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Examination

BY DR. ERIC Y. DROGIN

Lawyers and mental health professionals have a great deal in common. We dedicate ourselves to alleviating human misery, while at the same time absorbing the criticism of those who suggest, with ever-decreasing subtlety, that we create as many problems as we solve. Our mutual needs include oxygen, caffeine, and continuing education credits—not necessarily in that order. Still breathing, still awake, and still licensed, we fight the good fight on behalf of our clients, and we wear the label of “counselor” proudly.

One notable difference between the two professions is in the fights we tend to pick once our clients depart, somewhat poorer but all the wiser, leaving us to our own devices. Wartime cartoonist and author Bill Mauldin (of “Willie and Joe” fame) asserted repeatedly that one could usually tell the combat troops from those bringing up the rear by the way the latter were so much more eager to escalate a situation from words to blows.

The same cannot typically be said of battle-weary litigators. They gave at the office. Between jousting matches, lawyers treat each other to lunch with such unforced civility that criminal defendants often cite this as an example of why the field of law is really just a mutual admiration society and why counsel cannot really be trusted. By contrast, mental health professionals—whose job it is to be sympathetic, soothing, and supportive for hours at a time—are occasionally described as circling the wagons and firing inward when it comes to dealings with their own kind, much to the bemusement of the attorneys who defend them, utilize them as expert witnesses, and serve as public members on their certification boards.

Lawyers and mental health professionals also have very different ideas about what it means to conduct an “examination.” The notion of the litigator’s “direct” examination of one’s own witness is bound, rather ironically, by rules designed to ensure that questions aren’t too direct:




What if anything did you observe at that point?

Help me out here. Was it a 2019 Volvo S60 T6 R-Design in Osmium Gray Metallic with Massachusetts plates, traveling at a rate of between 85 and 90 miles per hour while blasting—somewhat incongruously—Lynyrd Skynyrd’s “Southern by the Grace of God”?



When faced with opinions we really don't want anyone to hear, from witnesses being paid by the other side, we actually get to try to put words in their mouths, in the course of what can be a very "cross" examination indeed. Ideally, this is accomplished by laying out a series of precise, irrefutable statements that can only be interpreted one way, and that are really only masquerading as questions, enabling us in effect to do the testifying ourselves:

 **My client was treated on February 23rd of last year, as established in the record marked as Plaintiff's Exhibit A.**

During the course of treatment provided on that date, as established in the same record, my client was given the medication described in Plaintiff's Exhibit B.

As noted on page 333, paragraph 11 of the 2022 edition of the Physician's Desk Reference—an excerpt from which is marked as Plaintiff's Exhibit D—that medication is "never to be administered to persons who consume sushi."

My client is described in the record marked as Plaintiff's Exhibit A as having had "no breakfast, but just completed a lunch consisting of Sashimi, Nigiri, and Maki."

Is there anything else you'd like to add?



Counsel knows exactly where both types of examination are at least supposed to go. At times it almost seems if witnesses, including one's own, are just in the way. Indeed, one of the primary functions of a deposition is to lend even more predictability to these exchanges. "Shouldn't we just settle this now? Lunch is on me."

An examination conducted by mental health professionals—who, no matter what kind of day they may be having, should never discernibly be "cross"—is supposed to be a curious, questioning, open-minded sort of affair. Sure, certain psychological symptoms may be suspected, and a highly focused referral question is always considered to be a plus, but the goal is never to make the results come out in a certain, pre-ordained fashion. In fact, when the mental health professional's examination appears to have been primarily goal-directed, this can be the main focus of the cross-examination conducted by counsel.

Mental health professionals are also supposed to examine themselves. Their own discipline was largely born of an "introspection" movement that enabled them to understand what their own patients might be experiencing. In the present day, psychotherapists are explicitly encouraged by codified ethical guidelines to keep tabs on their own emotions and behaviors, and to take themselves out of the lineup if what they discover spells trouble. "Physician, heal thyself."

"Lawyer, sue thyself" never really caught on, and the kinds of means-ends examinations we conduct in the course of our day jobs don't reflect techniques that would afford much personal insight. Unlike mental health professionals, however, we do receive a fair amount of direct feedback about how we're doing from those we undertake to "counsel." Also unlike mental health professionals, we often generate a very considerable amount of recorded evidence of our own behavior. With understandable trepidation, it may be worth taking a look at some of that evidence. Drawing upon all the objectivity we can muster, we can ask ourselves "just who is that person chatting with the client, going toe to toe with the other side's podiatrist, and engaging in a sidebar at the bench?"

Although most of us aren't physicians, we're best advised to conduct physical self-examinations on a regular basis. There is considerable peace of mind—the portal to mental health wellness—to be gained from the reassurance that comes from medical vigilance. Admittedly somewhat graphic directions for such procedures—be forewarned—are offered by the Mayo Clinic at <https://tinyurl.com/mayoselfexamA> and <https://tinyurl.com/mayoselfexamB>. Please note: regardless of our professional identities, these are not examinations to be conducted in the courtroom.

ABOUT THE AUTHOR

ERIC Y. DROGIN is a Norton Healthcare Louisville Hospitals Medical Staff member with clinical privileges in adult psychology. He teaches on the faculty of the Harvard Medical School, where he serves as the Affiliated Lead of Psycholegal Studies for the Psychiatry, Law, and Society Program at Brigham and Women's Hospital and participates in the Program in Psychiatry and the Law at the Massachusetts Mental Health Center and the Forensic Psychiatry Service at Beth Israel Deaconess Medical Center. Proud to be a Kentucky lawyer for over 30 years, Dr. Drogin is a former chair of the ABA Science & Technology Law Section and a former president of the American Board of Forensic Psychology. Please contact him at eyd@drogin.net with your suggestions for lawyer mental health and wellness topics.

