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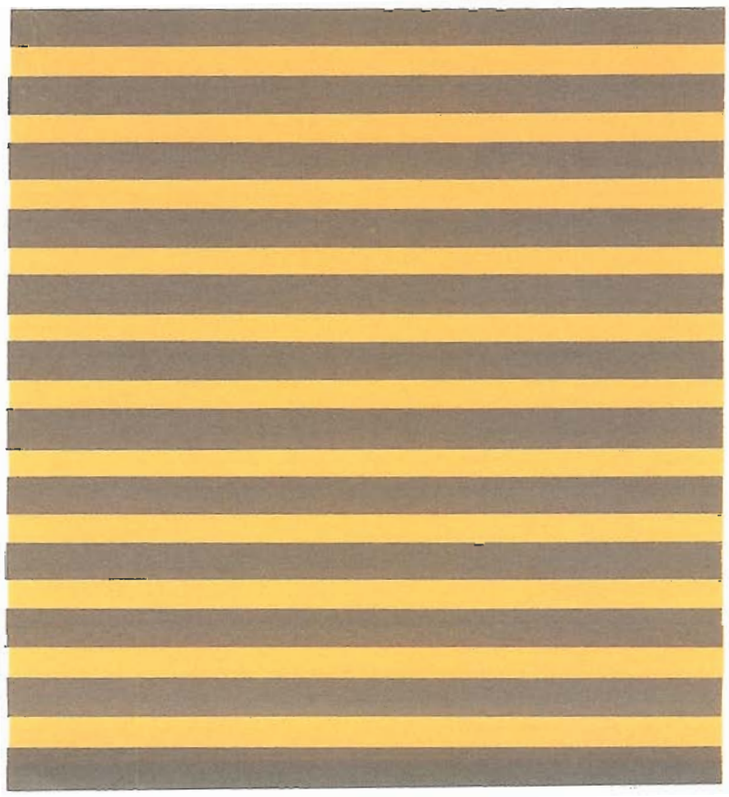

"Three's a crowd": the presence of third parties during the forensic psychiatric examination

BY ROBERT I. SIMON, M.D.

The forensic psychiatric examination is conducted best in privacy. Lawyers seek to be present during these examinations to ensure an accurate record and to effectively challenge any misrepresentations or inaccuracies at trial. Institutional settings often present daunting venues for the conduct of a private examination. If third parties must attend the examination, they should do so as observers only. The process of litigation should not be allowed to convert the consultation room into a courtroom. The forensic psychiatrist must ensure that vigorous advocacy does not undermine the integrity of the examiner nor the conduct of a valid, impartial professional examination.

Forensic psychiatric examinations and romance share very little in common except that "Three's a crowd." Third parties are usually unwelcome in the consulting room during the independent psychiatric examination. The cornerstone of psychiatric practice is privacy, but privacy vanishes under the

spotlight of litigation. Still, forensic psychiatrists have tenaciously attempted to maintain privacy as much as possible in the litigation context. Lawyers, however, often express concern that either the client or the examiner may act in ways that are deleterious to the client's best legal interests. Lawyers also worry that during an adverse examination, the power asymmetry existing between examiner and examinee can be used against their client.

These legal concerns also have been expressed by some courts that appear to grossly overestimate the power of psychiatrists to influence the outcome of a psychiatric examination. For example, in *People v. Ortiz* (Wanda)[1] the court stated: "When dealing with psychologically disturbed individuals, who are the most vulnerable of our citizens, a skilled examiner could possibly make a person not responsible for his/her crimes appear on videotape responsible and therefore thwart a potential defense. On the other hand, an expert in the human mind could make a sane, innocent person appear insane." Although this is unlikely, in a stressful, adversarial context some attorneys express concern that an unsupervised forensic psychiatric examination may be psychologically harmful to their client.

Shuman[2] conceptualizes two good-faith reasons why lawyers seek to be present during these examinations: (1) concern with providing an accurate record of the examination so as to effectively challenge any misrepresentations and inaccuracies of the results at trial; and (2) limitation of inappropriate subjects, methods or procedures. Other reasons cited by lawyers for attending the forensic psychiatric examination of their clients are to take the measure of the forensic expert and to prepare for cross-examination. This has been the overriding principle justifying New York court decisions permitting counsel to be present at court-ordered psychiatric examinations.[3]

However, the presence of lawyers and other third parties can interfere with the task-specific rapport needed between examiner and examinee. Further, all parties to the litigation may be harmed by an inadequate forensic psychiatric examination. Because a third party may be present during forensic examinations, psychiatrists should be aware of and know how to deal with the possible ramifications this poses for the forensic psychiatric evaluation.

Civil litigation

In litigation, some jurisdictions allow attorneys to be present during the examination in both civil and criminal cases, though the stipulation usually exists that they must not interfere with its conduct.[2] The right to counsel can attach by law to many aspects of criminal litigation, including forensic psychiatric examinations. In civil litigation, the right to counsel is arguable but may be mandated by the court. However, most courts have held that no right exists that allows counsel to be present during state-requested clinical evaluations.[4] Regardless, the presence of third parties during the examination should be approved by both parties to the litigation.

In civil litigation, courts have taken differing positions on due process arguments asserted by attorneys for their presence during court-ordered examinations.[5] A number of courts have recognized a litigant's presumptive right to the presence of counsel in civil litigation absent a showing that the presence of counsel would interfere with the examination.[6] Other courts have found that no such presumptive right exists. However, counsel is permitted to be present after a showing of good cause.[7] Still other courts have held that this question should be addressed by the sound discretion of the trial court.[8]

The right to counsel at involuntary civil commitment hearings is virtually undisputed by the courts.[9] However, only a

few states permit a patient to have counsel present during precommitment hearing psychiatric examinations.[9] A number of courts have rejected the argument that counsel has a right to be present during the precommitment hearing, usually on grounds that it might interfere with an objective evaluation.[10] These cases restricting counsel from attending prehearing examinations have been criticized as "unduly solicitous of those examiners who claim complete privacy is needed to establish the rapport necessary to make an evaluation.[11] However, Perlin[9] concludes that "it does not appear likely in the near future that the right to counsel will be extended to this stage [prehearing psychiatric interview] of the proceedings."

In some cases the court may place restrictions on the scope of inquiry permitted by the forensic psychiatrist during an examination, allowing an attorney to be present to ensure adherence to the court order. For example, in the *Matter of Alexander L.*,[12] a termination of parental rights case, the trial court on remand prohibited the doctor from inquiring into the patient's alleged past criminal acts or the reasons for the attorney's presence. The family court clinic's psychiatrist had refused to perform an examination in the presence of counsel. The court of appeals ruled that, as a matter of law, the parent was allowed to have counsel present in the absence of a demonstration that the attorney's presence would impair the validity of the psychiatrist's assessment. The court order on remand directed counsel to remain out of sight of the examinee but permitted his lawyer to interrupt the examination to prevent any violation of its restrictions.

In essence, the court applied a judicial standard that required the examiner to significantly depart from accepted professional standards of practice, thus interfering with valid medical conclusions. The New York State Psychiatric Association entered an appeal as *amicus curiae*, arguing that the prohibition prevented questioning about child abuse and neglect, substance abuse, and other important areas that could arise

during the examination.[13] The appeals court, however, was not persuaded by these arguments.[14]

When courts place unrealistic limitations upon the independent psychiatric examination, the forensic psychiatrist should consider the possibility of withdrawing from the case. The psychiatrist should make clear his or her rationale about how the court's conditions would interfere with the evaluation. If this is not acceptable, the psychiatrist should withdraw. It is the rare circumstance where the psychiatrist does not have this option. The forensic psychiatrist does not have to be put in the position of conducting an improper examination or one that cannot provide valid conclusions because of egregious demands made by the court. Allowing an attorney to be present to interrupt and object will likely doom the examination. If the psychiatrist decides to proceed with a restricted examination, compromise of the psychiatrist's ability to reach clinical decisions, including the inability to form an opinion, must be immediately reported to the retaining party or to the court for resolution.

Criminal litigation

The Sixth Amendment provides that the criminal defendant shall have the "assistance of counsel for his defense." The Supreme Court has held that two different rights are guaranteed by the Sixth Amendment. The first is a right to the presence of counsel; the second is the right to effective assistance of counsel. Melton et al.[15] point out that both these rights "have implications for the conduct of forensic evaluations."

The Supreme Court has granted criminal defendants a constitutional right to counsel beyond that of presence at trial. The defendant also has a right to counsel at pretrial proceedings such as at a postindictment line-up, at a probable cause hearing, and at arraignment.[15] The leading case on a criminal defendant's right to counsel is *United States v. Wade*.[16] The

Court held that the right to counsel attached at any stage in the criminal prosecution that was deemed "critical." In *Wade* the Court found that the right to counsel at postindictment line-up identifications met the "critical stage" test. It reasoned that the presence of counsel was necessary to observe, and thus to be able to reconstruct at trial, any irregularities in the identification process.

In *United States v. Ash*,[17] however, the Court held that no right to counsel existed when the police displayed a witness photo for identification. The Court concluded that the key question should be whether a procedure involves "trial-like confrontation" of the accused with "the intricacies of the law and the advocacy of the public sector." Thus the "trial-like confrontation" test in *Ash* narrowed the circumstances where a criminal defendant had the right to the presence of counsel.

Although the United States Supreme Court has not addressed the matter directly, a number of state and federal courts have held differing opinions on the issue of attorney presence during the forensic psychiatric examination.[5] A minority of states have equated the pretrial forensic examination with these "critical stages" of the criminal process and have held that Sixth Amendment guarantees apply to forensic evaluations. Most state and federal courts, however, still hold that a defendant does not have the right to have an attorney present during the forensic psychiatric examination.[18] The Supreme Court, in *Estelle v. Smith*, agreed with the majority position. Although the Court did require the state to inform the defendant's attorney about any planned examination, it noted with approval a lower court's opinion that the actual presence of an attorney during the forensic psychiatric examination "could contribute little and might seriously disrupt the examination."[19]

In *United States v. Byers*[20] a government psychiatrist testified that Byers seized upon a suggestion by his wife that he was under a "spell" when he murdered his paramour. The psychia-

trist, who had examined Byers over an eight-week period, opined that the defendant faked the paranoid delusions that he claimed directed his behavior at the time of the crime in order to avoid conviction. The "psychiatrist's representations" did not appear in the psychiatrist's report, nor was the defense attorney informed of it prior to trial. The jury found that Byers was sane and was guilty of second-degree murder, including weapon offenses. The case was appealed.

The court of appeals affirmed the convictions in a brief *per curiam* opinion.[21] Judge Bazelon, in his dissenting opinion, questioned the psychiatrist's interviewing technique and whether his "repeated inquiries had a coercive impact upon the defendant."[22] He observed:

> But as this case makes clear, testimony based on a compulsory psychiatric examination can raise questions more basic than the problem of self-incrimination. We cannot even begin to assess the unfairness and injustice which may have resulted from the confusion surrounding Byers' delphic remarks. Justice surely requires that we avoid, wherever possible, rank speculation by the jury on matters so critical as the precise words and context of a defendant's alleged admission. Here again, a taped record of the psychiatric interview could allay our fears. A taped record of all interviews would protect both the government and the defendant, and would help secure a fair verdict based on reasons, rather than on prejudicial speculation.[23]

Although Judge Bazelon clearly made a strong case for the defense to obtain verbatim interviews, the court did not rule on this point.

Byers petitioned for rehearing, with a suggestion for rehearing en banc. While the petition was pending, the Supreme Court rendered its decision in *Estelle v. Smith*.[24] The Court sustained Fifth and Sixth Amendment challenges to a psychiatrist's testimony in the sentencing phase of a capital case based on a pretrial competency examination. Byers's request for a rehearing en banc was granted in light of *Estelle*.

Judge Scalia, writing for the majority, concluded that there is no right to counsel at a post-notice insanity evaluation, and he strongly favored excluding the attorney from the forensic psychiatric evaluation:

> The "procedural system" of the law, which is one justification for the presence of counsel and which, by the same token, the presence of counsel brings in its train, is evidently antithetical to psychiatric examination, a process informal and unstructured by design. Even if counsel were uncharacteristically to sit silent and interpose no procedural objections or suggestions, one can scarcely imagine a successful psychiatric examination in which the subject's eyes move back and forth between the doctor and his attorney. Nor would it help if the attorney were listening from outside the room, for the subject's attention would still wander where his eyes could not. And the attorney's presence in such a purely observational capacity, without ability to advise, suggest or object, would have no relationship to the Sixth Amendment's "Assistance of Counsel."[25]

Judge Scalia also concluded that the Sixth Amendment does not require taping of state-requested evaluations: "It is enough, as far as the constitutional minima of the criminal process are concerned, that the defendant has the opportunity to contest the accuracy of witnesses' testimony by cross-examining them at trial, and introducing his own witnesses in rebuttal."[26]

In dissenting from the majority, Judge Bazelon again cautioned against reliance upon psychiatric testimony obtained from unmonitored examinations:

> The Constitution, of course, is not wedded to particular technologies. If audio or video taping were unavailable, the defendant's privilege could be preserved by having counsel or a defense expert present to observe and make notes of the interviewing. What is critical is that there be some independent monitoring of the interaction, so that a court is not required, as it was in Byers' case, to take a psychiatrist's representations purely on faith.[27]

Third-party influences

The forensic psychiatrist must consider the skewing effects of having third parties present during the independent psychiatric examination.[28] As Zonana[29] points out, "the psychiatric interview is not merely a set of questions and answers; it is a complex integration of many sources of data that include verbal response, style reaction and quality of interaction. Any factors which alter the way in which a psychiatrist collects and experiences the data alter the validity of the interpretation of the data in some unknown way." To minimize interference, attorneys should be instructed to sit behind the examinee and remain silent. When attorneys for both sides attend the examination, they should be cautioned against having any conversations or adversarial interaction. If any contention arises during the interview between opposing counsel and the examiner, the litigant may become quite upset. At that point opposing counsel may attempt to have the examiner removed from the case. Some forensic psychiatrists advise lawyers from the beginning that if they interfere or disrupt the examination in any way, it will be terminated.[30]

The presence of the attorney representing the examinee may impart an added adversarial tone and chill the examination, making it more difficult for the forensic psychiatrist to develop an examination rapport with the examinee. Consequently, the examinee may not be able to settle down and may experience an exacerbation of symptoms. The presence of attorneys may also provide an occasion for the examinee to magnify symptoms, either consciously or unconsciously. On the other hand, the presence of the examinee's family members or friends during the examination may provide added psychological support, calming the examinee so that she or he appears less symptomatic or mentally disordered than might be the case in an unencumbered examination.

Occasionally an examinee cannot or will not attend the forensic examination unless accompanied by his or her attorney, a

family member or a friend. For example, a phobic individual may not be able to leave home without constant accompaniment. Initially the third party may need to be present during the examination. It frequently turns out that the accompanying person is able to leave after a few minutes as the examinee begins to feel more comfortable. It usually is sufficient support for the examinee to know that the accompanying person is sitting in close proximity outside the office. Frequent breaks that allow the examinee to make contact with the accompanying person also may prove calming. When the attorney is the accompanying person, breaks pose the problem of the examinee possibly "checking" answers with the attorney.

Forensic psychiatric examinations conducted for the purpose of training necessarily involve the presence of other individuals. Such "public" interviews may introduce additional distorting influences that need to be addressed by the forensic psychiatrist in any opinions that are generated. A Sixth Amendment claim requiring the presence of counsel at a staff conference leading to an evaluation of a defendant's mental state at the time of the crime has been uniformly rejected.[31] The examinee should be notified ahead of time that he or she will be examined by the psychiatrist's team. As an extra measure of protection, written consent for the examination may be obtained from the examinee and his or her attorney.

The following vignettes illustrate some of the problems associated with third parties being present during the forensic psychiatric examination:

Vignette 1: The lawyer for the examinee in a psychic injury case was allowed to be present by law during the independent psychiatric examination. She forbade any inquiry into the litigant's past psychiatric history. Despite protestations by the examiner that current damages could not be assessed without knowledge of the examinee's prior level of psychological impairment, the lawyer remained adamant. The defense

lawyer also was present. Frequent acrimonious arguments erupted between the lawyers. The examination was interrupted many times by numerous calls to the judge. The examinee became extremely anxious and agitated. He had to excuse himself frequently to go to the men's room. The forensic examination took on aspects of a hostile deposition. It had to be rescheduled with strict guidelines set by the judge prohibiting interference by the attorneys.

Vignette 2: A forensic psychiatrist traveled to a distant city to conduct an examination of a litigant claiming severe posttraumatic stress disorder. The examination was to be videotaped. At the beginning of the examination, the technician performing the videotaping informed the psychiatrist that the plaintiff's attorney would not allow any inquiry about the traumatic stressor or about the plaintiff's psychological reaction to the stressor. The technician stated that he was the local sheriff and was acting as the emissary (third party present) of the plaintiff's attorney. The examiner called the defense attorney, who practiced in another city. The attorney wanted to "get the examination over with" and did not wish to confront the plaintiff's attorney. The examination was terminated by the forensic psychiatrist. The case was settled shortly thereafter.

Vignette 3: A forensic psychiatrist was retained by a plaintiff's attorney to examine a woman who had been brutally raped. The records of her psychiatric treatment revealed that the victim experienced extremely serious psychological distress and impairment caused by the rape. The examinee refused to be examined alone, requesting that her boyfriend be present. During the course of the examination, the boyfriend held the plaintiff's hand and kissed away her tears. Efforts to disengage the couple were fruitless. None of the severe psychopathology noted in the treatment records was discernible during the examination.

Vignette 4: A plaintiff claiming sexual harassment was examined by a forensic psychiatrist. After the interview was completed, the

examinee complained to her attorney that she was harassed by the examiner. The plaintiff's attorney filed a motion to have the examiner dismissed from the case. The forensic examiner produced an affidavit stating that he treated the litigant with respect and sensitivity during the entire lengthy examination. The motion to dismiss the examiner was denied. Thereafter the examiner adopted a defensive policy to have someone from his office always present during forensic examinations or to have the examination videotaped.

Vignette 5: By law, an attorney was allowed to be present during the examination of a client who was claiming severe head injury. Since the attorney had to be at trial, she sent a nurse–paralegal in her place. The paralegal never said a word during the examination. The paralegal was later proffered as a witness to impeach the alleged improper conduct of the forensic psychiatrist during the examination of the litigant.

These clinical vignettes illustrate only a few of the troubling issues that arise when third parties cast their shadow over the examination. Nevertheless, it is the forensic psychiatrist's responsibility to ensure that a viable psychiatric examination is conducted.[32] If conditions exist that are inimical to performing a credible examination, the forensic psychiatrist should notify the retaining party or the court and desist. The effects upon the examination of the presence of third parties, if any, should be noted in any oral or written opinions that are generated by the examiner. Prudence may dictate that examinations of litigants in fiercely contested cases be conducted with a disinterested party present or be recorded in some fashion. The presence of the examiner's third party may also be intimidating to the examinee. The office member in attendance may be subpoenaed for deposition or trial by either side.

The presence of third parties not working under the supervision of the psychiatrist may alter the confidentiality status of the evaluation.[33] The forensic psychiatric evaluation may be

protected under attorney–client privilege. If the evaluation is not helpful to the attorney's case, he or she may not ask for a report and not disclose the expert. The presence of a third party may pollute the attorney–client privilege and destroy the protected status of the information developed during the examination. The fact that an evaluation is court ordered does not necessarily mean that confidentiality no longer exists.

As the clinical vignettes suggest, it is far preferable to agree on methods, procedures and subject matter before the examination takes place or to seek a protective order from the court. Forensic examiners need to know beforehand the expected scope of the subject matter. They should also be able to describe and justify the methods and procedures to be utilized prior to examination. Objectionable aspects of an attorney's presence during a forensic psychiatric examination may include leading or cuing the examinee, interfering with the free flow of the interview, altering the meaningful connectedness and emergence of psychological associations and information, and disrupting the task-specific rapport needed between examiner and examinee. The findings of the psychiatric examination may be invalid under these circumstances.

Whenever possible, the forensic examination should be conducted in private. Exceptions do arise, however, when the presence of a third party is essential to the conduct of the psychiatric examination. Examples that come readily to mind include a caretaker who accompanies a young child for examination, an interpreter for a non-English-speaking litigant, or a person who is able to sign for the deaf. In evaluating competency to stand trial, observing the interaction between defendant and attorney is critical to assessing the defendant's ability to work with his or her attorney with a reasonable degree of rational understanding. A good question to ask is whether the presence of a third party enhances or inhibits the process and the goals of the evaluation. One very competent and experienced forensic psychiatrist has never encountered any trouble with third parties present at examinations.[33]

Alternatives

Audio- or videotaping is one alternative to the presence of a third party. Some litigants may covertly audiotape the interview. Some examiners ask at the beginning of the examination whether the litigant plans to tape the interview. The examiner also should inform the examinee if the interview is being recorded.

A technician who is present for videotaping can be an unwelcome third party. The examination may take on aspects of a TV production as the technician constantly fiddles with an imposing array of equipment and then finally points to the litigant and says, "You're on!" Halleck[34] suggests that it is much easier to do a videotaped interview through a one-way mirror or in some type of auditorium setting where the cameraman is not visible. Despite initial technical distractions, examiner and examinee usually settle down quickly and proceed with the examination when the technician remains unobtrusive. Disputes that arise about who is entitled to the examination tapes and when these records need to be disclosed may need a judicial ruling. The tapes should not be turned over to the examinee without prior approval of all parties to the litigation.

Videotaping provides a faithful record of the examination for all parties concerned, assuming the integrity of the original tape can be preserved.[35] It may have the positive effect of keeping some examiners on their best behavior and the negative effect of the litigant "playing to the camera." For the forensic psychiatrist, the interview is preserved for review at a later time, permitting a "reexperiencing" of the examination before deposition or trial. Moreover, accusations of misconduct made against the examiner by the examinee can be rebutted by the videotaping if a credible examination was conducted. On the other hand, videotaped interviews may allow some attorneys unfamiliar with psychiatric principles and procedures to undertake a misguided prosecutorial

scrutiny of the psychiatric examination. Legal and medical reasoning are based upon very different premises.[36] In an attempt to obfuscate or discredit the opinions of the forensic psychiatrist, opposing counsel may attack the examiner's style and conducting of the examination.

The use of audio- or videotaping should be cleared and consent obtained by both the examinee and his or her attorney. Approval also should be obtained from the retaining attorney. Many forensic psychiatrists feel that consent given on the audio- or videotape is sufficient. It may be prudent, however, to obtain consent in writing. If the examiner plans to have a member of his or her office staff present during the examination, the examinee and his or her attorney should receive prior notification.

There may be a number of personal or legal reasons why taping or the presence of an unknown third party to the examinee may be resisted. For example, an examinee who had been unlawfully videotaped while in a state of undress vehemently rejected a videotaped interview. Some attorneys do not want interviews taped because information developed during the examination may be used to impeach the examinee. Opposing attorneys may want a video examination for just such a reason to play before the jury. The tapes can also be used to impeach the examiner.

An alternative to audio- or videotaping is the presence of a court reporter. Because court reporters generally work inconspicuously, little interference is felt during the examination. Nevertheless, the presence of a court reporter who is taking down every word will likely heighten the adversarial tone of the examination. The use of an adjoining room that permits viewing through a one-way mirror is yet another possibility. An intercom or a TV monitor also can be utilized if it is available. Obviously all parties to the litigation must be aware of and agree to such an arrangement.

When an attorney is unable to be present, the opposing psychiatric expert may attend the forensic psychiatric examination. This adversarial context tends to breed distrust and intolerance among opposing experts. Two problems immediately arise because of the adversarial animus. First, there are over 450 schools of psychiatric therapies. American psychiatrists have welcomed innovations in psychiatric approaches that alleviate mental suffering, especially where the causes of the mental disorders are unknown.[37] However, in this adversarial litigation context, the opposing forensic expert may find the competent examiner's different approach to evaluating the examinee to be deviant and to so advise counsel. Second, individual differences among examiners in their examination styles and interactions with examinees may be viewed by the psychiatrist attending the evaluation as idiosyncratic rather than as simply individualistic and well within acceptable standards. It does not appear that the variety of schools usually translates into conflicting modes of evaluation—at least not in the forensic context. The forensic psychiatrist who acts as an observer of an independent psychiatric examination must remain vigilant and attempt to avoid or correct for litigation biases. The danger is that the consultation room will be turned into a courtroom.

When an examination is performed away from the examiner's office, the examiner may have even less control over the circumstances of the examination. Different rules may apply. Opposing counsel may come armed with rules and regulations placing upon the examination conditions and restrictions that apply in the jurisdiction where the examination is taking place. A prior understanding should be reached with the retaining attorney concerning any limitations placed on the examination by opposing counsel. At the least, opposing counsel often accompanies the examinee to the examination. The attorney usually explores the physical circumstances surrounding the examination. The examinee's attorney may also attempt to "size up" the examiner, perhaps engaging the

examiner in "casual" conversation. The forensic psychiatrist on the road must be prepared to experience the unexpected.

The venue for the conduct of the psychiatric examination should be carefully selected and be relatively neutral. In out-of-town examinations, the forensic examination should not be performed in the examiner's hotel room. A separate adjoining conference-style room, however, may be acceptable. Medical settings or hotel conference rooms usually prove adequate. Often examinations can be conducted at airport conference facilities. The forensic psychiatrist may want to avoid conducting an examination in the offices of either attorney. The hurly-burly of a law office can be distracting to both the examinee and the examiner. Conference rooms in law offices are rarely soundproofed and free from interruptions. The litigation context may heighten concerns about privacy and confidentiality. Nevertheless, many forensic psychiatric examinations are conducted in law offices, be they the offices of the retaining attorney or of opposing counsel or at a neutral law office.

Institutional settings

Maintaining privacy and confidentiality during the forensic psychiatric examination of an individual in a prison or an institutional setting can be a daunting task.[38] The problem arises most frequently when no private interviewing area is available. In an administrative office, the phone rings frequently; the correctional officer comes into the room to answer the phone, interrupting the examination. In maximum security settings, a correctional officer is usually present. If feasible, he or she should be asked to leave.

A similar lack of privacy exists when the examination takes place at a prison infirmary or library. Other people are constantly coming and going. If an interview is conducted in a prisoner's cell, other prisoners become privy to the examina-

tion, with possible adverse consequences for the prisoner interviewed. Glass cubicles may be available for examinations in a prison. Although nothing may be heard, visitors walking by or attorneys and prisoners in adjacent cubicles can observe the examination. A psychiatric examination conducted within the sight of others may severely inhibit the emotional responses of the examinee. If the examination room contains a two-way speaker system, the privacy of the interview is always a concern for the defendant, particularly before trial. This issue must be addressed forthrightly by the examiner.

If at all possible, arrangements should be made to examine a prisoner in the psychiatrist's office. This immediately raises the problem of examining a shackled prisoner. In some instances the accompanying officers may unshackle the prisoner, but they must keep the prisoner in view, thus remaining within earshot of the examination. At other times the prisoner may need to be shackled in order not to have a corrections officer present. In either event the forensic psychiatrist must speak to the issue of security. If the forensic psychiatrist does not address the fact that the prisoner is in shackles, a barrier to the examination is certain to arise. Empathic interviewing requires an acknowledgment of the mutual discomfort of examiner and examinee with the use of shackles while at the same time recognizing the reality of security required by those charged with responsibility for the prisoner.

The following clinical vignettes illustrate some of the problems that can occur when examining individuals in institutional settings:

Vignette 1: A prisoner was being examined in a glass cubicle. The surrounding cubicles were occupied by attorneys talking with other prisoners. The defendant's attorney had entered an insanity plea. The defendant was charged with murdering his wife a few moments after he found her in bed with her paramour. In attempting to describe his feelings when he dis-

covered his wife's infidelity, the defendant felt overwhelmed with emotion. He quickly stifled his reaction and looked about to see if others had observed him. He refused to continue. The examination had to be interrupted and rescheduled. For the next visit, a private setting was arranged where the prisoner felt free to express himself emotionally.

Vignette 2: A prisoner was being examined in a room with a two-way speaker system. The prisoner was facing capital murder charges and had a history of psychiatric illness. When the prisoner refused to cooperate with the examination, the psychiatrist realized that the two-way speaker system could be an issue. After discussing the prisoner's concerns about privacy, the psychiatrist went to the control area to be sure the speaker system was turned off. However, he could not guarantee that it would remain turned off. The prisoner requested that a private room be found where they could talk. Another room was found after much searching. A tenuous alliance for the examination was established.

Vignette 3: A criminal defendant with a chronic schizophrenic disorder was ordered to undergo a competency examination. The defense attorney's request to attend the examination was denied. The attorney argued that he would be unable to accurately reconstruct what had occurred during the examination, nor would his client's testimony alone have the same credibility as that of the psychiatrist. The court ordered the psychiatric interview to be taped. The psychiatrist preferred to have the lawyer present. She noted that the interview was understood by all parties to be adversarial. The psychiatrist felt that the presence of the defendant's lawyer would make little difference to the outcome of the examination itself.

It is important for the forensic psychiatrist to call the institution before the examination takes place to ensure the availability of a suitable private setting. An examiner who simply walks into an institutional setting unprepared may find that no private area is available to conduct an examination. The

psychiatrist should elicit the help of the parties requesting the examination to reserve a suitable place for its conduct.

In an institutional setting, the forensic psychiatrist should ensure, to the extent possible, that his or her evaluation is not compromised by a lack of privacy because of institutional limitations or by the presence of third parties with a special interest in the case. Audio- or videotaping of the examination in a private setting is an arrangement that the court may accept in lieu of the presence of an attorney.

Conclusion

Whenever possible, the forensic psychiatric examination should be conducted in privacy. Because of the adversarial context of most forensic psychiatric examinations, the request by third parties to be present during the evaluation must be anticipated. If third parties must attend the forensic psychiatric examination, they should do so as observers only. The interests of neither party to litigation are served when "due process" is allowed to convert the consultation room into a courtroom. It is the responsibility of the forensic psychiatrist to ensure that vigorous advocacy does not undermine the validity of the forensic psychiatric examination or the integrity of the examiner. The forensic psychiatrist must be able to conduct a valid impartial and professional examination.

Notes

1. People v. Ortiz (Wanda), NY Law Journal, June 24, 1986, p. 7 (Sup. Ct.).

2. Communication with Professor Daniel W. Shuman, Southern Methodist School of Law, March 6, 1996.

3. Rachlin S, Schwartz HI: The Presence of Counsel at Forensic Psychiatric Examinations. J. of Forensic Sciences 33:1008-1014, 1988.

4. Reisner R, Slobogin C: Law and the Mental Health System, Second Edition. St. Paul: West, 1990, p. 477; see also Comment, The Right of Counsel During Court-Ordered Psychiatric Examinations of Criminal Defendants, 26 Vill. L. Rev. 135 (1980).

5. Shuman DW: Psychiatric and Psychological Evidence, Second Edition. New York: McGraw-Hill, 1994, 1995 Annual Supplement § 2-25, 26.

6. Zabkowicz v. West Bend Co., 585 F Supp 635 (ED Wis 1984); Langfeldt-Haaland v. Saupe Enterprises, 768 P2d 1144 (Alaska 1989); Eskandani v. Phillips, 61 Ill2d 183, 334 NE2d 146 (1975); Nemes v. Smith, 37 Mich App 124, 194 NW2d 440 (1971); Tietjen v. Department of Labor & Industries, 13 Wash App 86, 534 P2d 151 (1975).

7. Wheat v. Biesecker, 125 FRD 479 (ND Ind 1989); Pedro v. Glenn, 8 Ariz App 332, 446 P2d 31 (1990); Edwards v. Superior Court, 16 Cal3d 905, 130 Cal Rptr 14, 549 P2d 846 (1976); Karl v. Employers Insurance, 78 Wis2d 284, 254 NW2d 255 (1977).

8. Barraza v. 55 West 47th Street Co., 156 AD2d 271, 548 NYS2d 600 (1989).

9. Perlin ML: Mental Disability Law: Civil and Criminal. Charlottesville: Michie, 1989, p. 287.

10. Ughetto v. Acrish, 130 AD2d 12, 518 NYS2d 398 (App Div 1987) modifying 130 Misc. 2d 74, 494 NYS2d 943 (Sup Ct 1985), appeal dismissed 70 NYS2d 871, 523 NYS2d 497 (NY 1987); Lessard v. Schmidt, 349 F Supp 1078, 1100 (ED Wis 1972), vacated and remanded, 414 US 473, on remand, 379 F Supp 1376 (ED Wis 1974), vacated and remanded, 421 US 957 (1975), reinstated, 413 F Supp 1318 (ED Wis 1976); Lynch v. Baxley, 386 F Supp 378, 389 N.5 (ND Ala 1974); State ex rel Hawks v. Lazaro, 202 SE2d 109, 126 (W Va 1974).

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