

AAPL: Ask the Experts-2020

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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: There is one lawyer I run into who I find especially challenging. Do you have any tips or “come-backs” that might help me manage cross-examination?

Glancy: While examination-in-chief (direct examination) is an intricate dance with the lawyer who has called you, cross-examination can be particularly challenging. In examination-in-chief it is often a matter of assuming the role, which does come naturally to most of us, of the teacher or professor explaining concepts to a student. Depending on whether the student is a judge or jury a different manner may be appropriate. If it is judge alone, it is helpful if you have some information about the judge, and you can therefore temper your language to that which is appropriate. For instance, if you're aware that this judge has run the mental health court for five years then they will be familiar with terms such as schizophrenia, delusions, or hallucinations, and it would be redundant to explain these. Many judges however, will have little experience in these matters and will appreciate explanations, as will the jury.

Cross-examination is a different situation. A good lawyer will be trying to elicit evidence that helps their case or elicit evidence that harms their opponent's case, or simply wants to make you look bad or biased in front of the trier of fact. The best cross-examination consists of a series of one bite facts, delivered in a nice rhythm. The patient lawyer will gradually persuade you by slowly working up to the conclusion. A really good lawyer will know when to stop, having established their viewpoint, without being too greedy and asking you the final question. The final question usually begins with “So Doctor, you do agree that you were completely wrong previously?”

Even if the buildup has been excellent, this final question does give you an opening to say “No, my reading of the facts is somewhat different and although you have made some good points, I still hold my original opinion that...”. If they aren't really good, you may not get a chance to say this, and you hope that you

can say it later in the cross, or on redirect examination, if the lawyer who called you is aware of the issue.

One of the most effective techniques, which I think comes fairly rarely, is when the lawyer during cross-examination is able to impeach to witness. This usually happens when they can find a prior statement where the witness has said something contrary to what they said on direct examination. For an expert witness, the material statement often comes from something we have published or from a previous case. If it is from the previous case, the situation demands quick thinking, in order to be able to explain why the previous case was different from the present case. If it is from something one has written, this can be particularly difficult, and takes some explaining. Even if you do not adopt the statement previously made, which the lawyer will want you to adopt, they may be able to use it to damage your credibility. A good lawyer will save this for their closing argument. Sometimes a rude or arrogant lawyer will again be too greedy and make a provocative, snide comment, such as “so it depends who is paying does it doctor”. This is the mark of a bad lawyer, and could result in a rebuke from the judge, or give you an opening to say “no I gave you my objective an honest opinion based on the facts of this particular case”.

It is generally held that no matter how rude and sarcastic the lawyer is, it behooves us to keep calm and do not get angry. Sometimes this has the affect of actually frustrating the lawyer and they get more a more angry and vitriolic. This will often damage their own credibility in front of the trier of fact. Dr Emmanuel Tannay used to say that you should be yourself and “if the lawyer makes you angry then get angry.” I think each person has to find their own style in this regard. If you are going to say you’re angry, be sure to keep control of the situation. I was in a case involving a battered woman syndrome defense, when the lawyer in cross-examination said “this abuse was only trivial wasn’t it doctor?” I answered that I was outraged that he would trivialize domestic abuse in this manner. However, I did not allow myself to actually display anger, but only to express my outrage.

As noted above, a good lawyer in cross-examination uses one bite facts to gradually lure you into, what I call the vortex of cross-examination. Sometimes the facts are difficult and there is no way out. Often, early in a sequence, the lawyer will train you that he just wants a yes or no answer.

For instance:

Lawyer: You did a PCL-R?

GG: The PCL-R stands for psychopathy checklist revised and was devised by Dr. Robert Hare. It is a 20 item checklist...

Lawyer: You did a PCL-R?

GG: I had the opportunity to attend a lecture by Dr. Hare 1998 in Vancouver and in fact we went out for a very nice dinner afterwards....

Lawyer: You did a PCL-R?

GG: Well as I was saying, during dinner the doctor, who is a psychologist by the way,...

Lawyer: You did a PCL-R?

GG: Yes.

The lawyer has now trained me to answer yes or no. If they confine their cross-examination to accurate one bite facts there may be no way out of this vortex. However, be alert to the question when the lawyer gets it wrong and asks an open question:

Lawyer: "Please describe the PCL and how it predict dangerousness."

GG: (Now is my chance) well as I was saying during my dinner with Dr. Hare he explained to me the theoretical rationale for the PCL, which was as follows...

Another trick lawyers frequently use, is to throw a quotation at you from a paper, a book, or your prior testimony. There are a couple of important points here. First, you should find out the source of the quotation. Ask to see the actual text. If necessary ask for short adjournment in order to read the text. The first point you should analyze is whether you recognize this text as an 'authoritative treatise'. If the text is from, for instance a political consensus paper, or a newspaper, you should say you do not recognize this as an authoritative treatise. The lawyer is then not entitled to pursue the matter any further and ask you any questions about this quotation. If the quotation is from, for instance the American Journal of Psychiatry, or DSM-5, you should say that you do recognize it but do not necessarily agree with every sentence; at this stage, you can then analyze the statement and discuss whether or not it applies to the case that hand.

Kaye:

Dr. Glancy's wise words are to be heeded. Many of us struggle with a particular lawyer and there are likely personality issues that lurk behind these difficult encounters. Every expert has her own personal style and what works for one person might not work for another, but here are some ideas that you might find helpful as well as some rejoinders I have used:

1. Remember the power of the one-down position. Some lawyers want to be "alphas" and don't understand that you can lead from behind. I like to say "I'm sure the jury understood your question, but I'm having trouble, so can I ask you to rephrase it?" I take every opportunity I can to compliment the jurors.
2. "I'd be happy to answer your questions honestly and truthfully, but that was a compound question and if you can tell me which question you want me to answer first, I'd be pleased to do so."

3. I like to point out what the lawyer is doing so that it's clear that I know and that the jurors know. "I see what you're trying to get me to say, but that wouldn't be the truth and I took an oath to tell the truth."

4. "I can't answer with just a yes or no. I'm sure these attentive jurors remember I took an oath to tell the whole truth, and the whole truth can't be answered with just a yes or no. Your honor, can I tell the whole truth?" or "I wouldn't like to mislead the court/jury by not giving a complete answer."

5. Look at the jurors, smile, and make them wish that if they needed a psychiatrist that you would be their doctor. As long as they'd rather have you as their doctor, you're winning.

7. Sometimes I'll preface an answer with "Let me try to teach it to you (the jurors) the same way I explain it to the residents, nurses, and medical students I teach..."

8. Keep your pace slow from the very beginning. That way when you need time to think of a response, it's not as obvious that the lawyer has you and you're thinking. If the pace of your answers doesn't vary the jury isn't tipped off to your discomfort.

9. Tell your lawyer that she should object to "badgering" if this is really happening.

10. If the lawyer is trying to mislead or mischaracterize, I call her on it. "I think you just mischaracterized my testimony, but I'm sure the jury will remember on direct examination when I was asked a similar question I said..."

11. "I've answered this question 3 times already and my answer is still....and if you ask it a fourth time my answer will still be...." or I'm sure the jury remembers I answered this same question 15 minutes ago, but I can repeat my prior answer if you don't remember...

Dr. Glancy noted that your prior testimony can be used against you and I agree. But that can be dangerous as well. I had a defense lawyer read me an outtake from a prior case. My response was: "Oh, I remember that case, the jury awarded the plaintiff 2.7 Million dollars!"

Take Home Points:

Being firm and steadfast in court is helpful. Still, one must remember to show respect for the process and act with suitable decorum. While trials are adversarial by design, there is no reason for civility to be disregarded by any of the participants. We each have our own style and personality and over time,

finding your footing will instill confidence. Learning something about the cross-examiner's style from hiring counsel and from reading transcripts of the lawyer from depositions or prior trials can be very helpful. Remaining professional is critical, but in reality, you may be caught by flying mud.