is too insubstantial from the psychiatric perspective to permit ethical expert testimony.

In contrast to the relatively routine situations just noted, a midcourse or late withdrawal is one that occurs after considerable time, effort, and money have been expended, and the case is proceeding toward resolution in some form, such as a deposition or a trial. The expert risks leaving the retaining attorney and the client in the lurch, and bad feelings, at the very least, are one of the likely outcomes. Despite the absence of a traditional doctor-patient relationship with anyone involved,[1] the expert often confronts the feeling of abandonment on the part of the retaining attorney. However, the right to withdraw can be regarded as an essential safeguard for the expert's objectivity and independence. Some situations leave it unclear whether the expert's withdrawal serves the best interests of justice. Indeed, as discussed later, the decision to withdraw at a late stage rests at the nexus of competing considerations of ethics, justice, and personal consequences.

What conditions or contingencies justify so significant a decision as to withdraw late in the case? This review explores the factors that can enter into such a decision and the likely risks, problems, and consequences that may follow.

The Expert's Mandate for Objectivity

The expert has a mandate to strive for objectivity in an opinion. Article IV of the ethics code of the American Academy of Psychiatry and the Law (AAPL), states: "Although [experts] may be retained by one party to a dispute in a civil matter or the prosecution or defense in a criminal matter, they adhere to the principle of honesty and they strive for objectivity" (Ref. 2, p xi).

Subsequent commentary notes: "Practicing forensic psychiatrists enhance the honesty and objectivity of their work by basing their forensic opinions. . .on all the data available to them" (Ref. 2, p xii).

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As examples reported herein show, availability of all the data is sometimes crucial.

Factors Influencing Late Withdrawal

Withholding of Critical Data

An earlier study[3] indicates that experts encounter this problem in actual practice. Forty-nine percent of respondents to a survey about attorneys who withhold case materials from their own retained expert[3] reported that such a withholding had happened to them. In certain cases, the withheld material was critical to the opinion.

Example: In an insanity trial for first-degree murder, the defendant, who had a history of long-standing mental disorders, claimed to have a plate in her head and to have been at a certain facility in a coma from a head injury for months at an earlier point. These facts were recorded in the defense expert's report. The public defender repeatedly told his retained expert that records of the episode were unavailable. Three or four days into the actual trial, during a restroom break immediately before the expert went on the stand, the public defender handed the expert a stack of records from that same facility about the coma. When the expert took the stand, the prosecutor pointed out the absence of any note of a plate in the head in those records and took the following tack on cross and closing argument: "You fell for her story, Doctor." The insanity defense failed.

Such a failure sheds no light on the effect of the plate, since the insanity defense rested on the mental state at the time of the alleged offense, not the presence or absence of the plate. In an unusual situation such as the one described, the problem of withdrawal is rendered even more difficult, because the new data appear right in the middle of the trial, making both review and adjustment of opinion next to impossible and preventing negotiations with the attorney. The fact that the expert does not know this information (as the prosecutor apparently does) renders the expert's testimony ineffective, despite the latter's good-faith efforts to review all data previously made available. Even if the expert elects to go forward, as in the example—as opposed to withdrawing at literally the last possible moment—the timing and the result may well be harmful to the expert's reputation.

In any case, if the expert goes forward, the oath requires strict admission of these circumstances. Testimony will also place "on record" the nature and source of the problem. Here, the presence of the plate would support a claim of previous head injury, but the witness could convey the defendant's claim of injury while acknowledging that the injury could not be confirmed.

Example: An expert received approximately 500 additional pages of depositions subsequent to having formulated a preliminary opinion. He was subsequently asked by the retaining attorney to disregard the additional depositions as being irrelevant to his preliminary opinion. The expert stated that he needed to review and analyze the additional data to update his preliminary opinion or even to make a determination of relevance. The expert indicated that, without that opportunity, he had to withdraw as the testifying expert but would consider remaining available to serve as a rebuttal or consulting expert. Alternatively, the expert could tell the truth as to when the material arrived, thus locating the problem appropriately with the attorney.

Attorney's Failure to Meet the Conditions Needed for an Opinion

Example: In a complex case with both psychiatric and general medical aspects, the retaining attorney refused his psychiatric expert's strong recommendation to obtain additional medical specialty consultations. A deposition in the case went well, but the judge at a hearing ruled for the opposing side on one part of the opinion, which restricted the expert's testimony. The attorney again refused the recommendation for additional consults, pinning his hopes on the trial itself, where he was confident that he could in some way elicit the excluded portion of the opinion. The psychiatric expert supplied some relevant literature references to aid the attorney toward this goal. At an immediate pretrial hearing, the attorney ignored those references, and the judge, while allowing the case to proceed, excluded part of the expert's testimony, as it went to the medical, not the psychiatric, aspects of the case on causation. The attorney reversed himself and decided not to proceed but to appeal the judge's order, and then asked the expert to supply thousands of dollars to support the appeal! The expert withdrew.

This example clearly demonstrates bizarre lawyering (itself a possible ground for withdrawal). Other alternatives might be available, such as declining to supply the money but continuing on in some other capacity.

Contextual factors may have been influential in this case. The attorneys may have felt the need to save money or get money because of cash flow problems. Small law firms sometimes take on cases without anticipating what will be required as expenditures. The attorney cannot usually withdraw at will. These factors may have played a role in the attorney's desperate plea.

A broader point, however, is also at issue. An expert's preliminary opinion as to reasonable medical certainty is driven by the data available. Additional data (such as input from another expert) may either dilute or concentrate the level of certainty and thus alter the opinion, perhaps in significant ways. If the expert's level of certainty changes, the expert acquires a duty to so inform the relevant parties.

The Payment Agreement

Many experts' fee agreements contain clauses that permit withdrawal by the expert without prejudice,[4–6] under defined or even undefined circumstances. Several of these withdrawal options turn on whether the attorney has honored the payment agreement and schedule of compensation. These failure-to-honor provisions often specify concrete events that require no interpretive steps. The expert withdraws by the terms of the contract. Of course, the facts of payments themselves may be disputed. This situation represents an indisputable reason to include clear language in the fee agreement, allowing termination for excessively late or absent payment.

Severe Loss of Objectivity

This condition can occur for a variety of reasons stemming from the facts of the case or the attorney's conduct. Consultation for this serious step is critically important.[7] As in clinical work, "serious compromise of one's capacity to work effectively is a legitimate basis for transferring the case" (Ref. 7, p 84). An example may be when the expert discovers a previously unknown relationship with one of the parties who was using a different name.

Last-Minute Change of Task or Focus

On occasion, attorneys precipitously alter their own definition of the expert's task or job description at a late point in the case. An expert specifically retained to perform a competence-to-stand-trial assessment may be asked to proffer at the same hearing the opinion that the defendant met insanity criteria at the time of the act. Such a sudden shift may represent appropriate grounds for withdrawal.

Example: Having performed an evaluation for competence to stand trial, the expert is told for the first time, on the threshold of court appearance, that he is expected to opine about insanity (which requires, of course, an entirely different evaluation). Tempted to withdraw, the expert goes forward and answers queries about insanity with "I have not performed that evaluation, so I have no opinion on that." Such candid acknowledgment of the limits of the opinion, as the most ethically appropriate response, is clearly preferable to withdrawal.

Alternatives to Frank Withdrawal

There exist several alternatives to frank withdrawal, as the following listing indicates.

1. Making a conditional withdrawal
   a. The expert states that he or she will withdraw unless certain remedies are undertaken within a specific time frame.
   b. The expert seeks to negotiate with the attorney to repair, adjust, or work around the problem.
   c. The expert issues a warning letter based on the original contract, with deadlines for the attorney to remedy the problem.
2. Providing focal testimony
   a. The expert unilaterally narrows the focus of testimony by choosing one limited area or topic on which testimony can ethically be given, such as documentation or medications.
3. Shifting to a consulting role
   a. The expert consults on the case, thus performing a valuable service while not testifying. Such consultation may focus on the weak points in the case.
   b. The expert offers to be available for the role of rebuttal witness with a limited focus.
4. Referral
   a. The expert offers the name of another expert: "Try Dr. Jones, who has a reputation for being able to make this kind of argument."
5. Structuring contract language, worded as follows (see also legal questions, described later)
   a. "Any opinion is preliminary and subject to revision if new data or evidence emerges that, in the sole opinion of the expert, would alter her opinion."
   b. "Payment is for services, not opinions."

c. "Payment is for expert services, not necessarily for testimony."
d. "Updates of information are expected to be supplied on a timely basis."
e. "The agreement is with the attorney, not the attorney's client."

Legal Considerations

To avoid a lawsuit for damages for breach of contract or a complaint to a professional society, the expert should consider several legal questions before terminating a relationship with the attorney late in the process.

Terms of Contract

A carefully drafted contract for the expert's services should be the basis for the decision of whether to terminate. Clauses that spell out those acts or failures to act by the attorney that allow the expert the legal right to terminate the relationship are crucial to avoiding a claim of breach of contract by "abandonment" in the middle of a case. The agreement between the expert and the attorney should specify in what areas the expert is expert, so there can be no mistake or misunderstanding as to the scope of the expert's testimony.

The expert should also request that he or she be provided with all existing and updated material relevant to the case as it continues. The contract should specify that, if at any time the expert is either ethically unable to proceed or the new information materially changes his or her opinion and negotiation as to a revised opinion or a changed role for the expert fails, the expert may terminate the relationship without prejudice. Clauses that would be helpful include: a liquidated-damages clause that limits the amount the attorney could recover in a suit for breach of contract to a sum no greater than the fee paid to the expert; the expert's right to terminate for stated cause; the attorney's indemnification of the expert for any damages that may be assessed against the expert by any third party over and above the liquidated damages; and a statement to the effect that the expert is retained by and responsible only to the attorney, who is also responsible for payment.

Avoiding a Precipitous Termination and Exposure to Legal Liability

Whether or not a written contract exists, the expert still has an implicit contract to provide professional services to the retaining attorney. The expert who is placed in a professionally precarious or ethically compromising situation should consider notifying the attorney in writing of the event immediately. The expert should be clear as to how it has affected his or her opinion, and, if possible, give the attorney a period of time to remedy the problem. If not remedied after notice, the expert has two choices:

1. Immediately inform the attorney in writing that, unless the problem is remedied, the opinion will change in accordance with the event in a manner that may affect the strength of the testimony; or

2. Notify the attorney that the unremedied event is so substantial that it is impossible ethically to continue as the expert or, if the attorney insists on the testimony (absent any breach of ethics created by your testimony), that the testimony may not help or may even hurt the attorney's case as a direct result of the unresolved event. The exposure that an expert may suffer if he or she terminates the relationship without taking these protective steps may be a damage action by the retaining attorney for the loss of the law suit (assuming that is the result). If the case is won with a substitute expert and the expert has been paid in full, the damages could be for the expenses of the new expert. There is also a potential exposure to a complaint for unethical behavior before a professional association (e.g., forensic society) for the claimed breach of ethics of abandoning a client (i.e., the retaining attorney)—a claim that, to be valid, may not necessarily presume that a classic doctor-patient relationship exists.

Questions of Ethics

As suggested herein, late withdrawal poses problems regarding ethics in relation to both the retaining attorney and that attorney's client. While this subject is not our major focus, a few comments may be relevant. The withdrawal may occur so late that the client is harmed by dismissal or failure of the lawsuit, even though the retaining attorney did nothing wrong (e.g., withhold material, alter the facts). It is also clearly harmful to the retaining attorney who is left in the lurch and may suffer reputational and financial damage. All these factors may be appropriately weighed in the decision to withdraw or proceed. Table 1 portrays the dimensions of the dilemma and the tensions attending the decision to withdraw. As with most dilemmas in ethics, in actual practice, the

Table 1 Considerations Affecting the Decision to Withdraw

Ethics	
FOR withdrawing	Avoid compromising honesty and objectivity
AGAINST withdrawing	Avoid abandoning attorney and client
Justice	
FOR withdrawing	Testimony without adequate basis may mislead
AGAINST withdrawing	Limited testimony may further a just outcome
Personal consequences	
FOR withdrawing	Avoid harm to reputation (i.e., "looking like a fool")
AGAINST withdrawing	Avoid ill will, liability, loss of future employment

conflicts are not between "goods" and "harms" but between competing "goods."

The following represents a model letter one might use in such a withdrawal, when the attorney withholds records that may be important to the opinion:

> As you know from our history of working together, I have great respect for your work, enjoy working with you personally and professionally, and have always found my consultations to you to be put to thoughtful and productive use. Unfortunately, in the above case consultation, I am not certain that I can be helpful in the next phase of my consultation to you. You are absolutely right that you, as the case attorney, can best make a "cost-benefit analysis" based on the materials which are ". . .at most marginally relevant and extremely unlikely to affect the overall likelihood of the plaintiff's success in the case." However, in order for me as an expert to complete opinion formulation prior to preparing trial testimony, I need to consider such materials. This includes my considering materials which you may not consider relevant as an attorney who wants to be successful on behalf of his client, or even materials which may be harmful to your being able to be as successful as you can be at trial.

Note that the letter is diplomatic and respectful, including judicious praise. The point is made, however, that the expert has a need to see the data to form a valid opinion, in part by using materials customarily used in expert work.

Conclusions

Many forces may combine to threaten a forensic expert witness's objectivity and independence of biasing or coercive influences.[3] Most of the time, a common-sense approach combined with interpersonal awareness seems to be more than sufficient to resolve the matter. The possibility of withdrawing from the case at hand represents an ultimate step in protection of those expert *desiderata*, but that step must be taken carefully, weighing the benefits against the harms as outlined in Table 1, and, at all times, protecting the integrity and ethical position of the expert.

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