

Reflections on Coaching by Attorneys

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There are two potential contaminants of the psychiatric examination in a medicolegal context. One is the malingering of forensically significant mental illness; the second is attorneys' coaching of litigants in an attempt to influence the litigants' behavior and demeanor in the examination and thus to affect the outcome.¹ Coaching represents both a forensic and an ethics problem, but the exact nature and the occurrence of coaching itself are not always unambiguous. For completeness, consider that defendants today are surrounded by "coaching influences" from friends, family, other inmates, jailhouse lawyers, the media, and the Internet. I focus here only on the attorney-client interaction.

Relatively little has been written about this problem, although there are anecdotal reports heard in practice. For instance, experts tell of litigants appearing at examinations bearing the appropriate pages of the *Diagnostic and Statistical Manual*. The pages have been supplied by their attorneys, with the ostensible goal of helping the client understand his or her problem, the better to explain it, or other specious rationalizations. Most attorneys, of course, practice at a higher standard of ethics than that in this example.

This editorial is intended to open the topic and to address the essential difficulty of distinguishing valid advice from venal coaching. Although little can be done by the forensic psychiatrist to affect or correct the latter, the expert's awareness of the problem may assist in maintaining the desired objectivity, accuracy, and validity of the forensic assessment. Indeed, the forensic expert's objectivity intrinsically contrasts with the attorney's legitimate partisanship in the ad-

versary model and places each discipline on a different ethics track.

I will review a range of attorney-client interactions depicted in a variety of sources, realistic and fictional, ranging from overt and unabashed coaching to highly ambiguous examples.

Sources

In response to a solicitation in the American Academy of Psychiatry and the Law (AAPL) Newsletter, some case examples were submitted to me. Additional examples appeared in a popular movie and a best-selling novel. In another example, a client-oriented advisory sheet, intended to be reviewed by a client before being medically examined, was obtained anonymously from an attorney. Finally, a law review article described an ambiguous case. These sources serve as stimuli for consideration and discussion of this obscure but problematic practice.

Clear Coaching

Example 1: The novel, *Anatomy of a Murder* by Robert Traver,² was published in 1958, and later was made into a successful movie starring James Stewart and George C. Scott and directed by Otto Preminger. The author, an attorney, included in the novel, with remarkable explicitness, a conversation between a murder suspect and his defense attorney, the novel's narrator. Although this fictional account owes no allegiance to reality, it provides a dramatic stimulus to these reflections.

The actual conversation covers a dozen pages and is a colorful, authentic-sounding bit of legal arcanum, well worth reading in full, but, alas, too long for this presentation. In the following excerpt, the attorney is trying to suggest almost imperceptibly

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that his client, who was witnessed committing murder, plead insanity:

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached, and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it? [Ref. 2, p 35]."

The excerpt so far, presenting the core dilemma of our topic, establishes a number of highly relevant points supplied herein, together with the relevant rationalizations: coaching is universally decried and universally used; it is wrong and unethical and is used by otherwise ethical attorneys; it is a form of deceptive and self-deceiving duplicity; and it is as old as the law itself. Although the point has been made, some further excerpts cry out for inclusion here:

"Tell me more."

"There is no more." I slowly paced up and down the room.

"I mean about this insanity."

"Oh, insanity," I said, elaborately surprised. . . . "Well, insanity, where proven, is a complete defense to murder. . . . [details are reviewed]. So the man who successfully invokes the defense of insanity is taking a calculated risk. . . ."

The Lieutenant [the suspect] looked out the window. He studied his [cigarette] holder. I sat very still. Then he looked at me. "Maybe," he said, "maybe I was insane."

Very casually: "Maybe you were insane when?" I said. . . .

"You know what I mean. When I shot Barney Quill. . . ."

"You mean—you don't remember shooting him?" I shook my head in wonderment.

[The attorney feeds a series of "You mean you don't remember. . ." questions to the client that elicit the expected negative answer.]

"You don't even remember threatening Barney's bartender when he followed you outside after the shooting—as the newspaper says you did? . . ."

The smoldering dark eyes flickered ever so little. "No, not a thing [Ref. 2, pp 45–6]."

As shown in this complex dance of disingenuousness, the client apparently volunteers on his own the idea of pleading insanity, and the attorney, who has spent many minutes "explaining" the legal possibilities, sees himself as being able to disavow any coaching. More disturbingly, the scenes, taken as a whole (beyond these excerpts), convey that the attorney has not the slightest belief that the client meets insanity criteria in any way.

Example 2: A movie entitled *Ten to Midnight*, starring Charles Bronson and written by William Roberts, was released in 1983.³ The movie depicts a serial killer tracked down by Bronson's law enforcement character. Upon being arrested, the killer has a conference with his attorney. The following dialogue occurs:

Defense Attorney: We can always plead insanity later.

Warren (the killer): (firmly) I'm not insane.

Attorney (selling it): I know that, but in case we want to go that route, I just want you to know we're in pretty good shape. No matter what you've done, the worse it is, the jury's going to think no normal person coulda done it. You follow me? So we work out a routine: say you're two people, one good, one bad, you start hearing voices, the bad boy telling the good boy what to do. He doesn't want to do it, but he can't help himself, see?

Warren (with cold deliberateness): You're saying I'm a schizo.

Attorney (emphatically): No, Warren! I'm saying that you'll walk out of a crazy house alive! They'll carry you out of a gas chamber dead!

This example—plausible, albeit fictional—constitutes unambiguous coaching. The attorney literally paints a bogus and flimsy insanity picture and pushes it on his client over the latter's objections. The movie context portrays the attorney as seeing this as a purely strategic maneuver, with no apparent awareness of any compromising of ethics (later in the movie the killer tries it on Bronson's character without success and is shot). Here, as in the previous excerpt, the attorney expresses no conflict, ethical or otherwise, about invoking insanity, even when he himself believes it does not apply.

Possible Coaching

Example 3: One challenge in analyzing the present editorial topic, as the excerpt from the novel and film above make abundantly clear, is the fine line that commonly exists in reality between the attorney appropriately assisting the client to prepare for the unfamiliar legal process and for discovery on the one hand, and the more explicitly corrupt "coaching" approach on the other. The excerpt from *Anatomy of a Murder* brought out the subtlety, uncertainty and rationalizations involved along that thin line, as does the following example. These headings (each followed in reality by amplifying prose not supplied here) are found in a leaflet apparently given by an attorney to potential examinees⁴ and entitled "Top Ten Tips for a Panel Exam":

1. Your first goal is to be believable.

2. Your exam begins when you drive into the parking lot.
3. Describe the accident in a general way.
4. Be prepared to discuss your body movement at the time of the accident.
5. Describe your injuries from the top of your head to the tip of your toes.
6. Describe your pain by frequency and intensity.
7. Description of limitations.
8. Do not volunteer information.
9. Avoid absolutes like “never” and “always”
10. Be honest with where it hurts [Ref. 4, p 1]

The prose that follows and illustrates Point 10—comparable with the explanatory paragraphs that follow each heading in the original—is supplied here verbatim:

Do not overreact to light touch. The doctor may touch you lightly and say “this hurts, doesn’t it?” The answer must be “no.” The doctor may press on the top of your head and suggest your low back hurts. Again, the answer must be “no.” The doctor may grab you at your shoulders or waist and twist your knees and suggest your low back hurts. The answer is again “no.” The doctor may have you sit on a table and lift your leg and suggest your low back hurts. The answer is “no.” Even clients who would otherwise be completely honest, may be subject to the suggestion by the doctor that they are having pain when they are not. The doctor may touch you in a place that has pain, but unless it really hurts the [sic] you should say, “yes, that is the place where I have pain, but that light touching does not hurt.” [emphasis added].⁴

Is this an attempt to bolster the client’s will to resist possible medical suggestions designed to detect malingering? Is it a suggested counterploy to the doctors’ expected ploys—a counterploy aimed, no matter how indirectly, at the truth? Or is it simple coaching? The last description is clearly supported by the fact that the attorney in the phrases in quotes is telling the examinee explicitly what to say at certain points in the evaluation, rather than telling the examinee, “Don’t be misled by suggestions,” or “Just tell the truth”; but does this differ substantively, technically, or ethically from telling a client, “You should plead not guilty,” when legal advice encompasses what the client should say?

Example 4: An adolescent female at a youth detention center faced serious charges and the possibility of waiver to the adult system. She was anxious and remorseful for her crime but behaved appropriately. After a phone call from her attorney, she changed dramatically, showing regressive behavior marked by frequent outbursts and noncompliance. A nurse later reported that she had overheard the attorney advise the inmate to “act childlike” in hopes that this might keep her in the juvenile justice system.

If correctly overheard and understood as intended (i.e., as an actual recommendation to the inmate), this somewhat vague advice would constitute possible coaching, although not to the extent of telling the client explicitly what to say.

Example 5: A man charged with sexual assault pleaded not guilty by reason of insanity based on a claim of having a psychotic episode. Despite being found “insane” in court, the hospital to which he was sent found no Axis I diagnosis. After a second offense, he was convicted without raising an insanity defense and was sent to prison on conditional release from the hospital. After completing his criminal sentence, he was returned to the hospital. At that point, he demanded to be released from the indefinite insanity commitment, boasting that his lawyer had coached him on how to fake psychosis during his evaluation. He argued that, since he no longer met the mental illness criterion for continued commitment, he should be released. (The effort failed.)

Here, the inmate claims he was coached, a largely unprovable claim in the present instance. The diagnostic problem is further complicated by the fact that individuals who were deeply distressed by the subjective experience of being psychotic have been known to claim, to salvage their self-esteem, that their psychotic states had been malingered and had been fully under their control at all times.

An Ambiguous Example

Example 6: Our final example is a footnote in a law review article⁵ regarding the “deceptions of psychiatrists”:

[A criminal examinee] had a history of malingering seizures. . . . After 20 minutes [of examination], the man stopped communicating. . . . He just muttered and chanted. When the marshal came in and informed the man that the interview was over, instead of standing up to leave, he fell to the floor and apparently had a seizure. It looked genuine, but [the examiner] had doubts because of the man’s medical history of malingered seizures and his incentive to malingere a seizure to avoid punishment in the criminal case against him. When [the examiner] discussed the case with the man’s attorney, the lawyer responded, “Yeah, Doc, you’re so cynical. You think everyone is malingering. I told him to have a seizure!” The attorney’s words, taken literally, suggest that a conspiracy existed between the attorney and the defendant to malingere a seizure. However, the attorney made his statement in a tone that conveyed the exact opposite, that it was preposterous for [the examiner] to suggest that the attorney would do such a thing. Perhaps the attorney was making a true statement, but conveying it in a way that was designed to deceive [the examiner] into believing it was not true.

Alternatively, perhaps the attorney was not making a true statement but was conveying it in a way as to suggest that he was not attempting to deceive [the examiner] and that [the examiner] was not to believe that his statement was a true one [Ref. 5, pp 228–9, footnote].

This vignette, contrasting tone of voice and content, well captures the common, perhaps inherent, ambiguity in determining the truth about coaching.

Discussion

In all the foregoing examples, can we distinguish between detailed attorney guidance and essentially corrupt coaching? This is a differential diagnosis that can be extremely difficult to make, especially because concrete elements of proof may not be as obvious as in some of these selected examples. “Diagnosing” coaching, like diagnosing malingering, carries a highly pejorative connotation, even if objectively determined and supported by data. One is accusing the attorney of a serious ethics transgression and a subversion of justice. Further complicating the moral calculus is the fact that the coaching may be unconscious—the attorney’s guidance inadvertently slipping over the line.

Are any particular approaches to the problem possible or called for by the forensic psychiatrist? A witness could mentally classify coaching with other ploys of the legal profession, such as conducting irrelevant or overpersonalized cross-examination, springing surprise data or witnesses, withholding key data, and the like. From this viewpoint, no particular action on the part of the expert witness would be called for, beyond the usual honesty and striving for objectivity, because any expert witness has little control or influence over the legal system’s internal operation. If concrete evidence, such as crib notes, is discovered, that fact can be simply incorporated into the report, the opinion, and any eventual testimony, letting the fact-finders make of it what they will. If the psychiatrist’s own retaining attorney appears to have coached the examinee, the psychiatrist could justify withdrawing from the case as a matter of ethics.

A related issue emerges from the problem of coaching: the matter of the attorney’s presence in the forensic examination. The subject is discussed elsewhere⁶ but the potential for nonverbal cueing of the examinee (a variant of coaching) presents a risk of contamination that affects the validity of the forensic examination.

From all the foregoing we might conclude: attorneys coach at their peril. Exposure of an attorney’s coaching may well sink a client’s case, ethics considerations aside.

A possible subsequent exploration presents itself: do psychiatrists, especially treating psychiatrists drafted into the role of expert witnesses, coach their examinees, too? The author knows of no data on this point, but information on this separate possible problem would be illuminating. We might speculate without proof that coaching occupies for attorneys a moral niche—decried but common—comparable to that of psychiatrists who inflate admission symptoms to extract approval and reimbursement from managed care.

Corrupt, unethical, but apparently far from unheard of, coaching of defendants by attorneys remains a wrench in the wheels of justice that should be considered and addressed but may, unfortunately, never be eliminated.

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