Stephen Rachlin,[1] *M.D. and Harold I. Schwartz,*[2] *M.D.*

The Presence of Counsel at Forensic Psychiatric Examinations

REFERENCE: Rachlin, S. and Schwartz, H. I., **"The Presence of Counsel at Forensic Psychiatric Examinations,"** *Journal of Forensic Sciences,* JFSCA, Vol. 33, No. 4, July 1988, pp. 1008-1014.

ABSTRACT: In virtually all situations involving forensic psychiatric assessments, the patient is represented by counsel. But does this fact entitle the lawyer to be present at the clinical evaluation? In a series of New York cases spanning a generation, judges have allowed presence of counsel at the psychiatric examination. The most common reason given for such a conclusion is to assure better cross-examination of the expert witness. Psychiatric evaluations mandated by law necessitate several guidelines different from those of the usual doctor/patient relationship. While we may have to accept the presence of attorneys in our consulting rooms, they should be observers only. To allow active intervention would distort the clinical process.

KEYWORDS: psychiatry, jurisprudence, doctor-patient privilege, privacy

The psychiatric interview is a highly specialized interpersonal interaction requiring specific skills on the part of the interviewer. Attention to practical matters such as the length of the interview, seating arrangements, and privacy have always been considered vital to the conduct of an effective interview [*1*]. The clinical psychiatrist is accustomed to absolute privacy when seeing patients for evaluation or treatment. The forensic psychiatric examination, evolving from the general psychiatric evaluation, has, by tradition, also been conducted in privacy.

Clinicians have generally resisted the intrusion of third parties, particularly attorneys, in the consulting room. The law has usually supported these objections with qualifications. In a current law school casebook of psychiatry and the law, Reisner states, ". . . courts have invariably rejected the claim that the Fifth and Sixth Amendments entitle a defendant to have his attorney present during a court ordered clinical interview" [*2*]. Of course, rights can be established on other than constitutional grounds, and in New York, there has been a significant amount of litigation in which the presence of counsel has been upheld. While we have not examined the posture of the law in other jurisdictions, New York may be a bellwether for sister states, necessitating a reevaluation of Reisner's conclusion.

In a growing line of cases spanning a generation, New York courts have allowed the attendance of counsel at clinical assessments. Is there any justification for a right to representa-

Presented at the 40th Annual Meeting of the American Academy of Forensic Sciences, Philadelphia, PA, 15–20 Feb. 1988. Received for publication 11 Sept. 1987; revised manuscript received 2 Nov. 1987; accepted for publication 13 Nov. 1987.

[1]Chairman, Department of Psychiatry and Psychology, Nassau County Medical Center, East Meadow, NY, and professor of clinical psychiatry, School of Medicine, State University of New York at Stony Brook.

[2]Chief, Program in Psychiatry and Law, chief, Psychiatry Outpatient Services, Department of Psychiatry, Beth Israel Medical Center, New York, NY, and associate professor of clinical psychiatry, Mount Sinai School of Medicine, New York, NY.

tion at the psychiatric interview? If so, under what set of special circumstances is it to be granted? Holdings in support of this development have been made in at least eight different medicolegal situations, involving four areas of law with which forensic psychiatrists may be engaged.

Case Law

Criminal Law

The leading case in criminal law is that of *Lee v. County Court of Erie County* [3]. Rufus Lee pled not guilty by reason of insanity to an indictment for a double murder committed two days after his release from a mental institution. A verdict of guilty was thrown out on appeal as contrary to the weight of the evidence. It was felt that Lee's sanity had not been proven beyond a reasonable doubt. A new trial was ordered, but Lee now refused to be psychiatrically examined, asserting the privilege against self-incrimination. On advice of counsel, the defendant persistently refused to answer questions about his behavior on the day of the crime, and the psychiatrists were unable to formulate an opinion.

The trial court then ordered that the plea of insanity be struck. On appeal, New York's highest court held that the privilege against self-incrimination does obtain during pretrial psychiatric examinations, but that Lee could not claim it, since he was pleading insanity and he had previously voluntarily submitted to examination. Disallowing the insanity plea was considered to be an improper sanction. The major holding of the court, and that for which it is frequently cited, is that since the defendant refused to be psychiatrically examined, he was barred from offering psychiatric evidence, though he could submit other relevant proof on the sanity question.

The court went on to state that defendants have a right to the presence of counsel in psychiatric examinations conducted after the issuance of their opinion. This was based on the reasoning that such evaluations represented a "critical stage" in prosecution. The analysis followed that of the United States Supreme Court in *United States v. Wade* [4] and was designed to assure a more meaningful cross-examination. The District Attorney was also given the right to be present. Both counsel were to act merely as observers.

This holding was subsequently codified into law: Section 250.10 of the Criminal Procedure Law states that when the defense intends to offer psychiatric evidence on the issue of criminal responsibility, both counsel may be present as observers at the clinical evaluation performed by a psychiatrist or psychologist designated by the District Attorney. Curiously, in the much more frequent determination, that of competency to stand trial, the same law says, in Section 730.20, only that a psychiatrist or psychologist retained by the defendant may be present at the court ordered examination.

A trial court, confronted with this paradox in *People v. Broccolo* [5], came to an interesting conclusion. Commenting on the lack of specific provisions for the conduct of a competency examination by a psychiatrist chosen by the District Attorney, and the lack of authority for the District Attorney to have his psychiatrist present at a court ordered examination, the court not only ordered the defendant to submit to this further evaluation, but added that the defense attorney may be present.

Tort Law

The earliest known case in our series comes not from criminal law, but from tort law, specifically, personal injury. In the 1966 case of *Milam v. Mitchell* [6], a trial court rejected the plaintiff's attorney's physical presence during the defense requested psychiatric examination, but it allowed a court reporter, placed in a position so as not to interfere, to record the interview. This decision was clearly in the interest of cross-examination.

Thirteen years elapsed until another frequently cited case was decided, also by a trial court. In *Murray v. Specialty Chems.* [7], precisely the same relief was ordered. Emphasizing that an examining physician may plan an adversarial role, an intermediate appellate court, in *Jakubowski v. Lengen* [8], allowed the presence of an attorney at a physical examination. The court stipulated that the lawyer's role should be limited to protection of the client's legal interests, presumably by objecting to the asking of what might be considered legally impermissible questions.

Two additional personal injury cases are worthy of note, both built on the precedents established in the foregoing litigations. In *Reardon v. Port Authority* [9], a psychiatrist's policy of excluding attorneys from his office during the conduct of examinations was found to be self-serving and without proper foundation. The specific presence of the lawyer was allowed despite the fact that the physician did not object to a court-reporter transcription, as had been granted in the preceding cases. The same psychiatrist attempted again to defend his policy in *Hernandez v. Consolidated Edison* [10]. Here, he was somewhat more successful. The court did not allow the attorney's presence but did authorize the plaintiffs to choose their own psychiatrist to attend the examination, and allow counsel to listen to and record stenographically the interview through an intercom.

The first known medical malpractice case evolving from the same foundation is that of *Ponce v. Health Insurance Plan of Greater N. Y.* [11]. In this appellate decision, the plaintiff was deemed entitled to the presence of her attorney and an interpreter during an examination by a defense appointed psychiatrist, as long as they did not interfere with the conduct of the examination. The physicians were warned against attempting to exclude the lawyers. Finally, a trial court recently made a complex decision relative to a physical examination of a chronically semicomatose patient. Noting, in *Mosel v. Brookhaven Memorial Hospital* [12], that if personally present, the plaintiff's attorney might be forced into having to testify as to the conduct of the examination if a controversy arose (rendering him unable to continue as counsel), the court instead ordered videotaping and audiotaping under a precisely defined set of circumstances.

Family Law

Yet another series of decisions comes from family law. In *Matter of Tanise B.*, [13] a termination of parental rights case which foreshadowed the leading case in this area, a lower court judge held that the right to counsel included the right to an attorney's presence at the court ordered psychiatric evaluation. The same right was extended to the petitioner and to the law guardian, so that a total of three lawyers could be present at the clinical examination. The court reasoned that loss of parental rights was an issue of great magnitude and, using the "critical stage" language of *Wade* [4], acted to assure the most meaningful cross-examination. The role of counsel was limited to that of observer and an audiovisual observation room was suggested for this purpose.

Matter of Alexander L., [14] is the only New York case bearing on the presence of counsel in proceedings to terminate parental rights which was decided by the highest court, the Court of Appeals. The Family Court clinic's psychiatrist had refused to conduct his examination in the presence of counsel. The Court of Appeals held that, as a matter of law, the parent was entitled to have counsel present absent a demonstration that such presence would impair the validity of the assessment. In interpreting the statutory requirement of legal representation for the parent from the time of first appearance in such proceedings, the court determined that it was "beyond question" that the clinical evaluation was to be included. The court based its decision on statutory rather than constitutional grounds and referred to the "critical phase" determination noted in cases we have discussed previously.

Upon remand back to the trial court, an order was fashioned which directed that counsel was to remain out of the line of sight of the respondent, but which prohibited the doctor from questioning the parent on past acts of an allegedly criminal nature or on the reasons for the attorney's presence. The order permitted the respondent's lawyer to interrupt the examination to prevent violations of this restriction. For the first time in its history, the New York State Psychiatric Association entered an appeal as *amicus curiae.* In its brief, the Association wrote that this constriction would preclude inquiry relative to child abuse and neglect, drug usage, and other possibly critical avenues. It was argued that the court was requiring a significant departure from accepted medical practice which could well preclude valid conclusions about parenting abilities. The potentially disabling effects of intervention by parent's counsel were outlined [*15*].

The appellate court was less than sympathetic (*Matter of Alexander L.* [*16*]). It modified the order only to the extent of adding that counsel for the petitioner and the law guardian also had a right to be present. Commenting that the presence of outsiders might be self-defeating, the court nonetheless felt that even-handedness was necessary to avoid any unfair advantage in cross-examination.

During the time *Alexander L.* was in litigation [*14,16*], other courts dealt with the role of the attorney in family matters wherein psychiatric evaluation was required. In another termination of parental rights case, *Matter of Jose T.* [*17*], the trial court granted all counsel the right to be present at the statutorily mandated clinical examination. In this case, however, it was directed that the lawyers remain out of the line of sight of both the examiner and the examinee and that they take no active role during the examination. Compelled recording was denied in this case, but would be allowed if the court clinic did not object (to either taping or a court reporter). In *Rosenblitt v. Rosenblitt* [*18*], a child custody case, the presiding justice in one appellate department commented that the plaintiff should be permitted to have counsel present, outside the examination room, or at least out of view of the parties. He added that the appropriate role of counsel should be that of an observer, and that no transcript be made of the examination.

Two other family law cases coming from the intermediate level Appellate Division should be noted. In *Nalbandian v. Nalbandian* [*19*], a divorce case, the plaintiff wife sued for maintenance because of psychiatric disability. She was allowed to have her attorney present during the psychiatric evaluation while the defendant's counsel was not allowed to be present. Finally, in *Sardella v. Sardella* [*20*], plaintiff's counsel was likewise authorized to be present at the psychiatric examination, solely as an observer, with the doctor selected by the court rather than by the defendant.

Civil Commitment

The last medicolegal area we will review is involuntary psychiatric hospitalization. The intermediate Appellate Division recently ruled in *Ughetto v. Acrish* [*21*], that patients have a right to counsel during precommitment hearing psychiatric examinations. This right can be exercised through either the presence of counsel (whose role is limited to observation) or by videotaping the interview. Though the court emphasized that the examinations in question were not those related to treatment but rather those related solely to the purpose of preparing the examining psychiatrist for testifying, no mention is made of the common practice in private and voluntary facilities in which preparation for testifying evolves solely from serial treatment interviews. In the same decision, the court ruled against the plaintiff's claim that their privilege against self-incrimination permitted them to refuse to submit to such examinations. The appeal to New York's highest court has just been dismissed. It is of note that plaintiff's counsel is the same attorney who won a stunning decision on the right to refuse treatment in *Rivers v. Katz* [*22*].

Discussion

The overriding principle justifying New York court decisions in favor of the presence of counsel at court-ordered psychiatric examinations has been preservation of the principles of the adversarial system under which the courts operate. While psychiatrists may not view their participation in such evaluations as adversarial, the Supreme Court, in *Ake v. Oklahoma* [*23*], may well have suggested otherwise. Accordingly, enhancing the value of the cross-examination of the expert witness is the most frequently cited motivation for the decisions in these cases. In some cases the courts have interpreted statutes guaranteeing the right to representation in the broadest sense, to mean representation at every stage of litigation, including the psychiatric examination. Other decisions have emphasized that the clinical examination is, in fact, a "critical stage" in the litigation process. One clue as to why the courts have been so concerned about extending due-process protections to the psychiatric examination may lie in the overestimation of the interviewer's skills apparent in *People v. Ortiz (Wanda)* [*24*]. The patient-defendant had killed her mother one day after discharge from a psychiatric unit. The judge rebuked the prosecution for having a psychiatric social worker interview the defendant without her lawyer present, stating: "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 to be insane" [*24*]. If this were true, the due-process argument would, indeed, be irrefutable.

The courts in this series have provided for the right to counsel in various ways. In a number of cases counsel was to be present in the examining room and some judges have allowed for the presence of multiple attorneys. Most have added the requirement that they be out of the line of sight of the doctor and his examinee. Others have suggested modifications such as transcription by a court reporter or the use of an intercom. One-way mirror rooms have also been suggested. The use of audio or videotaping has also been commonly mentioned. Judge David Bazelon, probably the most well-known member of the federal judiciary on psychiatric matters, writing the United States Court of Appeals decision in *Thornton v. Corcoran* [*25*], held that the right to counsel under *Wade* [*4*] did not extend to the attorney's presence at a hospital staff conference. The hospital had taped the meeting, and Bazelon suggested that the recording satisfied constitutional due-process rights. More recently, Bazelon wrote a significant dissent in *United States v. Byers* [*26*], arguing again for the utility of recording clinical interviews. The majority declined to rule on this question.

What can be the justification for this seeming intrusion by the judiciary into the traditional privacy of the psychiatric consulting room? Why are laws being written which explicitly grant counsel a right to be present at certain forensic psychiatric examinations? The answer may well lie in the particular nature of the forensic psychiatric examination, a clinical practice at the juncture of psychiatry and the law. Counsel for the New York State Psychiatric Association[3] points out that statutory examinations, that is, those mandated by law, cannot be looked at as embracing the traditional doctor-patient treatment relationship. Of course, forensic psychiatrists know this when they inform their examinees of the purpose of the evaluation and its lack of confidentiality. Indeed, in the role of forensic psychiatrist, clinicians may move, as one of us has discussed elsewhere, more and more into a modified adversarial, or at least advocacy, position [*27*]. Certainly an inadequate justification, but one which may underlie many of these decisions is the alarming overestimation of the powers of psychiatrists to make the mad look sane and the sane look mad, in *People v. Ortiz (Wanda)* [*24*].

This review demonstrates that in New York, the battle to keep the lawyer out of the consulting room during court ordered or statutorily required criminal forensic, tort, family law,

[3]S. Stein, Esq., personal communication, June 1987.

and even civil commitment examinations is all but lost. However, a vital distinction must be made between the presence of counsel and his intervention in the clinical process. Even agreeing with the former in no way implies acceptance of the latter. If our consultation is to be of any value to the finder of fact, psychiatrists must continue to insist that when attorneys must be present, they be present as observers only. Indeed, the presence of counsel may reassure the interviewee that he can safely answer the doctor's questions. To allow an active role for the lawyer, however (as the judge in *Alexander L.* [*16*] ordered), would turn the interview into a courtroom, without benefit of an impartial judge. It would serve the interests of no one, because of its distorting effect on our ability to perform an objective, reliable, and valid assessment.

Since we have learned to use one-way mirrors and videotapes as didactic methods for our clinical trainees, perhaps the challenge lies in discovering how to adapt these modalities for the forensic science situation. However, danger lies in this direction too. By memorializing the interview on tape, we may be subjecting a macroscopic clinical event to a microscopic legal analysis. Legal reasoning and clinical reasoning are distinct entities based on differing sets of premises [*28*]. Scrutinization of the interview during cross-examination may discredit the reasoning of the clinician, not because it is wrong, but because of these inherent differences. Would stenographic transcripts be a happier medium? Ultimately the courts will decide. In each case psychiatrists must argue for the preservation of the integrity of our clinical methods, thereby maintaining our ability to be of assistance to the courts while providing the extended due-process protections which the courts are increasingly demanding.

References

[*1*] MacKinnon, R. A. and Michels, R., *The Psychiatric Interview in Clinical Practice*, Saunders, Philadelphia, 1971.

[*2*] Reisner, R., *Law and the Mental Health System*, West Publishing, St. Paul, MN, 1985.

[*3*] *Lee v. County Court of Erie County*, 27 N.Y. 2d 432, 318 N.Y.S. 2d 705, 267 N.E. 2d 452 (NY 1971).

[*4*] *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

[*5*] *People v. Broccolo*, 130 Misc. 2d 606, 497 N.Y.S. 2d 816 (Co. Ct. 1985).

[*6*] *Milam v. Mitchell*, 51 Misc. 2d 948, 274 N.Y.S. 2d 326 (Sup. Ct. 1966).

[*7*] *Murray v. Specialty Chems.*, 100 Misc. 2d 658, 418 N.Y.S. 2nd 748 (Sup. Ct. 1979).

[*8*] *Jakubowski v. Lengen*, 86 A.D. 2d 398, 450 N.Y.S. 2d 612 (App. Div. 1982).

[*9*] *Reardon v. Port Authority*, 132 Misc. 2d 212, 503 N.Y.S. 2d 233 (Sup. Ct. 1986).

[*10*] *Hernandez v. Consolidated Edison, New York Law Journal*, June 10, 1986, p. 6 (Sup. Ct.).

[*11*] *Ponce v. Health Insurance Plan of Greater N.Y.*, 100 A.D. 2d 963, 475 N.Y.S. 2d 102 (App. Div. 1984).

[*12*] *Mosel v. Brookhaven Memorial Hospital*, 134 Misc. 2d 73, 509 N.Y.S. 2d 754 (Sup. Ct. 1986).

[*13*] *Matter of Tanise B.*, 119 Misc. 2d 30, 462 N.Y.S. 2d 537 (Fam. Ct. 1983), *aff'd* 98 A.D. 2d 689, 471 N.Y.S. 2d 242 (App. Div. 1983).

[*14*] *Matter of Alexander L.*, 60 N.Y. 2d 329, 469 N.Y.S. 2d 626, 457 N.E. 2d 731 (NY 1983).

[*15*] Supreme Court of the State of New York, Appellate Division, First Department, *Matter of Alexander L.*, Brief for *amicus curiae* New York State Psychiatric Association.

[*16*] *Matter of Alexander L.*, 112 A.D. 2d 902, 493 N.Y.S. 2d 157 (App. Div. 1985).

[*17*] *Matter of Jose T.*, 126 Misc. 2d 559, 481 N.Y.S. 2d 991 (Fam. Ct. 1984).

[*18*] *Rosenblitt v. Rosenblitt*, 107 A.D. 2d 292, 486 N.Y.S. 2d 741 (App. Div. 1985).

[*19*] *Nalbandian v. Nalbandian*, 117 A.D. 2d 657, 498 N.Y.S. 2d 394 (App. Div. 1986).

[*20*] *Sardella v. Sardella*, 125 A.D. 2d 384, 509 N.Y.S. 2d 109 (App. Div. 1986).

[*21*] *Ughetto v. Acrish*, 130 A.D. 2d 12, 518 N.Y.S. 2d 398 (App. Div. 1987) *modifying* 130 Misc. 2d 74, 494 N.Y.S. 2d 943 (Sup. Ct. 1985), *appeal dismissed* 70 N.Y. 2d 871, 523 N.Y.S. 2d 497 (NY 1987).

[*22*] *Rivers v. Katz*, 67 N.Y. 2d 485, 504 N.Y.S. 2d 74, 495 N.E. 2d 337 (NY 1986).

[*23*] *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

[*24*] *People v. Ortiz (Wanda), New York Law Journal*, June 24, 1986, p. 7 (Sup. Ct.).

[*25*] *Thornton v. Corcoran*, 407 F. 2d 695 (D.C. Cir. 1969).

[*26*] *United States v. Byers*, 740 F. 2d 1104 (D.C. Cir. 1984).

[27] Rachlin, S., "From Impartial Expert to Adversary in the Wake of *Ake*," *Bulletin of the American Academy of Psychiatry and the Law*, Vol. 16, March 1988, pp. 25-33.

[28] Guthiel, T. G., Rachlin, S., and Mills, M. J., "Differing Conceptual Models in Psychiatry and Law" in *Legal Encroachment on Psychiatric Practice*, S. Rachlin, Ed., New Directions for Mental Health Services, No. 25. San Francisco, Jossey-Bass, 1985.

Address requests for reprints or additional information to
Stephen Rachlin, M.D.
Department of Psychiatry and Psychology
Nassau County Medical Center
2201 Hempstead Turnpike
East Meadow, NY 11554