

AAPL Newsletter 2/11

Neil S. Kaye, MD, and Bob Sadoff, MD will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send question to nskaye@aol.com.

This information is advisory only for educational purposes. The authors claim no legal expertise and should not be held responsible for any action taken in response to this educational advice. Readers should always consult their attorneys for legal advice.

Q. How do I tell a lawyer that she/he is asking the wrong question?

A. Kaye: It is not uncommon for a forensic psychiatrist to have more knowledge and experience in a particular area than does the referring attorney. Hopefully, that is part of why our expertise is being sought, and the lawyer is prepared to hear our input. The "wrong question scenario" can arise from a misunderstanding of the issue at hand, a common problem in criminal law where criminal responsibility and competency to stand trial are often confused. In civil cases, it is not uncommon for a lawyer to appear to be targeting the wrong party or issue completely.

It is time for a phone call to the lawyer to discuss the case and your thoughts. These conversations are usually considered "work-product" and are not usually subject to discovery. Before telling the attorney that she/he is wrong, try to get her/him to better explain her/his thinking and present strategy on the case. Because lawyers plan the legal strategy, there might be a good reason she/he has framed things in a certain manner (who has the deep pocket, liability issues, settlement by other parties, stipulations, etc.)

You will need to be prepared to state whether or not your analysis of the data allows you to support the position articulated. If you cannot, be honest and say so, but if you have an alternative theory or approach based on your knowledge and experience, it is appropriate to share your ideas. Be polite, firm, honest, and know the facts of the case that support your opinion and tell the attorney succinctly. If nothing else, it will demonstrate how good you can be when you get to court.

A. Sadoff: I agree with everything Dr. Kaye has said. Let me add the following by expanding the question: Sometimes the lawyer asks the "wrong" question because he/she does not know the extent of the psychiatrist's expertise. Sometimes the expert may not wish to go to the extent the attorney requires in order to succeed in a particular case. Sometimes the question is only partially within the expertise of the psychiatrist who needs consultation from a colleague in a related field (psychology, toxicology, pathology, child psychiatry, psychopharmacology, neuropsychiatry, neurology, or other specialty

of medicine)

Thus, the question may not be "wrong" but there will need to be a clarification in the communication between expert and attorney. In the case of a clear incorrect question for the expert, the psychiatrist needs to alert the lawyer about his/her expertise and why he/she cannot help in this case. It is always helpful to the lawyer to recommend the proper expert in that particular case.

Occasionally, the attorney will request the psychiatrist to go beyond his/her expertise or to "see things my way". My response to these requests is to refuse and never work with that attorney in the future. Fortunately, these requests are rare, but do occur.

Finally, if after reviewing the records one believes he/she cannot help the attorney or does not have the required expertise for the issues at hand, it is prudent and appropriate to refer the lawyer to the appropriate expert or to let the attorney know that he/she is focusing on areas not amenable to our professional expertise.