

Giving Evidence as an Expert Witness

Prof AC McFarlane

Professor of Psychiatry and Head
Centre for Military and Postdeployment
Health

The University of Adelaide

What is your role?

- To inform the court
- To assist in deliberations about the evidence
- To provide expert knowledge and opinion
- To assist counsel in understanding and cross-examining other expert knowledge

Issues for clinicians

- Not used to being challenged and provoked
- Not used to public justification of an opinion
- Unfamiliar environment and procedures
- Not in control and unpredictable
- Adversarial

Court Appearance

- Look credible
- Get to know the court staff
- Be familiar with the set out of the court
- Speak slowly and clearly – the court reporters
- Arrive with time to spare
- Be prepared to wait around – bring material to assist in preparation

Dealing with Cross examination

- Be well prepared and read the document provided
- Ask for permission to refer to notes
- Take your time if specific entries in notes are challenged
- Keep good primary medical records

Dealing with Cross examination

- Answer the question
- Do not be bullied, ask for the judge to assist if in conflict over completion of an answer
- Be precise
- Acknowledge reasonable propositions and make appropriate concessions

Dealing with Cross examination

- Hold to your opinion if you believe it and it remains tenable in the light of emerging evidence
- Be prepared to be surprised by new evidence and be prepared to change your mind
- Treat it as a discourse with an intelligent colleague rather than an adversary

Dealing with Cross examination

- Do not be defensive
- If necessary defend your integrity
- You can give highly credible expert evidence and the case you are assisting may be lost due to the weakness of the legal argument
- Remember to talk to the judge and jury- they are making the decisions

Dealing with Cross examination

- Explain symptoms and their mechanisms in clear lay terms
- Do not retreat to jargon in the face of attack or implied criticism
- Acknowledge the inadequacy of clinical histories if this is appropriate
- Acknowledge the subjective nature of the interview process
 - » Remind the court that it is like cross-examination
 - » You are probing and testing the patient – like you are being tested

Dealing with Cross examination

- Do not lose your temper
- Be respectful and listen to the questions carefully
- Ask them to be restated and indicate if you do not understand the proposition being put to you
- Do not be bullied to say yes or no, unless directed to by the judge

Dealing with Cross examination

- Make reasonable concessions
- Consider issues that you may wish to be asked in re-examination
- Ask to refer to the literature if permitted
- Watch the judge and jury carefully and modify your style if required
- Use examples to make clear points

Dealing with opposing experts

- Be respectful but disagree even with senior colleagues
- Explain the reasons for differences of opinion
- Anticipate antagonisms but do not engage with them directly
- Check your views with a respected colleague

Guidelines

- Never say or write one thing in one place and express a different opinion else where.
- Acknowledge that a field may have changed and this does not dismiss the validity of the science
- Do not be selective in what you quote to the exclusion of strong dissenting opinion or fact

Guidelines

- Be willing to consider new issues and concepts that you have not had to deal with before
- Do a literature search about key issues in preparing for the court
- Anticipate the weakness of your opinion and how you will manage this matter
- You are not the one on trial

Criteria of Judgement

- On the balance of probability is greater than 50% chance in civil matters
- Beyond reasonable doubt in criminal cases
- Scientific proof is greater than 95% probability
- How to transfer group findings to individuals
- How to transfer this knowledge to legal setting

Conclusion

- You are a representative for your profession
- You advocate the value of science and knowledge to understand human behaviour
- Correcting misconceptions and prejudice about psychiatric illness