

THE PSYCHOLOGY OF LITIGATION

On Going to Jail

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Years ago, as a hatchling psychologist attempting to learn the ropes of forensic psychology, I discovered that correctional officers often did not know what to do with me when I appeared at their facility to complete a mental assessment on an inmate. I had the distinct impression that they had not seen many of my ilk. I thus got in the habit, long since discontinued, of asking the referring attorney to spell out in simple language via a court order the purpose of my visit and the accommodations I required to meet my goal, i.e., a private room where we would not be overheard in view of the privileged nature of the interview, a table and 2 chairs, and no handcuffs for at least a portion of the exam so that the defendant could complete psychological testing unimpeded.

Twenty-seven years later, correctional authorities now seem much more confident about how to handle me – more often than not they attempt to put me in a room with a correctional officer in attendance accompanied by assurances that a) the officer cannot hear what is being said and b) if he or she can hear, it does not matter because the officer is completely disinterested in the case. Objecting to the proposed guard is likely to be met with the offer that my only alternative is to use an attorney booth with a Plexiglas partition separating me from the defendant, a situation, trust me, that is not at all conducive to establishing the kind of relationship necessary to conduct an evaluation of this nature.

I recently had cause for concern when I learned that the judge presiding over the Huskey case thought it acceptable that an officer be in the room while the State's mental health expert examined the defendant, being of the belief that the room was sufficiently large that the interview could not be overheard by the officer. Having visited Riverbend Maximum Security Institute many times and in particular having been in the reception room where Mr. Huskey's examination was conducted, I can assure you that the trial judge is sadly mistaken in his belief that the room in question is sufficiently large enough that the interview would not have been overheard, not just by someone actually in the room itself but even by someone standing outside the door.

Understandably, Mr. Huskey was not comfortable with this arrangement and on the second day terminated the examination. According to the newspaper, the judge opined that if the State's expert could not complete an evaluation and testify, then the defense's experts, of which I am one, could likewise not testify. In short, Mr. Huskey was not afforded the opportunity of a mental defense. Apparently, a defendant who is uncomfortable with a guard eavesdropping on a private interview and who refuses to

cooperate with such a set up, double entendre intended, may be at real risk of losing the right to a mental defense.

Huskey, as I understand it, was not refusing to be evaluated by the State. He was refusing to have his evaluation overheard by a layperson, someone not qualified to understand and interpret the information being imparted to the State's doctor. I can easily foresee an expert saying he or she does not have an opinion to offer but the guard nonetheless testifying as to what he may have heard despite his testimony not being "expert." I can envision a prosecutor electing not to use the more cautious professional opinions of an expert in favor of the perhaps more inflammatory observations of the prison guard who had been present for the interview.

What especially bothers me about the Huskey case is that always my ace in the hole, after I have been browbeaten by first one guard and then another as I make my way up the hierarchy of supervising officers, is that if worse comes to worse I can always threaten to call the judge, heretofore feeling completely confident in my belief that the judge would back me up. Now, I fear that the response I am likely to get from jail personnel will vary from "So what?" to "Go ahead and call, lady" since evidently it is okay with some judges for what amounts to state lay witnesses to listen in on psychological interviews. Although I realize that this particular situation involves a State expert and the parallels I am drawing are not exact, it is nonetheless a little close for comfort and makes me uneasy.

Huskey was also concerned that he would be put in physical danger by his revelations, the guard later discussing with others what he overheard. This is a not uncommon occurrence, based on my experience. A jail, if you have not thought about this, is its own little community. There is much going on behind the scenes to which you and I are not privy. Information, rumors, and gossip fly thick and furious in this community, with all the usual ramifications and consequences. It is thus not too surprising, aside from legitimate fears about having prison staff privy to information they have no business knowing, that a defendant might not want his or her innermost thoughts and feelings broadcast throughout the prison grapevine, especially if this involves such things as rape, murder, and the like. Regardless of how one may feel about what prisoners are entitled to by way of constitutional rights, respect, compassion, and all that other good stuff, as far as I am concerned a defendant is still only accused, not convicted, and therefore should continue to enjoy certain basic rights, among those the right not to be murdered by his fellow inmates prior to going to trial.

Recently when visiting a prison to perform a mental state evaluation in a high profile case I was ushered into what was termed the visitors' gallery, a room several times larger than the room in which Mr. Huskey had been examined. An officer was posted at the very far end of this room while the defendant and I sat on the other end. I was given the usual bland assurances about the guard being unable to hear what was being said. Unconvinced, I asked the guard in a moderately low conversational tone how she was doing. She responded that she was just fine, with this simple demonstration being enough for me to know that this arrangement would never do.

To object means to run the gauntlet of an increasingly strident string of officers insisting on their “policy” of the omni-present guard before my bluff to complain to the associate warden was called and the nearby building in which he was ensconced pointed out to me. The short version is that he handled the problem to my satisfaction but by then I was exhausted from being repeatedly bullied. I was in no frame of mind to do an evaluation, with a ridiculous amount of time having been wasted, at state expense, in providing me what I should have been given in the first place and what I had specifically requested – the small room off the visitors’ gallery that has a glass window such that a prison guard could readily see, but not hear, both the defendant and me while sitting on the far side of the room, door closed.

I had occasion to meet that very afternoon with several attorneys who practice in the city where this particular prison is located. I shared my tale of woe and they commiserated, saying they likewise experience this difficulty on a regular basis at this same state prison. When I asked how they deal with this, thinking there might be a way of avoiding the stressful ordeal I had recently experienced, they told me they whisper during their attorney-client meetings.

Whisper!?! I cannot see me whispering for multiple 2 to 3 hour clinical interviews wherein I am attempting to ascertain, among other things, the thoughts and feelings an individual experienced when he committed a homicide. Shushing him or otherwise telling him to lower his voice as he recounts with building passion an event that has changed his life forever, left him with the mark of Cain throughout all eternity, possibly brought financial ruin as well as humiliation to his loved ones, etc. strikes me as counterproductive and inconsistent with the job I have, in many cases, been court ordered to perform. That is, I am limited in my ability to reach opinions about someone’s mental condition if I cannot evaluate an individual in his or her natural state, so to speak, where I can assess his or her full range of emotions.

Back to my story. The next day I returned to the prison, flushed with victory, pleased to have an acceptable place to work, and having renewed faith in Tennessee’s penal system. Shortly after beginning my interview the guard entered the room and very politely asked the female inmate and I to position ourselves so that he could see our mouths from his chair on the far side of the room. Mystified, I asked the inmate what this was all about after he left the room, not sufficiently having my wits about me at the time to ask the guard what he meant by such an unusual request. She informed me that several of the guards at this prison read lips.

While I appreciated the guard’s unintentional thoughtfulness in alerting me to a hazard that I would never in a million years have thought of myself, to this day I remain in total wonderment at the prison’s ingenious “resolution” of the situation: how could I possibly make a fuss about being overheard when, true to our agreement, such was clearly not the case. The guard, in all innocence, apparently saw nothing amiss in letting me know his intentions of learning the content of our discussion by reading our lips inasmuch as he was not *listening* to us.

In view of the behavior I am encountering from prison staff in the jails and prisons I visit throughout Tennessee, I have to suspect that correctional personnel are getting by with what I consider to be highly questionable behavior on a regular basis or they would not be so confident in their insistence about the correctness of their so-called policy and so sincerely and genuinely affronted when it is challenged. If I am repeatedly being met with this, then I assume other experts are as well. An attorney might do well to go over the ground rules with her/his expert prior to that individual entering a correctional facility so that later there are no surprises in the form of state witnesses popping up here and there who have sat in on interviews, especially if the expert has heretofore had little experience with prisons.

As for me, I believe it is time to consider reverting to my earlier “policy” of asking the referring attorney for a court order by way of explaining to correctional facilities what privileged communication involves and how this applies to a forensic mental evaluation - you can see but not hear the expert and the defendant. I guess I now need to add – and no lip reading guards, either.

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