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Ask the Experts

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Neil S. Kaye, Graham Glancy, and Ryan C.W. Hall will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send questions to nskaye@aol.com.

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Q. I evaluated a woman who was involved in a very severe motor vehicle accident and diagnosed with posttraumatic stress disorder. Now, I am being asked to evaluate the woman's daughter, who was a passenger in the vehicle and was also badly injured. She is represented by a different attorney than the mother. The attorneys are okay with me seeing both of them for an evaluation. Do you have any advice as to how I should proceed?

A. Kaye:

I have done a number of "multiple victim" cases including MVA's, airplane crashes, and toxic exposures. I can see an individual forensic psychiatrist managing perhaps up to six or eight evaluees at once, but above that I would generally refer the case to AAPL colleagues who specialize in mass evaluations and have numerous clinicians on staff and set procedures for doing this work. Like most of my examinations, I review all of the records for each person in advance and prepare a set of questions that I will use with all of them and then an additional set of questions targeted to each person specifically. I prefer to do all of the evaluations on the same day so as to limit the ability of any evaluee to discuss with the others (often friends or

family from the same incident) the focus of my evaluation. I also prefer to see the person with the greatest number of claimed symptoms/impairments

first, as then things should get easier for me as the day goes on. I am more likely to use psychological or neuropsychological testing in these cases, which at a minimum keeps people occupied in separate rooms but also lends some standardization to the work.

In my experience, I have usually arrived at different diagnoses and formulations for each of the evaluees, although diagnostic overlap in cases of obviously life- threatening trauma is more common. Still, the individual response to a given stressor is often personal as is their personal resiliency. While the reports may all share a significant amount of record review material, the rest of each report is clearly not boilerplate and I take the time needed to make it clear that I have evaluated and considered the person as an individual.

A. Glancy:

Forensic experts may also be involved in separate but related type of litigation involving class action suits. Class action suits are a procedural device that puts one or more plaintiffs in a group or class in order to make a claim against a defendant. If each one of the plaintiffs filed a claim individually, the whole process would be unmanageable to the courts and the defendants. This clearly has advantages to class members. Class action litigation can also include absent or unregistered members. It is said to have the advantage to the defendant that it protects the defendant from inconsistent obligations and indeterminable individual claims. All the plaintiffs must share common qualities in law or fact. The proposed class representatives should check common characteristics with the rest of the class. In these matters, forensic experts may be involved in giving evidence regarding causation or reference similar expected damages.

Although English law has addressed the principles of class actions for centuries, they only gradually came into common use in the United States and then even later Canada over the last 60 or 70 years. Although the use of class action suits regarding the damages caused by such entities as tobacco companies, the aftereffects of oil spills, or financial Ponzi schemes seems to make sense, this may be more complicated in the contemporary use of this type of litigation for victims of trauma such as battery, assault, in institutions such as training schools, juvenile facilities, residential schools, or jails and prisons.

Since the point of class action suits is to simplify the process, the courts are interested in making the payment of damages a simple process. If the action involves the

defendant who defrauded a number of plaintiffs in a Ponzi scheme, the defendants may be awarded damages involving a lump sum in order to make them whole again. It may be expedient for the courts to divide the members of the class into three classes; those who invested $10,000–20,000; those who invested $20,000-50,000; and those who invested $50,000–100,000.

This approach can become problematic when dealing with the damages awarded to 100 people who were abused as children in an institution. It is well-known in the field that the dose effect model is inadequate in explaining posttraumatic stress reactions in individuals. Other factors such as the degree of support available, biological predeterminants, peritraumatic distress responses, and genetics are important contributors. It is therefore illogical to place these people into, for instance, three classes, based on the amount of time they spent in the institution.

I have opined in cases such as this, with varying success, that only individual assessments can have valid results in assessing the psychiatric effects of any abuse on the individual's future mental health and functioning.

A. Hall:

These cases can be challenging from an office logistics and procedural standpoint. I find establishing clear channels of communication and clear expectations important. I think the individual asking the question started off well with making sure both attorneys were comfortable with the evaluator working for both parties separately but in conjunction. I would encourage individuals working in this manner to obtain letters of engagement from both parties. In the hypothetical above with a family dynamic involving parents and children (age of daughter not provided so we do not know if at age of majority or not), there may be a legal or personal reason why different attorneys were obtained, which may be important for the evaluator to be aware of (e.g., some injuries more significant for one party than the other, the physical location of the evaluees is different, aspects of the personal relationships between evaluees may be good or strained). In addition, it may also be important to understand the relationship between the two retained attorneys or law firms. Although not necessarily always clearly stated, in my experience, usually one attorney or firm tends to take lead on the overall case in terms of scheduling, taking depositions, and keeping the expert up to date on deadlines. With that said, it is important for the expert to remember there are two separate lawyers with two separate evaluees and that the expert has an obligation to both parties equally.

Issues that may arise include billing, scheduling, and confidentiality. For example, some records will likely apply to both evaluees while some will be specific for each one. Since there are two separate lawyers, how to document and bill for the communal records may be more of an issue. In general, I would try to split the communal records' review time between both parties, but I have run into situations where one party wants the expert to review more than the other party. So, it is important, as part of initial communications, to agree on how potential communal records are identified and billed (e.g., to the firm that sent the records, or upon agreement applying to both). Another financial issue that may arise is whether a retainer is obtained from both attorneys or not. In general, I would recommend obtaining one from each lawyer separately if the expert usually does obtain a retainer, since we do not know if one party will settle or be dismissed from the lawsuit for some reason. Although discussing financial issues may be difficult for some, taking the time in the beginning and clearly identifying how billing will occur is often important and clarifies the roles and expectations of all parties for these types of cases.

When it comes to testifying in the case, the expert should attempt to understand if the evaluations will be seen as "a single event" or multiple. For example, is it two separate reports, depositions, and trials or will it be one single court case with two separate plaintiffs. The complexity of this may vary on the specifics of each case (e.g., number of evaluees, class action or not) but, again, having a clear understanding of the legal framework is important, especially if one plaintiff settles or is dismissed while the other continues forward.

The last highlight point for this question is, although there may be two plaintiffs bringing suit, ethical and legal aspects of confidentiality still apply to each as an individual. Although there may be a single event in common for the two plaintiffs, their personal history and medical information may vary widely. Again, being clear on why separate attorneys were obtained and if there will be one communal report or separate reports will be important to consider. The expert may also want to remind both evaluees of the expert's role at the beginning of the evaluation and that information provided may be listed in reports and seen by multiple parties involved in the lawsuits. Although a warning like this is almost always given already, spending a little extra time to highlight the expert's role and the expert's involvement with multiple parties and answering additional questions may be important.

Take Home Points:

While it is permissible to evaluate multiple people involved in litigation related to the same event/incident, there are procedural safeguards that are recommended as part of striving for objectivity, impartiality, and fairness to all involved parties. We recommend

treating each person as an individual case and avoiding the presumption that the diagnoses or findings will be the same for each evaluee. It is especially important to manage the potential different expectations and arguments being made by each party and to be aware of how/when a particular opinion that may benefit one party may be potentially harmful to another.