The Devil's Advocate

Although the insanity defense rarely succeeds,[1] there is widespread fear that it is subject to abuse and that clever lawyers may use it to cheat justice. Hence there have been recent legislative proposals for the elimination of the insanity defense altogether,[2] and judicial discouragement of its use.

The New York Court of Appeals has now held that a plea of insanity in a criminal proceeding constitutes "a complete and effective waiver" of the traditional privileges involving an accused and his attorney and physician. In *People v. Edney*[3] that court made what it described as a "logical extension" of the waiver principle announced in *People v. Al-Kanani*.[4] The startling thing about *Edney* is that even the attorney-client privilege was diminished, apparently on the ill-founded assumption that an insanity plea suspends policies rooted in fairness and due process.

The facts of the two New York cases show how far the Court of Appeals has gone to reduce the *privileged* few. In *Al-Kanani* the patient-inmate had been held incompetent to stand trial and committed to Matteawan. While there he was treated by an institutional psychiatrist who later testified against him when he stood trial for murder after his release from Matteawan. On the basis of compulsory Matteawan examinations and evaluations, the institutional psychiatrist testified that the trusting patient-inmate was sane and a malingerer. In *Edney*, the lawyer for a man charged with kidnapping and manslaughter referred his client to a psychiatrist for evaluation and as an aid in preparing the defense. That self-same psychiatrist was called to the stand by the prosecution and was permitted to testify concerning the patient's mental status. In each case, all privilege was held to be waived automatically by the entry of an insanity defense.

In our judgment, both decisions are wrong. In the *Al-Kanani* situation the Matteawan psychiatrist is placed in a double bind by his conflicting roles as therapist and potential informer or prosecution witness, and the patient-inmate submits to treatment at his legal peril. He may have to choose between getting better or providing evidence against himself. Obviously, the result is detrimental to any professional relationship, but especially to a psychiatric one. Moreover, how far removed is this situation from that in *Leyra v. Denno*,[5] where the psychiatrist induced what was held to be an involuntary confession?[6] It is one thing to conclude that no confidential relationship arises as between an interviewing rather than treating psychiatrist and a court-referred patient, and quite another thing to decide that a patient-inmate who has been committed for treatment rather than evaluation is not entitled to that confidentiality the relationship requires if it is to be meaningful.

The results of *Edney* also impair another professional relationship. As pointed out by Judge Fuchsberg in his dissent, "all other federal and state courts . . . [which have had occasion to pass on the question] . . . have recognized the application of the attorney-client privilege in almost identical factual circumstances."[7] Other than in New York, the attorney-client privilege covers the situation where the lawyer in preparation of his case calls in a psychiatrist to interview and evaluate his client. Thus, to use the court's phrase, a "logical extension" of *Edney* would be to hold that entry of an insanity defense "completely and effectively" waives the ordinary attorney-client privilege as to all matters communicated to the attorney.

The practical consequence is that defense counsel must be highly selective in the choice of forensic experts and must make sure in advance that they are defense-minded rather than prosecution-minded. One must avoid the objective expert, for he may be a potential witness for the other side. Inevitably, the *Edney* rule will aggravate the so-called "battle of experts."

The New York decisions are shocking also because they run counter to the spirit if not the letter of the privilege against self-incrimination and the right to privacy.[8] It is a

Catch-22 to order an accused to Matteawan for treatment so that he may become competent to stand trial and simultaneously to gather evidence to convict him if he gets released. All of this may add up to a denial of due process of law, and it is possible that the federal courts would so hold.

The main argument in support of the New York decisions is that all they add up to is a policy of permitting access to relevant data so that justice will be accomplished. This argument, of course, equally justifies the abolition of any and all privilege. The law has not gone that far and has insisted that there be some limitations on a court's "right to know." The traditional limitations have been fashioned by common law and statute in terms of confidentiality and privilege, and the limitations in turn have been qualified by waiver principles. This crazy quilt of compromise between significant principles is most confusing.

If we look at the New York law regarding privilege in general, we will find that a plaintiff in a negligence action who places his mental status in issue thereby waives the physician-patient privilege.[9] On the other hand, where a court refers a defendant for psychiatric evaluation of competency to stand trial, any incriminating admissions or confessions made by the patient to the psychiatrist are inadmissible at the criminal trial as distinguished from the competency hearing.[10] In effect, the Court of Appeals adopted the rule in civil cases and ignored the more analogous rule in criminal cases when it held that entry of the insanity plea constituted a waiver of privilege. Presumably, the rule of the criminal code is based upon principles of fairness and considers the compulsory circumstances. It is keyed to the criminal process. The accused referred for evaluation of competency to stand trial has no choice and must submit to the psychiatric interview. So too the patient-inmate at Matteawan. Thus, the policy expressed in *Al-Kanani* is inconsistent with the policy of the New York Code of Criminal Procedure.

The fundamental question raised by both *Edney* and *Al-Kanani* is whether or not the particular psychiatrist-patient relationships are such as to qualify for privilege under generally accepted criteria.[11] In the case of *Al-Kanani* we presume that the psychiatrist at Matteawan was a treating psychiatrist. As such the situation calls for confidentiality because of the imperatives of that professional relationship. Few would deny that psychotherapy requires disclosure of intimate and highly personal matters and *a fortiorari* the therapist should stand in as confidential a relationship as a lawyer or priest. In the case of *Edney*, where presumably the psychiatrist was retained by the lawyer to evaluate but not to treat, as Judge Fuchsberg points out in his dissent, the problem is the ambit of the lawyer-client privilege. The evaluation was part of the work product of the lawyer. It was necessary. To give adequate representation he had to find out the client's mental status. Therefore, matters communicated to the psychiatrist should stand on the same footing as those communicated directly to the attorney.

In our judgment, the cost of the waiver doctrine comes at too high a price. Why should any penalty attach to an exercise of the right to plead the insanity defense? In other areas of the law persons may not be penalized for an exercise of legal rights.[12] In both *Edney* and *Al-Kanani* it was unfair to permit the psychiatric testimony and it may have been a denial of due process of law. The legislative expression of public policy regarding the confidentiality of matters communicated to court-appointed psychiatrists was abridged by the holding in *Al-Kanani*. The prosecution did not show, in either case, that the particular testimony was indispensable. Presumably, other witnesses were available. Finally, the waiver doctrine of the New York court imperils professional cooperation and unnecessarily threatens the delicate *entente* which now exists. The reality is that the insanity defense does not cheat justice and that criminal process is far more likely to convict the insane than to free the malingerer.[13]

HENRY H. FOSTER, Esq.

References

1. Student research, under my direction, disclosed that between 1958 and 1965 the insanity defense was successfully used in New York State 11 times, or about once a year. During the administrations of Thomas Dewey and Frank Hogan, there never had been a successful insanity defense in Manhattan.

2. For example, much-debated S. 1, as drafted by the Senate's Judiciary Committee, strictly limited evidence of insanity to the issue of criminal intent during the trial stage, although it could be considered more fully at the sentencing stage of federal criminal trials.
3. 175 N.Y.L.J. No. 113, P. 1, cols. 2–3, June 11, 1976
4. 33 N.Y. 2d 260, 351 N.Y.S. 2d 969, 307 N.E. 2d 43 (1973)
5. 347 U.S. 556 (1954)
6. For discussion of general problem, see Foster: Confessions and the station house syndrome. 18 DePaul L. Rev. 683 (1969).
7. Citing: *United States v. Alvarez*, 519 F. 2d 1036; *City and County of San Francisco v. Supreme Court*, 37 Cal. 2d 227 (Traynor, J.); *Lindsay v. Lipson*, 367 Mich. 1; *State v. Kociolek*, 23 N.J. 400; *People v. Lines*, 13 Cal. 2d 500; *People v. Hilliker*, 20 Mich. App. 543; Cf. *United States v. Kovel*, 296 F. 2d 918 (Friendly, J.). Also compare, *United States v. Carr*, 437 F. 2d 662 (D.C. Cir. 1970).
8. Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where sexual privacy was held to be constitutionally protected. Is there more judicial concern for the marital bed than the psychiatric couch? Is that Procrustean?
9. New York in 1828 was the first state to enact the physician-patient privilege which did not exist at common law. The privilege is said to be based on the possibility of embarrassment or disgrace disclosure would entail and the likelihood that its absence would deter individuals from securing medical service and treatment. See *Steinberg v. N.Y. Life Ins. Co.*, 263 N.Y. 45, 188 N.E. 152 (1933). In civil cases in New York the physician-patient privilege is deemed to be waived whenever the patient's physical or mental health is placed in issue by him. See *Koump v. Smith*, 25 N.Y. 2d 287, 303 N.Y.S. 2d 858, 250 N.E. 2d 857 (1969), and N.Y. CPLR §4504 (physician-patient privilege) and §4507 (psychologist-patient privilege).
10. See §662 of the N.Y. Code of Criminal Procedure, which provides in part "the report of the psychiatrists . . . shall not be received in evidence upon the trial of the defendant. . . . ."
11. The classic enumeration of the criteria for privilege is that expressed by Dean John Henry Wigmore in his treatise on Evidence §2290 (3d ed. 1940). See also Model Code of Evidence Rule 210 (1942). Even where the physician-patient, or psychiatrist-patient (6 states), or psychotherapist-patient privilege exists, there are a number of loopholes or exceptions. Examples of such include the transfer of records regarding hospitalization, court-ordered psychiatric examinations to determine competency to stand trial, and in civil cases where fraud, physical or mental status, etc. is put in issue by the plaintiff or defendant. See Slovenko: Psychiatry and Law, chap. 4 (1974). Proposed Rule 5.04 of the Federal Rules of Evidence originally raised a psychotherapist-patient privilege, but later such privilege was deleted, leaving a federal court with the rule regarding privilege of the state in which it sits.
12. Cf., *Shapiro v. Thompson*, 394 U.S. 618 (1969), but also see *Sosna v. Iowa*, 419 U.S. 393 (1975).
13. See Ferracuti: The psychology of criminal homicide, 32 Puerto Rico L. Rev. 569, 572–573 (1963), where he says ". . . in the United States from 2 to 4% of homicide offenders are consistently classified as legally insane, while in England about one third of all such offenders are declared legally insane, and, in some years, this proportion has been as high as 50%."