



## remarks

**Dodging Trick Questions** Learn how to sidestep traps set by attorneys for medical expert witnesses. A seasoned expert witness explains how to listen for “trick” questions then give truthful answers that preserve your credibility.

BY JOE D. HAINES, JR., MD



The opposing attorney has just asked the medical expert witness a series of benign questions, like where he attended medical school, whether he is board certified, and how many times he has testified. Then in the same conversational tone comes the question, “Doctor, is your opinion on this case engraved in stone?”

The doctor pauses, not sure how to respond. If he says “yes,” he’ll come off as arrogant and unreasonable and risk losing credibility with the

jury. If he says “no” he will appear unsure of his opinion and perhaps concede his entire testimony.

The opposing attorney smells blood and interprets the pause as a sign of indecisiveness and weakness. “Doctor, would you like me to repeat the question? It’s a simple question. A ‘yes’ or ‘no’ will do.”

If the expert witness takes the deal, he will almost cer-

tainly lose the exchange. If he blunders ahead without providing a clear answer, he risks losing the trust of the jury by appearing rattled or unsure. Every medical witness should seek to avoid this situation by preparing for the inevitable trick questions.

The trick question presents a dilemma like a great “Far Side” cartoon that depicts a poor soul at the gates of Hell trying to decide which of two

doors to choose. One door reads, “Damned if you do,” and the other says “Damned if you don’t.” Behind the new arrival is a devil with a pitchfork prodding him and saying, “C’mon, c’mon. It’s one or the other.”

Avoiding the pitfalls of trick questions can mean the difference between being an effective witness and a discredited one. The most important factor in dealing with trick questions is to expect them. By expecting the trick question the expert witness won’t be caught off guard and will have a ready response.

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pert witness, distort his testimony, and mislead the jury. There is often an attempt by the attorney to skirt the substance or reasoning behind the expert testimony. According to former trial attorney Judge David M. Lawson, a trick question can take one of the five following forms:

1. Assumes unestablished facts
2. Assumes a false premise
3. Demands an answer that cannot be given
4. Imposes unreasonable limitations
5. Draws the expert out of his field of expertise

Recognizing the trick question is just half the battle; the appropriate response is crucial. Here are a few examples of trick questions and appropriate responses.

**Question:** “Doctor, are you being paid for your testimony today?”

**Answer:** “No. I’m being paid for my opinion and my time away from the office.”

(The expert is never paid for testimony, but for his time and professional opinion.)

**Question:** “Doctor, isn’t it true that you mainly testify for plaintiffs (defendants)?”

**Answer:** “My job is to review the case I am asked to analyze and call it as I see it.”

(The attorney is trying to impeach the expert’s credibility by making him appear biased.)

**Question:** “Doctor, will you agree to give me a simple ‘yes’ or ‘no’ answer to my questions?”

**Answer:** “For those questions that can be answered with a ‘yes’ or ‘no’ I will agree. However, some questions

may require an explanation and a simple ‘yes’ or ‘no’ may not be entirely truthful.”

(Don’t take the “deal” the attorney is offering you in order to restrict your answers and mislead the jury.)

**Question:** “Doctor, what is the weakest part of your case?”

**Answer:** “It’s not my case, it’s the attorney’s case.”

(Remember that the lawyer who retained the expert is not the expert’s lawyer and the case is not the expert’s case. The expert is merely rendering an opinion.)

**Question:** “Doctor, have you ever made a mistake?”

**Answer:** “Yes, but I haven’t made any errors in opinion concerning this case.”

(It is important to concede that you’ve made mistakes in the past, otherwise the jury will not believe you.

But you can emphasize that you haven’t made mistakes in the case in question.)

**Question:** “Doctor would you consider this textbook an authoritative source?”

**Answer:** “That depends on which chapter, section, page, or passage you are referring to.”

(If you have not read every page of the book in question, do not make this deal with the attorney. He will try to use the authority against you in any way he can. In addition, textbooks are often out of date, so they are no longer authoritative.)

**Question:** “Doctor, would you agree that reasonable doctors could disagree?”

**Answer:** “Yes.”

(It is important to concede this point, otherwise the expert will

appear unreasonable.)

**Question:** “Doctor, would you agree that the treating doctor would have greater knowledge of the patient and her problem that would allow him to make better decisions regarding this particular patient?”

**Answer:** “Not necessarily. A certain distance from the case allows greater objectivity when analyzing the facts.”

(By answering “yes,” the expert subordinates all his opinions to the treating physician, even if the treating physician was negligent.)

**Question:** “Doctor, why did you spend several hours in a secret meeting with your attorney if all you were going to do here today was tell the truth?”

**Answer:** “First of all, he is not my attorney. The meeting wasn’t secret. And it’s normal procedure to review a case with the attorney who has retained me.”

(Don’t allow the opposing attorney to trap you into admitting something that is not true.)

**Question:** “Doctor, have you ever lied?”

**Answer:** “Yes, when asked if I had gotten into the dessert before dinner. But never under oath.”

(A bit of humor can defuse this loaded personal question, with the follow-up that you take testifying in court as a serious matter.)

**Question:** “Doctor, when you reviewed this case, how did you proceed?”

**Answer:** “I assumed that the patient received reasonable care and then analyzed the facts of the case to either prove or disprove my assumption.”

(This response shows that the expert has analyzed the facts in an unbiased manner.)

There are several important principles to keep in mind when answering tick questions. It's crucial not to let the attorney put words into your mouth.

To avoid a 'yes' or 'no,' listen for these phrases in order not to lose control:

1. "Doctor, would you say..."

**Answer:** "No, but I would say..." or "That depends" or "Not in this case because of..."

2. "Doctor, is it fair to say..."

**Answer:** "That depends on what you mean by fair."

3. "Isn't it true that..." (Watch for the inaccurate summary question to follow.)

It is important to be responsive to the attorney questioning you, but be wary about volunteering information. Certain words and phrases should be avoided altogether. It looks bad if halfway through his testimony a medical expert says, "Well, to be entirely honest,..." This gives the impression that previous testimony may not have been "entirely honest" and the attorney will pounce on this.

Other phrases, such as, "to tell the truth," and "to be candid about this" can have similar bad results. It is also best to qualify answers where appropriate and avoid saying "never" and "always." Since medicine is an inexact science, the opposing attorney will have no problem in finding an exception to any 100-percent rule you might propose.

A perfectly acceptable response is, "I don't know," or "I don't remember." This acknowledges the medical expert's limitations which enhances credibility.

It's important to treat both attorneys the same, even though one is trying to trip you up. This reinforces to the jury that the testimony is unbiased. It is never appropriate to lose control of your temper and become angry with an attorney. This will make the attorney's day and seriously damage your credibility.

The medical expert witness has a tremendous advantage when answering questions before a jury by shifting into the teaching mode. Most physicians are adept at explaining complex medical issues to patients and they should capitalize on this skill. A physician who is teaching is more animated and engaged with the jury and easier to relate to than someone who robotically answers questions.

Ultimately, members of the jury ask themselves whether the medical expert is the sort of person they would want as their doctor. The expert who comes across as caring, patient, friendly, and not adversarial has 90 percent of the credibility battle won. The attorneys have a much more difficult task since public opinion of lawyers is low and they are often viewed with distrust.

It is also important that as an expert, you do not allow yourself to be drawn out of your area of expertise. A family practitioner shouldn't be providing opinions about neurosurgical matters. If more information is required to answer a question, don't hesitate to ask for it. Ask to examine any documents that you need for reference. Don't promise more than can be delivered. Remember Clint Eastwood's advice as Dirty Harry: "A man's gotta know his limitations."

So, what would be a good response to the question posed in the beginning of the article: "Doctor, is your opinion engraved in stone?" This is a classic example of a trick question that makes the expert look bad whether he answers 'yes' or 'no.' The secret is to restate the question so it can be better answered. For example: "What do you mean by engraved in stone? If you are asking whether or not I'm sure about my opinion, then the answer is yes, I'm sure of my opinion."

A medical expert who can respond to

trick questions like this one will increase both his credibility and success. ■

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