

AAPL: Ask the Experts-2018

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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 questions to nskaye@aol.com.

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Q: Do you ever take cases pro bono, and if so, how do you keep from appearing bias toward “your side?”

Kaye:

Throughout my career, I have occasionally taken cases pro bono. There are a number of reasons for so doing, some of which include: 1. A case may involve issues or areas of law that I find particularly interesting or novel and thus may afford me an opportunity to further my own education; 2. A case may involve a victim who would otherwise be unable to secure a competent expert; 3. The referral may come from a good source and it makes good business sense to try to work with the referring party; 4. You gain perspective into an area of law that may be challenging and unfamiliar; 5. You learn to appreciate limited resources and to help decide how they should be used; 6. The case may allow for networking; 7. Helping others can be a reward itself or; 8. Teaching the trier of fact can be fun.

But, as Dr. Glancy will address below, pro bono work can create significant exposure for the expert as well.

Glancy:

Opposing counsel: “Good morning Dr Glancy.”

GG: Good morning

Counsel: I believe you are doing this case pro bono?

GG: Yes

Counsel: That is very laudable

GG: (Preening) well thank you

Counsel: It is like giving to a good cause?

GG: *(Finally this guy realises what a good guy I am)* exactly

Counsel: You are the type person that gives to charity?

GG: (*this is great*) you betcha

Counsel: And I am sure there are a lot of good causes that you believe in?

GG: (*this guy is giving me the credit I deserve*) yes there are

Counsel: And you would advocate for these charities?

GG: Yes I would

Counsel: This particular case comes down to the issue of X and Y?

GG: Yes, that is true

Counsel: So, you are an advocate for the issue of X and Y?

GG: Well—er

Counsel: That is why you are not charging for it.

GG: er —well

Whenever I accept a case I try and think through the issues upon which I might be cross-examined. As I am sure all of you are aware this can include any issue from the original phone call from counsel to how you walked up to the stand minutes ago. This exercise helps if you are a pessimist, although I like to call myself a realist. This is a part of the cross-examination that I could imagine in a pro bono case. As noted above taking a pro bono case could change your good intentions to having your blood spattered all over the court room. In other words, there is a real problem with taking pro bono cases.

Dr. Kaye has outlined the positive aspects of accepting to do pro bono cases, and I agree of these are legitimate. However, I should caution the unwary that this could get you into a difficult situation as described above. My advice would be to consider a strategy to mitigate this possible attack. The simplest strategy would be not to accept pro bono cases, but as Dr. Kaye has outlined, there may be advantages to accepting some cases. Therefore, you should consider a specific policy, which you can present if challenged.

One such policy may be to accept a certain number of pro bono cases each year. One might have a stated policy that you accept x number of cases each year and after that you refused to get involved. If this is your policy, you would have to accept cases that deal with issues in which you were not particularly interested. In fact, it might involve you accepting a case about an issue with which you disagree.

You could also have a policy that pro bono cases makeup x percentage of your practice. Again, you would have to accept cases no matter which side you are on. By having a policy such as one of these you can retain the ethics principle of striving for objectivity and honesty, and also enjoys the aforementioned benefits of accepting pro bono cases. Be aware of peer group pressure in this regard. Sometimes you are persuaded to take a pro bono case because some of your peers are involved in the case. You should consider this carefully in the light of my above statements.

Another problem that I have encountered is that in pro bono cases it is common for the retaining attorney to say that she just wants a short report and it will be included in a brief with all the others. Always be careful of this type of statement. The lawyer may well believe it when she says it, but they may have no control over what happens afterwards. It is possible you may end up flying all over the country, and having to do multiple hours of preparation for examination cross-examination, when you thought you just had to do a quick two-page report.

In fact, as well as the cross-examination above, the fact that your report was only two pages may also be the subject matter of an aggressive cross-examination. In the final analysis, this may lead to certain amount of bad feeling all around, linked with sincere regrets about accepting the phone call in the first place. Caution: think about these issues carefully before accepting a pro bono case.

Take Home Points:

Doing pro bono work is admirable and consistent with our clinical work; physicians have always extended free care to those in need. One of the ways to judge the merits of the work is to see if the lawyer is also doing the case for free. Being aware of your reason(s) for taking the case pro bono is important to clarify, as you may well be cross-examined on this subject. The courtroom is not the place for you to promote your personal favorite cause as an "expert." Remember, it is okay to advocate for your scientific and impartially reached opinion. That is different than advocating for a person or a particular cause.