

AAPL: Ask the Experts-2016

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Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send question to nskaye@aol.com.

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Q.: The lawyer in a criminal case has asked me to testify as an expert on the effects of alcohol and antipsychotics on the alleged victim, and also to sit with the lawyer during the trial to coach/assist her with questions of witnesses and the opposing expert. Can I do this?

A. Kaye:

While there is no prohibition against this, I highly discourage this practice. Specifically, I am against the mixing of roles. The credibility of the expert would be inherently tainted by the apparent role of non-impartial advocacy when sitting at the defense counsel's table. Lawyers may not immediately see the conflict presented by such "dual agency" and so it is suggested that you discuss with the lawyer what she is hoping to achieve. Your guidance may be just the counsel the lawyer needs. Often, an expert will actually have more courtroom experience than the lawyer when the topic is a complex mental health issue and most lawyers are appreciative of our input.

I had a similar case recently and the lawyer wanted me to address issues related to the victim's use of illicit drugs and alcohol with her antipsychotic medications, but without allowing me to examine the victim. I declined noting that unless the victim specifically refused to be interviewed, to opine on her condition and the effects of her mental illness based solely on a list of medications and a purported diagnosis would force to practice forensic below the accepted standard of care. The judge threatened me with contempt of court, but I held my ground and noted that while I could address things in the hypothetical, such an opinion was unlikely to be of real use and would easily be grounds for an appeal. After sitting in court for a few hours, the judge finally agreed to excuse me.

A. Glancy:

If the retaining counsel retains you to address the effects of drugs and alcohol in conjunction with antipsychotic medications, in the hypothetical, there is no reason why he should not do this, if you feel qualified to do so. If you then do a report and possibly testify regarding your opinion, there is no reason why you should not sit with the lawyer in order to listen to and help prepare a cross examination of the opposing expert. If on the other hand you would be more comfortable interviewing the evaluatee, you should not be seen sitting at the table with the lawyer since this gives an appearance of advocacy. A cornerstone of the AAPL ethics guidelines is the striving for objectivity and honesty, and this should always guide our professional life.

The forensic psychiatrist acting as an evaluator and as a consultant might be considered a dual role. It does however appear to be contemplated in the landmark decision *Ake v Oklahoma* (470 US 68 (1985)). It may well be that lawyers have less difficulty with it than we forensic psychiatrists have.

In Canada it seems to be less of an issue, and it is not uncommon practice for the forensic psychiatrist to sit at the table with the lawyer, often at stage where a particularly important witness, such as the evaluatee, is testifying. Occasionally one has the opportunity to see the opposing expert testify and perhaps help prepare the cross examination. I have never known anyone to have a difficulty with this, and it never has been an issue to my knowledge. However even as I write this I can see the wisdom of Dr. Kaye's advice and I am in the process of revising my opinion.

Take Home Points:

Dual agency is often a delicate balance and an issue that demands an expert's vigilance. Expert witnesses and lawyers often apprise this issue differently and the pressure for an expert to stretch this boundary is a common occurrence in litigation.