PREPARATION OF WITNESSES

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Scotland

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In Scotland a system known as precognition has arisen in the preparation of witnesses before a trial. Before considering what precisely this means, it is useful to outline the ethical and legal issues that have to be taken into account in releasing information for court purposes. Also, we will consider how these principles have developed in recent years as there is an apparent paradox between what actually happens in practice as opposed to guidance formulated by regulatory bodies and statutes originating from the UK parliament.

The UK-wide regulatory body for the medical profession, the General Medical Council (GMC), publishes guidance within its document *Confidentiality:*

Protecting and Providing Information on disclosure of information in specific circumstances where the doctor may require ethical advice. One such situation is where a doctor is likely to be cited to give evidence in court. Indeed, a failure to adhere to the GMC constraints may constitute serious professional misconduct, in which case it is possible for the ultimate sanction of erasure to apply.

The principle espoused here was enshrined within the Hippocratic oath, which was probably written in the fifth century BC. A modern restatement of this oath was produced by the World Medical Association, when formed in 1947, and this became known as the Declaration of Geneva. Specific reference was given to this issue:

> I will respect the secrets which are confided in me, even after the patient has died: I will maintain by all the means in my power, the honour and the noble traditions of the medical profession.

This is one of the earliest references to the concept of professional secrecy and one can see the derivation of current ethical guidance and legislation in the series of statutes that flowed from this principle.

Parliament saw fit to legislate on this subject, commencing with the Data Protection Act 1984 that only applied to computerized records. There was progression through the Access to Medical Reports Act 1988 relating to preemployment matters, the Access to Health Records Act 1990, encompassing written notes, and culminating in the Data Protection Act 1998. These acts were all designed to enhance the rights of individuals to ensure that accurate data were retained by healthcare professionals and that there was a legislative right for individuals to view their records and have any mistakes remedied. Although the primary purpose was to allow people to know what information was contained within their medical records, parliament also wished to have statute-based law to prevent unauthorized release of sensitive information.

There are, however, specific circumstances when a doctor may breach a professional confidence without either ethical or legal ramifications as a consequence. Such a situation arises, for example, when giving evidence in court. Unlike the solicitor–client relationship, the medical profession along with the priesthood does not enjoy absolute privilege. Therefore, the doctor should answer truthfully and fully while testifying in court. Whilst the GMC does guide the doctor to question the presiding officer of the court if a matter of confidence appears irrelevant to the proceedings, there is no doubt that the doctor must bow to the court's authority if told to do so as otherwise he/she would be in contempt of court. The example given by the GMC is where attempts are made to compel the medical practitioner to disclose information relating to relatives or partners of the patient, who are not parties to the proceedings, and the doctor has reservations about the appropriateness of the disclosure.

Consequently, it appears quite clear that a doctor may not release such information, unless (1) a patient gives informed consent to a doctor divulging information or (2) is ordered to do so by the presiding officer of the court (magistrate, sheriff, or judge). In the latter situation the doctor should assess whether there are necessary criteria to breach confidentiality without patient consent, such as with a public-interest disclosure.

Despite the foregoing explanation, in Scotland the system of precognition has arisen historically in the preparation of witnesses before a trial. In fact, although this has traditionally been associated with criminal cases and this article deals with that context, this approach is now also used in civil cases and representation has even been made to the GMC to allow this in preparation for a hearing of the Professional Conduct Committee involving a case that took place in Scotland.

It is interesting that there is no statutory definition as to what constitutes a precognition, but it is generally accepted that this is to know before (the trial) the evidence that an individual is likely to give if called upon to do so. The Defence's right to take precognitions is a matter which is enshrined in the common law (1987, *Stair Memorial Encyclopaedia*). Although Lord Thomson's *Second Report on Criminal Procedure in Scotland* (1975) devotes a whole chapter to the subject of precognitions, it deliberately makes no attempt to define them.

Precognition of a witness may be undertaken by either the Crown or the Defence and it is through the process of precognition that the Defence is made aware of the strength of the Crown's case. Having had the benefit of this process, the Defence can offer clients full advice on their position and prepare cases for trial if necessary.

Precognition-taking is a distinctive feature of the Scottish system. In contrast, with other jurisdictions such as England and Wales, there is disclosure of the Crown's case which virtually does away with the need for independent investigation by the Defence.

Precognitions differ from other statements in the sense that they cannot be put to witnesses during the course of a trial. Whereas a witness statement is essentially an account of what the witness has said, a precognition is a precognoscer's account of the witness's evidence, i.e., the statement subsequently produced has been filtered through the mind of the

precognoscer. This is perhaps a subtle distinction but it is an important one given the exclusion of precognitions from the court process.

In fact, witnesses are under no direct legal obligation to agree to be precognosced by the Defence. There is some authority for the view that they have a civic duty to do so, but that is all.

In *Her Majesty's Advocate* v. *Monson* [1893] 1 Adam 114, the Lord Justice-Clerk expressed the view that:

> every good citizen should give his aid, either to the Crown or to the Defence in every case where the interests of the public in the punishment of crime, or the interests of a prisoner charged with a crime, call for ascertainment of facts.

In *Wilson* v. *Tudhope* [1985] SCCR 339 (Sh Ct), Sheriff Gordon took the view that this duty is merely a moral one and cannot be enforced.

Because witnesses are under no legal obligation to agree to be precognosced, this clearly may pose a problem for the Defence. In 1967, the Grant Committee considered the issue of whether the Defence should have the power to compel witnesses to attend for precognition. They recommended against it, apparently taking the view that if defense solicitors were granted these powers of compulsion, there was a danger that the powers might be overworked. The Grant Committee was also concerned about the difficulties that might arise where accused parties chose to defend themselves. The solution recommended was that it should be possible for the Defence to cite witnesses for precognition under oath before a sheriff.

This procedure was first introduced by the Criminal Justice (Scotland) Act (1980) and is currently set out in section 291 of the Criminal Procedure: Scotland Act (1995). It is exceptional for medical witnesses to be precognosced in this way, but it is not totally unknown, should they be unwilling to cooperate with the process.

Although some writers believe that evidence given at precognition is as privileged as that spoken in court as far as breach of confidentiality is concerned, the GMC may not share that interpretation, as they state unequivocally: "You should not disclose personal information to a third party such as a solicitor, police officer, or officer of a court without the patient's express consent," except in the specific circumstances outlined and there is no consideration here of precognition.

Finally, what was said by a witness when she/he was precognosced prior to giving evidence cannot be put to her/hime whilst giving testimony in court, the exception being the unusual situation where that precognition was given under oath in front of a Sheiff. An unsworn precognition such as that normally provided to a solicitor or their agent is excluded on the basis that this is only what the witness is alleged to have said to the precognoscer.

See Also

Preparation of Witnesses: United States of America

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United States of America

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Introduction

The Role of the Witness

The forensic expert has two duties of equal importance: first, to perform scientific investigations, either in the field or laboratory, to reach a conclusion about evidence; and, second, to communicate those results and their meaningfulness to a judge or jury through testimony. Testimony in part is what makes forensic science unique; no other scientific discipline has this legal requirement. Like peer-reviewed journal articles, presentations at meetings, colloquia, and other forms of interaction in which scientists engage, testimony is a structured method of communicating scientific results, but with one significant difference.

The duties of a forensic scientist take place in two very different environments. The first duty occurs under the rules, methods, and norms of science at the crime scene or in the scientist's laboratory. Forms of communication between peers are the articles and presentations mentioned above. The second duty, however, takes place in a locale that is foreign to most scientists: the courtroom. And very few, if any, of scientists' rules of operation travel with them into the legal arena – some may even be detrimental. Attorneys

have no such professional portmanteau: they always play by their rules in their home field. The friction thus created between attorneys and scientists results from two conflicting cultures with different norms. Furthermore, testimony is peer-to-layperson, not peer-to-peer, and the expert must adjust his/her speech, vocabulary, and thoughts appropriately.

The Difference between Reports and Testimony

Scientific articles are the canonical form of communication for scientists and researchers but the articles originally had a very different form than they do today. The style, presentation, and argumentation of a seventeenth-century scientific article had many of the components of good story-telling: strong active verbs, first-person narrative, expressive vocabulary with a lack of technical jargon, and few, if any, abstractions. By contrast, twentieth-century scientific articles demonstrate just the opposite with their passive, third-person voice, technical terminology, high quantitative components, increased cognitive complexity, and higher volumes of data.

Forensic scientists are caught in a stylistic dichotomy that goes largely unnoticed: While they write reports in a twentieth-century style, testimony is presented in what could be considered a seventeenth-century style. Therefore, "the fibers were examined by polarized light microscopy, Fourier transform infrared spectroscopy, and microspectrophotometry" in a report translates to, "I examined the fibers by placing them on a glass microscope slide and analyzing them with various microscopes and instruments that tell me about the fiber and measure its color" during testimony. Experts and attorneys alike should pay attention to this phenomenon as it pertains to the nature of scientific writing and legal testimony.

Voir Dire/Qualifications

An expert is qualified in two steps. First, the attorney who issued the subpoena to the expert asks questions that establish the witness' expertise. These questions are designed to demonstrate facts about the witness' background to meet with the judge's and opposing attorney's approval; this is sometimes referred to as "qualifying a witness." Second, the opposing lawyer challenges those qualifications through additional questions; this is called the *voir dire* (French for "speaking the truth") of the witness. If the judge determines that the witness is qualified to speak as an expert on a subject, the proponent attorney begins direct examination of the witness.

All of the work the forensic expert completed – collection, examination, and testing of the evidence, writing of reports, and pretrial conferences – is merely preparatory to testifying in the trial. The most important role of the forensic scientist is interpreting a complicated scientific discipline to a judge or jury. In this light, the expert should not testify only as to conclusions, but should also explain how those conclusions were reached and what they mean to the facts of the case (*Bethea* v. *United States* 537 F.2nd 1187. (D.C. Ct. App. 1976)). Otherwise, why testify? Experts are not fact witnesses – they are called to court because they can provide their expert opinions and should do so.

Most people confuse resumés and curriculum vitae (CV). A CV is the complete description of a career, including employment, education, training, teaching, publications, presentations, awards, and professional associations. All this information should pertain to the expert's professional life; hobbies such as archery and needlepoint should not be included. Other items to exclude from a CV are any personal information other than the expert's name (no home address or phone number), social security number, or other non-work-related contact information. A CV may be entered into evidence and therefore becomes a public document, available to anyone who obtains a copy of the case file.

A resumé, on the other hand, is a condensation of the most pertinent facts about a career. Resumés are brief – generally one page – and to the point: employment, education, and perhaps professional affiliations are stated. Resumés are for employment applications. Experts should provide CVs prior to testifying in court to both attorneys; additional copies should be brought to court just in case. Resumés are too incomplete to be useful to court officials.

It may be helpful for the expert to have his/her *voir dire* qualifications written in a question-and-answer format. The answers should not be written down completely, however, as this may lead an onlooker to decide that the witness doesn't even know his/her own qualifications; brief outlines, notes, and obvious abbreviations should be used to guide the attorney. If the witness is qualified in a variety of disciplines (hairs and fibers, typewriting, and handwriting), then he/she should have a different set of qualifying questions for each specialty.

Getting through *voir dire* should be the time for the expert to demonstrate his/her expertise, qualifying him/her for the testimony he/she is about to offer. The last thing an attorney wants is a surprise during *voir dire*, for example, that the expert failed an introductory chemistry course – twice. A prepared attorney has reviewed the expert's CV and cleared any embarrassments or impeachments ahead of time.

For an expert who has testified rarely, *voir dire* builds confidence; it reminds him/her that he/she is

an expert and has extensive knowledge in the current topic. If an expert has never testified before, the attorney should be direct: "How many times have you testified previously?" Everyone has a first time. A good answer to this is, "This is the first time I've been required to testify." For an expert who testifies often, the danger resides in sounding either bored or pompous. If a particular publication or training class in the expert's CV is relevant, the attorney may ask about it to break the routine.

Prepared attorneys can save themselves in the courtroom by taking time to review the CV of all experts, not just their own. Much can be hidden in a CV, as any human resources person can attest. Time gaps between jobs, lack of or restricted professional development (only receiving training from one agency), job-hopping, and similar deficiencies are all potentially fertile ground for investigation. The more competent attorneys will discover as much as possible about an expert before the trial. It can be useful to order transcripts of previous trials if the expert testified on the same or similar topics.

Direct Testimony

Direct testimony is the expert's first chance to demonstrate his/her demeanor and command of the subject matter. The expert must lay the foundation of the science, the examinations conducted, and the significance of the results. The proponent attorney should not be an obstacle to this process – it is the expert's moment to shine; the opposing attorney will be enough of an obstacle on cross-examination. During direct examination the expert develops a rapport with the jury. This is facilitated with a conversational tone and relaxed approach. The expert educates the jury without being condescending. The expert should look at the attorney during questioning but look at the jury (or judge) when answering; they are the trier of fact and the answers are for their benefit.

Direct testimony builds the attorney's argument and the expert provides the relevant facts. The attorney and the expert should decide in advance on format – go question-by-question in a tight script, an open question-and-exposition format, or a combination. Courts may grant leeway with direct testimony, so the attorney could ask, "How are forensic hair examinations conducted?" to which the expert can give a discursive answer. For attorneys who are unfamiliar with the science employed and who are willing for a seasoned expert to pace him/herself, this may work best. Other attorneys favor an orderly approach, which can be effective if the case or the evidence is complex.

Cross-Examination

The US adversarial system of justice allows the accused to question the testimony of a witness against him/her. Cross-examination is not a necessary evil but a required part of the justice process. Experts who correctly performed their tests and examinations, came to valid and legitimate conclusions, and prepared properly for trial have nothing to fear from a cross-examination. Some attorneys may have knowledge of science or a particular forensic specialty and may present a challenge to the inexperienced expert. Experts must remember they have been "asked to be in the courtroom because the justice system requires their expertise." Cross-examination is not, or should not be, a personal attack.

Experts should present the same demeanor and temperament with both attorneys. Being solicitous on direct but defensive or aggressive on cross-examination will make the expert seem biased. Tempo is also important and should remain the same regardless of the questioner; the experienced witness controls the speed and flow of testimony. This gives the jury time to listen to both questions and answers.

Attorneys are not scientists, and vice versa. An attorney may use a term in a sense other than what the scientist understands. A good example is "error." To a scientist, every measurement contains some error and this is a quantity to be evaluated and understood – "standard error of the mean" is a statistical value, for example. To a lawyer, however, "errors" are bad, they are mistakes, and they mean the expert has done something wrong. Therefore, experts should not hesitate to clarify terms or questions presented to them. If the attorney happens to misstate the facts as the scientist knows or has established them, the scientist should also not hesitate to correct the attorney first and then answer the question.

Although "error" was used as an example above, everyone makes mistakes. Admitting a mistake or an apparent lack of thoroughness in testing may tarnish the expert's reputation but not as badly as if the expert covers it up. Admitting to a mistake demonstrates honesty and integrity; it also shows the jury that the expert is human.

Too few attorneys pay close attention during the cross-examination of their witnesses. Much can be learned about strategy, tactics, and the quality of the expert from a careful consideration of this trial phase. Experts, in many ways, are sitting ducks – they cannot question, object, or defend themselves other than through answering the questions they are asked.

Preparation for Attorneys

"The importance of the pretrial conference for the attorney cannot be overstated." Attorneys must take time to prepare their witnesses properly. The significant aspects of the upcoming testimony should be reviewed by both parties. The pretrial can be thought of as a dress rehearsal and the attorney and the expert should review their notes and be prepared to discuss the case before coming to the pretrial conference. The attorney should thoroughly familiarize the expert with all exhibits which will be entered into evidence that pertain to the expert's testimony. Preparation prior to the pretrial conference and the trial itself is essential for both the expert and the attorney.

It never hurts to be informed. An attorney should read about the expert's discipline, even if it is only a chapter in an introductory textbook. Terminology and concepts are key to familiarization and this leads to a smooth and comfortable delivery. The expert will also appreciate this effort because it makes his/her job easier than working with an attorney who steadfastly remains ignorant or who is cavalier and breezy about the subject.

The majority of forensic experts in the USA work for a government agency (local, state, or federal), although many work for private firms or are self-employed. An attorney may question an expert about having a bias or preference for whom they testify ("Isn't it true that you've never testified for the prosecution/defense?"). Experts should not be ashamed that they work for the government or are only employed by the defense – these situations are outside their control. Government agencies rarely accept defense work (it's not their mandate) and defense attorneys typically cannot employ government workers (it's against their mandate). Nevertheless, employment by the government, testifying only for the prosecution or the defense, or failure to meet with opposing counsel before trial are issues that can be used to effect by attorneys. The prepared expert should be ready for questions of this nature. An attorney may ask, "Aren't you being paid [by the federal, state, local government/opposing counsel] for your testimony today?" implying that your testimony has been purchased. A gentle reminder that nearly everyone appearing in court today, including the attorneys, judge, and jury, are being compensated for their time should close down that line of questioning. Another type of question similar to this is, "You've spoken with the government's/defendant's attorney, haven't you?" There is no secret about the fact that you have talked with the attorney who subpoenaed you. There is nothing improper about talking to the attorney before the trial. Wise attorneys, unless they suspect something is amiss, steer clear from these baiting questions.

Preparation for Witnesses

If an expert isn't prepared to testify, he/she doesn't belong in the courtroom. Preparation entails reviewing reports, understanding the fundamental theories of the discipline, familiarity with the science (not what exams the expert performed – that is the method or protocol) of the discipline, and the timing and names involved in the case. The prepared expert is also familiar with the courtroom, the prosecutor, and all the parties involved.

Dress, Demeanor, and Diplomacy

Courts are very conservative environments and a good witness blends in. It is a courtroom, not a theater. Dress appropriately. Tattoos, piercings (other than earrings on women), and anything that might distract a jury (a shiny brooch that dangles) should be removed or covered.

At some point during testimony, an attorney may ask a question that angers an expert. An expert should never show his/her anger and never answer a question in anger. When experts lose control of their emotions, they will not do what they are in court to do: give truthful answers. They should remain calm, be polite, and answer the question. The more an attorney attempts to aggravate the expert, the more courteous and professional the expert should become. Experts themselves are not on trial in a case, no matter what may be asked. If questions are too insulting, the proponent attorney may object, but the expert must remain calm and handle questions without help. It is important to keep in mind that nothing a lawyer says is evidence unless it is answered affirmatively by the witness.

The expert should remain dignified at all times, from the moment he/she enters the courtroom and takes the oath until he/she leaves the courtroom. Do not chew gum, fidget, or groom (scratch, pick, or preen). A slim briefcase and the necessary documents are all that should be taken to the witness stand.

How to Listen to Questions

Listening is critical to successful testimony. Experts should be responsive and simple in their answers. Don't embellish. If the question is not understood,

clarification can be requested. This is especially important if the question is vague or contains a value judgment, such as “Isn’t it a fact that your laboratory has had problems?” If the question is not clarified, the answer may be misleading.

Whenever a person tells the same story twice, no matter how carefully, inconsistencies are possible. Previous inconsistent statements can be reconciled by the expert with his/her best recollection of what happened, and explaining the inconsistency (“If I said the evidence was returned on April 7th, I misspoke. It was returned on April 17th”).

How to Answer Questions

Attorneys have an absolute right and sometimes a duty to object and the expert must give them that opportunity. The judge must rule on the objection before the expert can answer. Experts should wait until the objections and ruling are over before answering.

Hypothetical questions are just that – questions that offer a hypothesis containing only facts that have been testified to in the trial, but asking the expert to offer an opinion based solely on those facts. The facts must be clearly understood and sufficient for an opinion to be made. Hypotheticals can be dangerous because the expert has conducted examinations and rendered expert opinions based on much more data than are offered in any hypothetical question. To ask a hypothetical on only a verbal surmise of a situation may be misleading and the expert must pay close attention to any such question.

Some experts have the notion that all questions should be answered “yes” or “no.” Many questions cannot be answered accurately with only “yes” or “no” because either the question is, or the answer would be, incomplete or ambiguous. If the attorney asks the expert to “only answer ‘yes or no,’” the expert is entitled to tell the attorney that the question cannot be answered “yes or no” without the answer being misleading. The court should not direct you to answer “yes or no,” unless the question permits that kind of answer. If the court does direct you to answer “yes or no,” the comment regarding the need for an explanation, with luck, will flag the question or area of inquiry as something to be covered in redirect questioning.

The expert should beware of compound questions. If several questions are rolled into one, it may be difficult, if not impossible, to answer each one accurately unless they are broken down. In such a case, the expert may say, “I will try to answer your questions one by one.” If the question is too long, the expert could ask, “Can you break those questions down for me and ask them one at a time?”

What to Do if You Are Alone

An expert can be alone in two ways: near the courtroom and on the stand. The first typically happens when the expert is waiting to testify. Someone may try to strike up a conversation that may segue into talking about the case. The expert should not discuss the case with anyone except the attorneys or the judge. Attorneys have been known to use investigators (who do not identify themselves) to elicit comments from experts that are then used against them in the courtroom. If someone identifies him/herself as related to the case on trial and tries to start a conversation about the case, the expert should not do it alone. For example, if the opposing attorney introduces him/herself and asks questions about your impending testimony, an appropriate response might be, “I’d be glad to discuss this but I’d feel more comfortable if both attorneys were present for this conversation.” Otherwise, the expert may enter into *ex parte* (away from one party in the case) conversation that could become part of the attorney’s questioning in the courtroom (“Didn’t you just tell me in the hallway...”). No stenographic transcript will be available to establish what was said or not said.

Regrettably, experts are often alone on the stand as well. The proponent attorney may not pay attention and not object or be ignorant of rehabilitating questions on redirect. The prepared expert knows this and is ready to go it alone.

Leaving the Courtroom

When an expert is finished testifying, the judge will excuse him/her; this release may be liable for recall for future or rebuttal testimony. If the expert is excused (and no indication of further testimony is given), he/she should collect his/her briefcase and notes, stand, and calmly leave the courtroom. He/she should not speak, gesture, wink, smile, or do anything else at or to either attorney, the jury, bailiff, or onlookers – no one. If an investigator or attorney follows the expert to ask or tell him/her something, the expert should listen or answer and then leave. Nothing should be said until the courtroom is left behind. Experts who have no further business in the courthouse should leave; experts who have no further business with the attorney who subpoenaed him/her should go home or back to work.

See Also

Expert Witness: Qualifications, Testimony and Malpractice; Medical; Daubert and Beyond

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