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Working With Lawyers: A Historian's Perspective

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One recent Saturday morning during the frenzied preparations for an upcoming trial, an attorney I work with mentioned that she had my home phone number posted on her kitchen cabinet. We both chuckled at the image of a historian listed alongside the plumber or pediatrician as a provider of indispensable emergency services. "Everyone should be able to reach their historian at a moment's notice!" This was a rare and humorous moment in my nearly two decades at History Associates Incorporated (HAI), where my academically-trained colleagues and I provide a range of historical services including conducting historical research for litigation.

During that time I have seen lawyers increasingly seek out professional historians from firms like HAI as well as the academy to help them address historical issues in a variety of legal matters. Some of these cases, like the recent spate of legal actions involving Holocaust assets, are high-profile disputes where historians play prominent roles. In many other cases, lawyers call on historians to perform such tasks as documenting the origin and meaning of an arcane phrase used in a disputed contract or finding out who dumped what, where, and when on a contaminated industrial site. No matter how searing the public spotlight, or obscure the historical question, historians working as experts in legal matters engage in a serious and intellectually challenging business.

Because both the law and history encompass the full range of human experience, the variety of historical

issues that may arise in a legal setting is conceivably just as broad. In my experience, however, much of the work for historians in this arena involves complex civil matters where institutional parties have substantial monetary or strategic interests at stake. An exception to this trend has been a series of criminal cases where public defenders have sought out our expertise to reconstruct the wartime experiences of veterans charged in capital cases. Although we ultimately work for a client, we work with their attorneys.

Historians and lawyers share a common professional interest in stories and evidence. While historians are certainly susceptible to our passions and perspectives, we are not advocates in the legal sense, but rather strive to uncover and sift through surviving evidence of the past to carefully piece together stories about what happened. Attorneys are professionally obligated to advocate for their clients' interests by telling stories that are built on and constrained by the evidence of past events. It is the historians' dedication to careful scholarship, vigilant pursuit of professional detachment and skepticism, and reputation for clear and engaging presentation that lawyers value most regardless of what role we play as experts.

Attorneys typically retain historians as either consulting or testifying experts. The obvious distinction between these two roles is that testifying experts participate directly in the legal process, while consulting experts work behind the scenes gathering evidence, educating counsel, identifying testifying experts, or evaluating the facts supporting the legal strategies presented in the case. Underlying this role differentiation are rules of procedure that govern attorney/client and work product privilege, and evidence disclosure and discovery. These rules vary from jurisdiction to jurisdiction. In general, consulting experts work under the umbrella of attorney/client privilege and, as a result, their work--communications with colleagues and counsel, work products, notes, and in some circumstances the evidence collected--is protected from discovery by the adversary. In contrast, the work of a testifying expert is usually open to examination by the adversary during the process leading up to and including testifying in court.

In either role, the legal system provides incentives for both attorneys and historians to preserve the expert's objectivity. Lawyers want their consulting historians,

working under the privilege doctrine, to aggressively search out evidence to compile the most complete stories regardless of how that information might support or counter the client's interests. They do not want to be surprised by factual evidence introduced in court and need to evaluate their legal strategies based on the most complete understanding of the facts. Historians who fail to find key evidence which the adversary then presents in court can cost the client a legal victory or the added expense of an unnecessary trial and, in the process, diminish their own professional reputations and business prospects. Testifying historians who present opinions that run counter to the historical evidence, or are obviously biased, not only damage their own integrity, but also jeopardize the very interests the attorney is obligated to protect.

While both consulting and testifying historians must demonstrate a high level of professional expertise, their roles typically emphasize different capabilities. Consulting historians are usually hired for their investigative and analytical skills--serving as historical detectives who are able to efficiently navigate both the courthouse basement and the World Wide Web. The ability to develop, execute, and report on a focused and systematic research plan is crucial to the consulting historian. When selecting a testifying historian, lawyers look for exceptional presentation skills and professionally recognized mastery of the particular subject matter. In both cases, attorneys tend to look for a historian with experience doing history in a legal setting as well as personal compatibility with the legal team.

If the numbers of historians working as experts in legal matters have increased in the past two decades, it is still hardly a growth industry. There are a few private firms with professional historians who support attorneys primarily as consulting experts. These historians capitalize on their exceptional knowledge of a wide range of archival sources and the process of conducting historical research. While the educational background and professional experience of some of these individuals may qualify them to testify in certain instances, much of their consulting work remains confidential. Testifying historians most often come from the academic ranks where their specialized knowledge catches the attention of attorneys dealing with legal issues related to a particular field of study. Unless a historian's specialization becomes central to an

expanding area of litigation, it is unlikely that they will have more than an occasional opportunity to testify. As a business, historical research for litigation serves a niche market that values the skills necessary to conduct efficient research or subject matter expertise linked to particular legal disputes.

The business relationship between expert historians and attorneys entails certain practical considerations including defining a scope of work, establishing billing arrangements, and actually performing the work on time and within budget. These details should be addressed in writing as part of a retention agreement. Such agreements may be as informal as a proposal submitted by the historian delineating the scope of work, estimated costs, and terms and conditions of payment and a corresponding written authorization from the attorney. Lawyers engaging a testifying historian will usually only want a minimal written record of the transaction. In other instances, a lawyer may require a formal contract including extensive legal provisions governing the relationship.

Defining the historical issues in the case, the parameters of the investigation needed to address those issues, and how the historian will present his or her findings is essential for a common understanding of the work to be done. As the project progresses, all of these elements will likely evolve either based on the historian's research findings or shifts in legal strategy. These changes will also require revisions to cost estimates and schedules. Clear communication regarding these adjustments goes a long way toward ensuring a successful business transaction and a pleasant professional relationship.

Ideally, experts are paid for their time, not their opinions. This subtle, but important, distinction leads to the standard time and materials billing arrangements used by most experts. It is also the reason why expert historians should not accept a contingency arrangement whereby they receive a portion of any settlement or award as their fee. Historians should avoid even the appearance of allowing their research or interpretation to be influenced by financial gain based on the outcome of the legal proceedings.

Several factors are involved in determining how much to charge for time spent on a project. As in any business endeavor, the historian should at least cover

costs and receive a reasonable profit. The rate should also reflect the value the lawyers place on your expertise. Although there is little competition for testifying experts--since only a few individuals are likely to possess the requisite knowledge--consulting experts may find counsel weighing the cost of a historian with specialized research skills and experience against the cost of a junior attorney or a paralegal to complete the same task. In choosing to employ a legal professional over a historian, an attorney runs the risk of missing key evidence, failing to understand the facts in their proper historical context, or simply paying more in the long run for inefficiency. Nevertheless, competition from legal professionals or other historians is a consideration when establishing a billing rate. Testifying experts often charge a premium for time actually spent on the stand or being deposed. But they should beware that opposing counsel may question this rate during the proceedings, and if it can be construed as excessive it may be used to discredit their testimony.

Budget and time constraints are another common element in the business relationship between expert historians and attorneys. The litigation process requires lawyers to constantly weigh the cost of pursuing a particular legal strategy against the risks of not taking those steps. For the historian working with the attorney, this means justifying recommended research steps in terms of estimated cost and probability of success, as well as conducting research in carefully documented stages. Such cost limitations obviously mean that historians are not free to pursue leads indiscriminately, but they are professionally obligated to explain the probable risks and rewards associated with operating within the constraints established by the attorney. Similarly, expert historians ordinarily do not have the luxury of setting their own pace. The project schedule, either set by the court or dictated by the client, determines when the work will be done. Depending on the level of effort needed, these deadlines often mean that the work must be done by a team of historians.

As the anecdote about my home phone number suggests, working with attorneys can be demanding at times, but I find great personal satisfaction working with insightful lawyers to address questions about the past that affect people today. These experiences also hone my professional skills by introducing me to the

wealth of diverse source material, sharpening my ability to analyze and synthesize evidence, and challenging my preconceptions. These are essential tools of the historian's craft, and while we are not indispensable in the same way as the plumber or the pediatrician, lawyers have come to appreciate the skillful practice of history.

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