AAPL: Ask the Experts-July 2013

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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.

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Q. We have chosen to address four questions that share a common theme: The art of expert testimony: what to say under certain circumstances on the witness stand.

1. What do I do when the lawyer insists on a "yes or no" answer and the question can't really be answered that way?

2. I am aware that the pre-trial stipulations prohibit discussion of certain facts. On cross exam, I'm asked a question that would require me to answer in a way that would either reveal material I am not supposed to know or say, or else to lie. How do I proceed?

3. I am in an upcoming trial where opposing counsel owes me money from a different case where I was her expert and was stupid enough to trust her. Can I make this known?

4. How do I criticize opposing data/theory without sounding like a hired gun?

Sadoff:

To the first question, I would turn to the judge and say that the question cannot be answered with a simple "yes or no" and may I explain my answer if the judge insists on a "yes or no" reply. If there is a jury present, I will say to the judge that giving a "yes or no" response without explanation would be confusing to

the jury. (Does the judge really want to confuse the jury by not allowing me to explain?) I have never been refused by a judge when I ask to explain my "yes or no" answer.

To the second question, I would turn again to the judge and remind him that my answer to the question would violate his ruling. I would do that only if the attorney who retained me does not object to the question. He may want me to respond if it is favorable to his case as the opposing lawyer has "opened the door" that was supposed to remain closed. The judge may not allow the question or may punish the cross examiner for "opening the door" by allowing me to answer. In no case should the expert lie on the witness stand. That is perjury, which is punishable to the expert. Always let the judge make these difficult decisions.

In the third case, I would have to inform the attorney calling me of the situation since it would pose a "conflict of interest" if I agree and then I am cross-examined about the previous case to show bias on my part to "get back" at the opposing attorney. Your retaining lawyer will either confront the opposing attorney in order to get you paid so there is no conflict, or inform the judge in the case about the financial situation in order to resolve it so you may be involved without a conflict, or have you sit this one out if the matter cannot be resolved. There is no obligation on your part to keep the matter confidential. It will usually inure to your benefit as the judge may encourage the attorney to meet her financial obligations to you.

The fourth case is handled quite simply by your giving scientifically based testimony to rebut the opposing theory. Always begin by saying "With all due respect to my adversary" and then quote the data you have gathered in your search of the literature and relevant research that supports your conclusions and opinions. We cannot prevent the perception of biased others who may think of us as "hired guns" but we can use all the scientific data at hand to prove our points and feel secure that we have given the best and most accurate testimony under the circumstances at the time.

Kaye:

I agree wholeheartedly with Dr. Sadoff and his years of experience as an expert show with the thoughtfulness in his answers. In addition to his ideas, many of these questions bring to my mind the importance of preparation with the lawyer. By making the lawyer aware of the potential pitfalls and information you have about opposing counsel you can work together to try to keep these issues from becoming distractions in court. I too believe that turning to the judge and asking for guidance is a great strategy, but I can also say that on rare occasions I have been before judges that recognized my "experience" and decided not to "throw me a lifeline" despite my asking. My response was to simply say the question couldn't be answered "yes or no" and that as I have taken an oath to tell the "whole truth," I need to be allowed to answer with more than a yes or no. After such a statement, I was allowed to answer appropriately and the cross examiner abandoned her forced "yes-no" style.

When facing the "prohibited material" material, if preparation has gone well and the retaining lawyer is awake, there won't be a problem. However, if the lawyer missed the opportunity to object, I will again turn to the judge and say: "Your Honor, I don't think I'm allowed to answer that and I don't want to cause a mistrial." That wakes everyone up and ends the problem.

As for the unpaid bill scenario, I have had that happen just once. I was most uncomfortable and got to court early. Prior to the start of trial, when the lawyers were asking for procedural rulings, I stood up and asked the judge if I could speak to her "in camera." I was invited to her chamber where I explained my situation and she instructed me to say nothing, but she also spoke to the lawyer involved and my bill was paid. It served as a reminder to me to get paid in advance of doing work or releasing reports, a lesson on which I still need refreshers periodically.

Reviewing opposing experts report in advance is critical. Try to be able to refute her opinion using the best science you can muster. At the same time, be humble. There is such a thing as a "respected minority opinion" and your willingness to countenance such an opinion will help you to appear reasonable and impartial. When I hold the respected minority opinion, I remind the jury that at one point the minority opinion was that the world was round and not flat. They quickly understand that my minority view may simply be cutting edge thinking.

Sadoff/Kaye:

Take home points: I n summary, these four questions all go to the quality of expert psychiatric testimony. In the courtroom, when in doubt about how to respond, turn to the judge for help. Remember, if things are too hot, you can ask for a break to recompose your thoughts. Do not panic and do not lie on the stand. Be as prepared as possible by going over direct and cross examination testimony with retaining attorney well in advance of the trial. Know the data and the research as well as the details of the case. Finally, never bad-mouth a colleague on the stand. Judges and juries respect experts who show respect to those whose opinions may differ.