

Ask the Experts

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Neil Kaye and Graham Glancy 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: In what circumstances is it appropriate to meet with a defendant or a defendant's family if they request to debrief with you after the verdict in a criminal case, after being engaged as an expert witness for the defense?



A. Kaye:

A great question often requires the answer be yet another question. This really great question demands a plethora of follow-up questions.

A complete answer requires employing a variety of perspectives and Dr. Glancy and I will attempt to shine some light on a least a few of these. Some simple and obvious questions include: who hired you, what if any duty do you have to the evaluatee or to the retaining party, does feedback constitute a blurring of the boundary between forensic and clinical work, what is the purpose of providing feedback and how might it be used, why does this party want to know, who would pay for the time, could disclosure harm anyone else even if unintended, when in the evolution of the case the request is made, is an appeal planned, is the requesting party happy/angry/surprised/disappointed by the verdict, are they praising or critical of your work/testimony, have

they been involved in the process prior to the verdict, and does family or anyone else have a right to such an audience?

The questioner tells us she was a defense expert in a criminal case but we don't know the outcome or if there will be an appeal. We have no idea why the request is being made or what are the expectations of the requesting party or if they are prepared to hear what you have to say.

With the myriad opportunities for appeals in the justice system, it is highly likely that I would decline the request, as partaking would undoubtedly muddy the waters for appeals, and would clearly cause you to have to decline any work in an appellate matter, which could potentially be a disservice to the original retaining party and/or to the defendant.

As for a duty, I believe you have one duty to the retaining party, a second and different duty to the evaluatee, and a third and still different duty to the justice system. Accepting a fourth and again different duty seems burdensome and unnecessary. It is not uncommon, especially in high-profile cases to get requests for interviews by media after a jury has ruled, but caution is advised. Material that has been disclosed is public and might be a topic of discussion, but not everything you know or have learned during a case is actually disclosed in the course of a trial/case, and extreme care is needed to not breach confidentiality.



A. Glancy:

This is a complicated question, requiring a complicated answer. First, there is the question whether it is ethical to give feedback in a forensic assessment. Second, there is the problem of whether it is within your retainer

to spend time giving this feedback. Third, giving feedback is not a unitary concept and this requires elucidation.

Brodsky and Goldenson (1) suggest that giving feedback is consistent with the aims of trauma-informed principles, which is becoming part of an evolving forensic psychology. They also argue that it is consistent with the aims of therapeutic jurisprudence, increasingly a factor in forensic psychology and psychiatry. Giving feedback would presumably help an evaluatee develop insight and improve their well-being. This would need to be balanced against maintaining honesty and objectivity, a governing ethics principle. Giving feedback, I would posit, could mean changing from an assessor to a treater in mid-stream. This may confuse the evaluatee, and put one in the position of "wearing two hats."

The second point to make is that arguably your client is the retaining lawyer, not the evaluatee. Following this line of thought any feedback, therefore, should be given to the lawyer, not to the evaluatee. The lawyer, as they see fit, may pass on the feedback to the evaluatee. One problem that might arise is that they may not deliver this as a mental health professional would deliver feedback, perhaps causing a negative effect. Another problem to consider is whether the lawyer has paid you to spend the extra time with the evaluatee delivering feedback. They may well feel that if the evaluatee requires therapy this should be paid for in the normal manner, for instance by healthcare funding or insurance. The lawyer may well be within their rights to say that, since you had billed ten hours for this case, they will only pay you for nine hours, since the last hour was therapy, which they did not request or condone.

It is also possible that you could attenuate an evaluatee's expectations by giving unwanted feedback. For

instance, if you were to tell an evaluatee that they qualify for an insanity defense, the lawyer may be placed in a position where they are in conflict with the evaluatee, because they have a different plan, for instance accepting a plea deal for time served. In some circumstances, it may be best to allow the lawyer to decide how much feedback should be given, since they are taking the lead in the case.

Feedback is not a unitary concept. (1) One must consider *how much* feedback should be given to the evaluatee. For instance, reassuring an evaluatee by saying “you are doing fine” may be a lot of different from informing an evaluatee that they are endorsing rare symptoms and are therefore likely malingering. This may depend on the type of case. For instance, in a personal injury case, dealing with possible PTSD, at a certain point in your evaluation you should be prepared to answer the question of whether your assessment confirms the claimed psychological injury.

In some cases, giving extensive feedback could affect further interviews, for instance by the psychiatrist on the opposing side, or by a psychiatrist for the same side. For instance, consider a case where an evaluatee with a diagnosis of schizophrenia sets fire to his house, killing his mother. You might assess him and give him the feedback that although you confirm his diagnosis of schizophrenia, you believe he does not qualify for an insanity defence because he told you that he was angry with his mother following an argument about how much money she retained from his welfare check. It is possible that defense counsel retains another forensic psychiatrist, and armed with this feedback, the evaluatee does not mention anything about his check during that interview. Or, following the assessment and feedback, when the defendant testifies in his own defense, he knows not to mention the welfare check. This could be analogous to coaching the witness, albeit inadvertently.

This does bring us to the other topic of *timing* of the feedback. Should you give feedback in the middle of an interview, at the end of an interview, the end of the session, following the formulation of your opinion or after the matter is settled? It could easily happen following the interview that you believe everything you are told and would likely support the position taken by the evaluatee. Having received collateral information sometime later, however, you could realize that what they told you was inaccurate or incomplete and you may come to a final conclusion not consistent with what you thought would be your initial opinion.

In this case, the evaluatee may feel deceived, and the feedback you gave them, in the best tradition of trauma-informed care, and to support their well-being, may well end up leaving them feeling deceived and betrayed. At the very least, any feedback should be conditional on reviewing collateral information and coming to a final conclusion.

Take Home Points:

With the myriad of specific considerations needed to decide if one is willing to discuss a case with a defendant or the family after a jury verdict, it is impossible to declare a clear answer to the question of participation. There may be reasonable or even good grounds to be involved in such a discussion and a way to do this that is ethical, professional, dignified, and respectful of all parties.

The first step in addressing such a challenge is to be aware of all of the risks one may confront. This is a place where consultation with the retaining lawyer and a senior colleague with experience in this type of situation can be invaluable. Should one decide to proceed, go slowly, and divulge only the amount of information absolutely necessary to answer the question.

There are times when less is more. ☪

References:

(1) S. L. Brodsky, J. Goldenson (2022) Feedback in forensic mental health assessment, *Journal of Forensic Psychology Research and Practice*, DOI: [10.1080/24732850.2022.2124140](https://doi.org/10.1080/24732850.2022.2124140)