

AAPL: Ask the Experts-2015

Neil S. Kaye, MD, DFAPA
Graham Glancy,

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.

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 deal with my past record, which includes successful Daubert challenges that ruled my testimony inadmissible?

A. Kaye:

I feel your pain. In today's world, with most experts' testimony readily available with just a few clicks on the Internet, there are no secrets. Further, most seasoned experts have been through some type of evidentiary hearing process, regardless of whether or not it was a formal Daubert hearing. Eventually, most experts should expect to carry some of these battle scars. Please, do not feel alone, nor should you succumb to the belief that this is some scarlet letter.

The first thing is to let the retaining attorney know of your prior experience and to place it in context. Why you were excluded, at what level court, and if a formal ruling was issued citing the reasons for your exclusion are helpful data. Early in my career, I was in a case where the judge excluded all psychiatric experts and our testimony because he felt it was simply unnecessary, and so I was proud to have been in the company of a renown expert and past AAPL President. When asked in deposition about this I tell the story, and somehow that question never gets asked again in the actual trial.

The second thing is to address this concern on direct examination, so that any opportunity for the opposing counsel to address this on voir dire or on cross-examination can be undermined. This is consistent with my belief that almost always it is best to address any weaknesses in a case on direct examination where control can be maximized.

My final advice is to refrain from being overly defensive. If you address this in a matter-of-fact way, with an even tone and a good look directly at the questioner, the sting is greatly mitigated.

A. Glancy:

Do you ever get that sneaky cognition that comes unbidden and whispers to you “oh this is a good/well-paid case /it will make me famous and I really want it”? But then you get that sickly feeling and think “the last time I did a similar case it was subject to a Daubert challenge or I got destroyed in cross-examination”. Well the advice here is to deal with the voice immediately. Pick up the phone and tell the retaining attorney what happened previously and discuss it with him. At this stage you can now try to problem solve and learn from a previously difficult situation. What went wrong, why did it go wrong, and most importantly how can I correct this? Expertise in any field, and particularly in forensic psychiatry, comes with a continuous investment in dealing with and solving increasingly difficult problems. This is a way that you can learn and improve. If the answer is that this is not salvageable then the situation is that you tell the attorney that you cannot take the case even if he implores you to do so.

If you think that this is something that you can salvage then consider how you might do it. For instance you might want to do a literature review and find some new literature that supports your position, which you did not have at hand in the previous case. You may want to use adjunctive psychological testing or structured professional judgment, which would support your opinion. Since the last case you may have had extra training in the use of, for instance of the PCL-R or the HCR 20, which would make the methodology for your opinion peer-reviewed and generally accepted.

The worst thing you can do is hope for the best and to not be open about it with the retaining attorney, right from the beginning. There may be other things that you should disclose upfront, for instance that you have generally been on the other side of such cases, that you feel that you may be biased in some way, or that the case involves syndromes, science or concepts in which you do not believe. For instance some years ago I saw a case of a man who was charged with murdering prostitutes, who claimed that he had what was then called multiple personality disorder. I told the retaining an attorney, who was probably the most well-known criminal lawyer in Canada, that I am skeptical about the concept and referred him to a psychiatrist who I knew believed in the concept. Soon afterwards the lawyer phoned me with another referral and, when I said I had feared I had put you off, he said on the contrary I now know you are somebody that I can trust and with whom I can work.

Take Home Points:

The lesson here is to be open and honest with the referring attorney. Any other course of action will be to your detriment, both in the short term on the long-term. The goal of the opposing attorney is to invoke shame and to thus precipitate the chain reaction that comes from such a powerful emotion. As psychiatrists, we know all about that response and so we know it can be managed. Discussing this with a peer can be of benefit in normalizing your feelings as well, and consultation is always encouraged. And remember, there is always another case and there is no point in taking unnecessary risks.