The Champion

January/February, 2005

29 Champion 12

COVER STORY: UPDATING APPROACHS TO CLIENT COMPETENCE: UNDERSTANDING THE PERTINENT LAW AND STANDARDS OF PRACTICE

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In 2000, a federal district court in Louisiana wrote one of the most extensive and thoughtful rulings on trial competence available today. The court's ruling in *U.S. v. Duhon* responded to a government agency recommendation for a finding of restoration to competence of an accused who had undergone extensive evaluation, had been found mildly mentally retarded, and had undergone competence "training" while in federal custody. n1

n1 *U.S. v. Duhon, 104 F.Supp.2d 663 (W.D.La.2000).*

Duhon is notable in at least two ways. First, the court discussed at length the fabric of the case law that defines the meaning of competence to stand trial, and also what it means to be truly restored to competence. Second, the court detailed the various categories of evidence that might be considered in a competence assessment. These ranged from the specific testing processes, to the meaning of the data obtained in testing, through the role played by lay persons' observations, and to the value of an attorney-expert's views on an accused's competence. The discussion includes consideration of the strengths and limitations of the various approaches taken by mental health professionals in assessing and "treating" Duhon.

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From NACDL's point of view, the case is distinguished by the fact that the district court chose to rely, in passing, on an article published in *The Champion* describing the limitations inherent in a mental health expert's capabilities of assessing the ability to assist counsel. n2 It is nice to know that a federal district court judge may have been impressed enough by a piece in *The Champion* to have relied upon it -- no doubt at the urging of a thorough and imaginative defense lawyer.

n2 *104 F.Supp.2d 663 at 668, n. 21,* citing Burt and Philipsborn *Assessment of Client Competence, A Suggested Approach*, 22 THE CHAMPION 18 (June 1998).

On the other hand, the citation is symptomatic of a problem in the competence assessment process. There are few authoritative guides on the standards of practice for both mental health experts and defense counsel in approaching competence assessment.

The dearth of published and accepted standards of practice for lawyers in competence assessments is arguably one of the many causes of the unevenness in the approaches to competence issues. n3 There are few sources to assist lawyers in deciding when, how, and with what approach to raise (or to choose not to raise) a competence to stand trial question in a given case.

n3 As used throughout this article, the word "competence" means competence to stand trial, unless otherwise indicated.

Indeed, the courts have been extremely uneven in dealing with the definitions of competence (particularly where state statutes are far afield from U.S. Supreme Court decisions); what categories of evidence should be deemed reliable and valid where competence is at issue; what type of expertise should be relied upon by the trier of fact; what role the appointed or retained trial counsel should play in informing the court (and/or the experts) of the bases for a competence (or incompetence) adjudication; and how the approaches to competence assessments accepted in the mental health community can, and should, be integrated into the judicial findings about an individual's trial competence.

This article discusses some of the approaches experienced criminal defense lawyers have used in dealing with competence issues, especially since the previously mentioned article was published in *The Champion* in June 1998. n4

n4 See n.3 above.

Insofar as competence questions are among the "standard" mental health questions that arise in criminal cases, an effort is made to review the discussion of these questions offered in the current mental health literature on competence to stand trial questions. n5 This article also urges the leading criminal defense organizations to be more attentive to the development of standards of practice, and to provide more training and continuing education for criminal defense lawyers on trial competence issues. This is not only so that we, as a group, can do a better job in performing our duties, but also so that we can encourage the courts to do a better job of showing the fundamental respect for persons charged with crimes that is the basis for the requirement that a person be competent to stand trial.

n5 There are many types of legally recognized "competencies." As used in this article, the word "competence" means only competence to stand trial in a criminal case.

Competence And Incompetence Revisited

[If] a Man in his Sound Memory Commits a Capital Offense. . .and if, After he has Pleaded, the Prisoner Becomes Mad, he Shall not be Tried, for How can he Make his Defence?" Blackstone, *Commentaries* XXIV

In 1960, the United States Supreme Court announced in a simple, one-page opinion what is generally considered the modern statement of the requirement of competence in *Dusky v. United States.* n6 The requirement of competence to stand trial is "rudimentary" and it must be clear that ". . .the trial of an incompetent defendant violates due process." n7 , n8 *Dusky* set out what are today generally considered the three basic elements of competence. The accused must: (1) be rational; (2) have a sufficient present ability to consult with counsel with a "reasonable degree" of rational understanding; and (3) have both a rational and factual understanding of the proceedings. n9 Fifteen years after *Dusky*, the Supreme Court decided *Drope v. Missouri*, which added what some commentators consider to be the fourth element of the competence test. This additional element requires that the accused have the ability to assist counsel in preparing his or her defense. n10

n6 *Dusky v. United States, 362 U.S. 408 (1960) per curiam.*

n7 *See Riggins v. Nevada, 504 U.S. 124, 139-40 (1992),* Kennedy, J., concurring.

n8 *See Medina v. California, 505 U.S. 437,553 (1992).*

n9 *Dusky v. United States, supra, 362 U.S. 408.*

n10 *Drope v. Missouri, 420 U.S. 162, 171 (1975).* The court described these as the basic tests in use today in *Medina v. California, supra, 505 U.S. 437, 452.*

In the years that followed *Dusky* and *Drope,* the techniques and approaches to assessing trial competence were of continuing interest to a specific community of mental health and legal scholars who focused on mental health issues in the criminal courts generally. As has tended to be true about issues involving the intersection of mental health and the law, the "line" defense bar seems to have given the development of standards of practice surrounding the evaluation, assessment, and litigation of competence a fairly wide berth. A review of the draft "ABA Standards on the Prosecution Function and Defense Function," dating back to the decade after the decision in *Dusky,* reveals no specific discussion about competence *per se.*

By 1986, however, the ABA *Criminal Justice Mental Health Standards* addressed a wide variety of mental health and criminal case issues, including competence to stand trial. Anecdotal evidence suggests that these ABA standards were not regularly covered during continuing education programs for the criminal defense bar until the increase in sophistication in the training for death penalty defenders took hold over the last 25 years. Indeed, some otherwise extremely skilled and knowledgeable defense lawyers informally polled during the writing of this piece indicated that they have never received any training on competence assessments.

Since 1986, the United States Supreme Court has decided several cases of importance to our current understanding of competence. Two of these rulings occurred in the early 1990s. The first is *Medina v. California.* n11 There, the Court affirmed a decision of the Supreme Court of California, which had noted in language that has made all too little of an impression on the criminal defense bar that ". . . one might reasonably expect that the defendant and his counsel would have better access than the People [prosecution] to the facts relevant to the court's competency inquiry." n12 In additional language that was anointed by the United States Supreme Court's affirmance, the California Supreme Court had noted that with respect to the ". . .defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability." n13

n11 *505 U.S. 437 (1992).*

n12 *People v. Medina, 51 Cal.3d 870 (1991), affirmed* in *Medina v. California, supra, 505 U.S. 437.*

n13 *People v. Medina, supra, at 884-85.*

This state court *dicta* underscores the value of information possessed by the criminal defense lawyer. This lawyer-based information is something that mental health professionals have integrated into their published approaches to competence assessments -- at least at the high end. The assessment of an accused's competence is not a task that should be undertaken without the participation of that client's lawyer -- and the *dicta* quoted above supports this view. This truism has been [*14] commented on both in published decisions and in the professional literature, in part because only defense counsel in a given case can provide a description of how the lawyer and client are actually interacting, in contrast to what interaction is actually needed in the case context. "One of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would normally go into the defense of the case." n14

n14 *U.S. v. Duhon, supra, 104 F.Supp.2d 663 at 668, n.21,* citing Burt and Philipsborn, *supra.*

Indeed, without finding out from counsel of record what the nuances of the charges and available defenses are, and how the accused is interacting with counsel, how does a mental health professional gauge both situational awareness of rights and procedures, and the ability to assist counsel in conducting the defense? Yet, even today, anecdotal evidence suggests that neither mental health experts nor defense counsel participate in this recommended interaction -- often out of sheer ignorance of the case law and literature.

Where the question of competence involves the nature, quality, and characteristics of communication (or lack of communication) between counsel and client, defense counsel will often be the best source of information. n15 In a standard work on mental health and the courts, the authors make a succinct point. "The clinician also needs to obtain information from the attorney. . . more important, only the attorney can provide the clinician with information about the

length, substance, and nature of previous attorney-client contacts." n16 This practice note should be emphasized to the criminal defense bar and mental health experts.

n15 As noted, this truism is recognized in the mental health literature per DR. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr. Grisso points out: the *Godinez* Court included decision-making abilities within the *Dusky* standard." *Id.* at 73.

n16 *Id.* at p. 150.

The second significant U.S. Supreme Court case from the early 1990s was the 1993 decision in *Godinez v. Moran.* n17 For practitioners who want real familiarity with the Court's definition of competence, *Godinez* is a "must read." *Godinez* is really the only case in which the Court has discussed the combination of the characteristics of competence to stand trial and the attributes of the accused who is competent. The *Godinez* court sets out its expectations of the situational awareness that the accused should have of his or her procedural rights, as well as the decisional abilities that are expected to flow from the accused's understanding of the case, and interaction with counsel.

n17 *509 U.S. 389 (1993).*

In *Godinez,* the Supreme Court ruled that there was no difference between being competent to plead guilty and being competent to stand trial. The Court emphasized that there are certain decisions that any competent accused will be assumed to have the ability and capacity to make, regardless of whether that person is going to plead guilty or stand trial. The breadth of the abilities and capacities that the court attributes to a competent accused come as a surprise to numerous lawyers and mental health professionals:

"In sum, all criminal defendants -- not merely those who plead guilty -- may be required to make important decisions once criminal proceedings have been initiated . . . these decisions include whether to waive the privilege against self incrimination, whether to take the witness stand, whether to waive the right to trial by jury. . .whether to decline to cross-examine certain witnesses, whether to put on a defense, and whether to raise one or more affirmative defenses." n18

n18 *509 U.S. 389,398.*

Some of the sophisticated recent mental health literature covering competence acknowledges the importance of *Godinez.* n19

n19 A good example of the understanding that an experienced mental health expert brings to this matter is found in DR.THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSENTS AND INSTRUMENTS, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr. Grisso points out: the Godinez Court included decision-making abilities within the Dusky standard." *Id.* at 73.

There are other significant trial competence rulings from the U.S. Supreme Court handed down beginning in 1996. In *Cooper v. Oklahoma,* the Court decided that the standard of proof placed on the accused who is attempting to prove his incompetence cannot be so high as to violate the Due Process Clause of the U.S. Constitution. n20 Oklahoma's "clear and convincing" standard proved too high. The *Cooper* opinion reviews the history of the requirement of competence in the Anglo-American legal tradition, and the court rejects a burden of proof by clear and convincing evidence based in part on what it found to be the vagaries of the competence assessment process, on the one hand, balanced against the need for courts to be assured that they are only trying competent people, on the other.

n20 *517 U.S. 348 (1996).*

One can read into the *Cooper* decision the view that the mental health assessment sciences have not yet reached a point at which it makes sense to require high standards of proof. Because of the premium put on competence, requiring only proof by a preponderance of the evidence of incompetence will decrease the risk of erroneous findings of competence.

In 2003, the Court reconsidered psychoactive medication and competence in *Sell v. United States,* a decision that builds on the Court's first such decision, *Riggins v. Nevada.* n21, n22 These two decisions will continue to be of great importance, particularly as the mental health professions in state and federal institutions administer psychotropic medications with accuseds facing trial. These cases guide the discussion in any case in which a client facing trial has been administered psychotropic medications, and particularly anti-psychotic drugs that are known, in the literature and/or in the case law, to have extensive side effects. Indeed, there is an entire body of federal and state court case law discussing the level of due process that attends the administration of anti-psychotic medication to persons in custodial settings, some of which serves as a useful backdrop to the litigation of concerns about the effects of anti-psychotics generally. n23

n21 *Sell v. United States, 539 U.S. 166 (2003).*

n22 *Riggins v. Nevada, supra, 504 U.S. 127.*

n23 See *Washington v. Harper, 494 U.S. 210 (1990),* a case that discusses the hearing requirements for the involuntary administration of anti-psychotics to a prisoner.

A secondary but extremely important reason for defense counsel to be familiar with the body of law that regulates the administration of psychotropics to potentially incompetent accuseds is to ensure that trial courts properly consider all factors required by *Sell* before allowing the trial of a person medicated with, or in need of, certain classes of psychotropics to go forward.

One additional recent ruling warrants comment here. It is from the U.S. Court of Appeals for the Ninth Circuit, and involved a non-communicative death row inmate. In *Rohan ex rel. Gates v. Woodford,* the Ninth Circuit decided, first, that an accused must be competent when pursuing federal habeas relief. Second, the Court noted that the competence element requiring the ability for rational communication now has an expanded definition. n24

n24 *334 F.3d 803, 808 (9th Cir. 2003):* "Capacity for rational communication once mattered because it meant the ability to defend oneself [citations omitted] . . . while it now means the ability to assist counsel in one's defense. . ." [further citations omitted]

As the Court noted, it is no longer only the capacity to communicate rationally that characterizes the compete defendant -- it is also, in a larger sense the ability to assist in one's own defense. This is a point worthy of consideration since few competence evaluations are based on examination of the latter ability. Many examiners would not know (without being informed) what goes into the defense of the case at issue. The change in the case law's focus is a subtle elaboration. For example, a mentally retarded or disordered person may have the ability to communicate rationally on basic subjects without having a real ability to assist counsel in the conduct of the defense of a complex case. The same [*16] may be true of persons with a wide range of disorders. More generally, this means that competence assessments that focus merely on the *ability to interact* do not measurably advance an understanding of an accused's trial (or post conviction) competence.

Case Law Yields Variable Assessment Practices

One is hard pressed to find the United States Supreme Court making reference to the many scholarly articles on the competence assessment protocols, tools, techniques, and instruments available. The reason for mentioning the value of the ruling in *U.S. v. Duhon* in the introduction is that it is one of the very few cases reflecting judicial commentary on what seemed defensible, or indefensible, in a particular competence assessment process. The exception is where the courts discuss questions of "medication into competence" under *Riggins* and *Sell* by urging a combination of methodical fact finding and caution -- making note of the literature on the effects of certain classes of psychoactive medications that have yet to be fully understood in the mental health sciences.

However, we have yet to read a decision from the Court dealing with competence issues that goes as far as the Court's 2002 landmark decision in *Atkins v. Virginia* in referring to what might be considered authoritative mental health literature and standards that lower courts and legislatures might consider when establishing statutory requirements for competence adjudications. n25

n25 *Atkins v. Virginia, 536 U.S. 304 (2002).*

In several respects, requiring trial competence without providing anything but a legal definition of the concept has resulted in the absence of precise guidance on how to evaluate and adjudicate competence. This means that there are numerous options open, and the quality of practice has suffered as a result. In essence, the state of the law is such that, at the low end, the litigation practice embodies the *dictum* that "if you don't know where you're going, any road will get you there." The California Supreme Court indirectly acknowledged this problem in commenting on the value of expert testimony specific to competence:

"The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . . it does not lie in his mere expression of conclusion." n26

n26 *People v. Lawley, 27 Cal.4th 102, 132 (2004).*

Reviewing courts rarely address competence questions by expressing concern either at the inadequacy of the lawyering related to a competence issue or on the poverty of an expert's approach that compromised the integrity of proceedings. It is understood that lawyering that is measurably departing from the ABA standards, and what is locally accepted as effective lawyering, may cause reversal of a conviction or death sentence. n27 Since the court's ruling in *Strickland v. Washington,* it has generally been understood that while not controlling, the ABA standards will be viewed as indicative of the standard of practice for lawyers defending criminal cases. n28

n27 *Wiggins v. Smith, 539 U.S. 510 (2003).*

n28 *Strickland v. Washington, 466 U.S. 668 (1984).*

While the federal courts have not issued notable decisions in which ineffective lawyering was viewed as the cause for the poor handling of the accused's possible incompetence to stand trial, there have been a few cases in which the courts were presented with sufficient post-conviction evidence of incompetence that cases have been remanded for a retrospective competence assessment. These are cases in which the question is not whether there was ineffective representation that caused a prejudicial error warranting reversal, but rather whether there is sufficient evidence of incompetence of the accused in the record that there might have been a violation of due process in that an incompetent person was subjected to trial and punishment. These retrospective competence cases give us a type of backward description of what post-conviction courts have viewed as useful sources of information on competence.

The retrospective competence inquiry process first appeared to be disfavored by the United States Supreme Court, which warned that there would be "the difficulty of retrospectively determining an accused's competence to stand trial. . ." n29 However, over time, federal and state reviewing courts have remanded so that trial courts could revisit competence questions. For example, when the Ninth Circuit remanded *Odle v. Woodford* for a retrospective competence hearing, it did so with instructions to the state trial court to determine whether "the record contains sufficient information upon which to base as reasonable psychiatric judgment" the accused's competence to stand trial many years before. n30 Because neither the trial judge nor defense counsel had raised a competence question, the *Odle* court's "recipe" for the determination was extremely basic, encouraging inquiry into the availability of information from the record, any experts, and the lawyers, or investigators who might still be available.

n29 *Drope v. Missouri, supra, 420 U.S. 162, 182-83.*

n30 *Odle v. Woodford, 238 F.3d 1084, 1089 (9th Cir. 2001).*

Other courts have issued similarly basic orders for a retrospective competence assessment hearing, noting the expectation that lawyers and examining experts may have useful material available to assist in the retrospective assessment. n31 Significantly, while trial competence standards are described as exclusively legal, in retrospective competence assessment cases, courts have used the "reasonable psychiatric judgment" test to gauge the existence of post-conviction evidence of trial incompetence. n32

n31 *See U.S. v. Mason, 52 F.3d 1286, 1293 (4th Cir. 1995); U.S. v. Renfroe, 825 F.2d 763, 767-68 (3d Cir. 1987); U.S. v. Johns, 728 F.2d 953, 957-58 (7th Cir. 1984); Bolius v. Wainwright, 597 F.2d 986, 988 (5th Cir. 1979).*

n32 *People v. Ary, 118 Cal.App.4th 1016 (2004).*

Understanding Of Law Necessary To Comprehend Literature

Because competence to stand trial is a legal requirement, an understanding of the case law and statutes that make up the legal framework of competence is itself an essential foundation for a criminal defense lawyer's reading of the pertinent mental health literature. Dr. Thomas Grisso, one of the leading scholars on the subject of evaluating legal competencies, has written several works that confirm the value of knowing the legal framework of competence to stand trial as a basis for planning, and indeed evaluating, a competence assessment process.

In his recently updated *Evaluating Competencies: Forensic Assessments and Instruments,* Dr. Grisso begins the discussion of the evaluation of competence to stand trial by reviewing the legal standards. n33 This recent discussion of the legal construct of competence is much more extensive than the one contained in his well-known early work on the subject. n34

n33 *GRISSO,* EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS,

n34 2d ed., *supra,* at p. 70.

Drs. Melton and Poythress, who are mental health experts, joined law professors Petrila and Slobogin to publish their well-known *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers,* which is in its second edition. n35 These authors also set out certain key legal definitions as part of their discussion of legal competencies, including the competency to stand trial. n36 They set forth useful but very brief discussions of the controlling law to introduce legal concepts of importance.

n35 *GRISSO,* COMPETENCY TO STAND TRIAL EVALUATIONS: A MANUEL FOR PRACTICe (Professional Resource Exchange, 1988).

n36 2d Ed.

The same is true, though in a different way, of the ABA/SJI *National Benchbook on Psychiatric and* [*17] *Psychological Evidence and Testimony,* which was published in 1998. n37 As with *Melton, et al.,* the *Benchbook* covers a great many topics in the intersection between the mental health sciences and the law. The *Benchbook* also offers some discussion of the salient cases, while not dwelling on the textual analysis of significant United States Supreme Court opinions. The practitioner needs to understand what these good sources of information offer, and what he or she needs to have sought elsewhere.

n37 See Melton, *et al.,* Ch. 6 and 7.

What emerges from a review of the analysis of the law offered to us by these well-known experts in the field of competence assessments, and forensic mental health assessments generally, is the understanding that they opt for synthesis and a succinct statement of their views on the legal structure and definition of competence. They do not offer a lawyer preparing a case a detailed dissection of the law.

Thus, there is no substitute in this area for a thorough reading and understanding of the pertinent case law. This is not to attack the mental health literature -- the manuals written exclusively for lawyers present similar problems. This holds true even though a different approach has been taken in some of the practice manuals that have been developed for the capital defense bar. For example, in the long published *California Death Penalty Defense Manual*, the emphasis tends to be on an updating of the case law related to mental health cases. In a section on mental health experts, the *Manual* offers a discussion of recent decisions pertinent to certain mental state mitigation, mental state defense, and competence issues in conjunction with a discussion of some of the pertinent scientific literature. n38

n38 Reference is to the AMERICAN BAR ASSOCIATION/STATE JUSTICE INSTITUTE NATIONAL BENCH BOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY (ABA, 1998). The section of the ABA that contributed to the work was the Commission on Mental and Physical Disability Law.

Admittedly, death penalty defense publications may not be a useful *litmus* of the practice guides available for the criminal defense bar, as death penalty defense is highly specialized. However, death penalty defenders in general are expected to have greater expertise on mental health issues than many of their colleagues. But even a knowledgeable reader of the *Death Penalty Manual* will need to review the relevant cases in approaching a competence inquiry.

A knowledge of the case law exposes those areas in the mental health literature that may need to be reviewed carefully with an examining expert. For example, *Melton, et al.*, discuss "competency to plead guilty" under the rubric of "criminal competencies." As they point out certainly in enough detail to remind the knowing lawyer (and expert), in *Godinez v. Moran* the Supreme Court held ". . . with the majority of federal courts that a person who is competent to stand trial is also competent to plead guilty." n39

n39 This manual, published by the California Public Defenders Association and California Attorneys for Criminal Justice, has been used as a model in various parts of the country. A new edition has been published this year under the editorship of Michael Ogul, who has taken over from well respected death penalty defense counsel, Michael Burt. Burt edited the manual for years prior to the current edition. Thankfully, both Michael Burt and Michael Ogul have a great interest in mental health and the law, and have developed the publication accordingly. The present author has co-authored the sections on mental health experts with Michael Burt and Jennifer Friedman.

But then, they point out that not all jurisdictions follow *Godinez.* n40 That observation on their part might shock some experts on criminal procedure, in that it is not at all clear that the United States Supreme Court decision in *Godinez* allows the states to require differing standards in the definition of competence to plead guilty versus competence to stand trial. Moreover, the mental health expert who has relied upon *Melton, et al.* to define competence to plead guilty as a separate category from "competence to stand trial," may be open to cross-examination on this point.

n40 Melton, *et al.*, 2d. ed., at 163.

This remark is not meant as a criticism of *Melton, et al.*, whose works are well-respected and much cited. However, it is meant to illustrate that in the absence of the acquisition of a good working knowledge of the case law, a [*18] lawyer seeking a quick fix of overall competence knowledge might accept as completely defensible a viewpoint stated by authors whose analysis of the law might, at least in the respect just used as an example here, be taken as a minority view.

Therefore, the practice note here is that lawyers approaching a competence assessment should review the applicable case law, concentrating on decisions that cover both the big picture and case specific issues. n41

n41 *Ibid.*

Leading Mental Health Literature Addressing Competence

When the United States Supreme Court concluded that it is not constitutionally acceptable for the mentally retarded to be executed in *Atkins v. Virginia*, the Court relied in part on the definition of mental retardation found in Sadock and Sadock's, *Comprehensive Textbook of Psychiatry* (7th ed.). n42 That work is cited here because it is an example of a useful text for lawyers seeking to learn about a variety of mental health issues. Its editors deal with competency in a relatively brief section of the book, correctly noting that "legal criteria, not medical or psychiatric diagnoses, govern competency." n43 Their book is filled with cross-references, and the editors steer readers towards well-known sources in the mental health literature on competence to stand trial, including Dr. Thomas Grisso, and Melton, *et al.* n44

n42 For example, a lawyer wishing to review an approach to competence assessment and malingering should become familiar with the tortured history of *U.S. v. Gigante, 982 F. Supp. 140 (E.D.N.Y. 1997)* and *U.S. v. Gigante, 996 F. Supp. 194 (E.D.N.Y. 1998)* and Gigante's eventual admission of malingering.

n43 This well-respected work is actually published today under the names Kaplan and Sadock. THE COMPREHENSIVE TEXTBOOK COVers a wide spectrum of subjects that may arise in criminal cases, and is certainly a compendium well worth knowing.

n44 *Id.* at 3285.

Sadock and Sadock outline the diagnostic criteria for various mental disorders, conditions and issues, while also covering the basic treatment approaches. The book is written as a reference work for mental health professionals. Importantly, since part of what lawyers are concerned about in understanding the mental health professional's approach to competence assessment are the various protocols and guidelines for forensic examinations, the editors provide brief but useful references to the literature, including the guidelines for forensic psychiatric examinations. n45

n45 *Id.* at 3285, 3289.

Melton, *et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (2d. ed.) has previously been mentioned. This book covers a lot of territory in addition to competence to stand trial. However, it specifically provides a series of useful observations and bits of information that should be known to lawyers approaching competence assessments.

The authors dissect the definition of competence in such a way as to allow a lawyer to understand what a qualified mental health examiner should know about competence. For example, they make the point that "With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges. . .may be grossly insufficient when a more complicated offense is involved. . . ." n46

n46 *Id* at 3289 citing Simon, Wettstein, et al. "toward the development of guidelines for the conduct of forensic psychiatric examinations," 25 JOURNAL OF AMERICAN ACADEMY OF PSYCHIATRY AND LAW 17 (1997).

This is a significant point, since many competence examiners do not appear to consider that the nature and complexity of the charge is a consideration in a competence assessment. Lawyers approaching competence assessments need to be thoroughly familiar with literature such as this, which supports the notion that competence assessments are conducted in a context -- a point also made by Dr. Grisso, as will be further noted below.

Helpfully, *Melton, et al.* review what is now a somewhat dated list of the various structured evaluation formats and testing protocols available for use by mental health professionals in competence assessments. *Id.* at 139. These include the Competency Screening Test; the Competency Assessment Instrument; the Interdisciplinary Fitness Interview; the two versions of the Georgia Competency Test; the Computer-Assisted Competency Assessment Tool; the MacArthur Competence Assessment Tool; and the Competence Assessment for Standing Trial for Defendants with Mental Retardation.

Importantly, for our purposes, the authors focus on what mental health professionals need to understand about the attorney-client relationship and attorney-client communications. As previously noted, they, among others, place among the "required" inquiries to be made by the assessing mental health professionals an interview with the defense attorney

concerning the length, substance, and nature of previous attorney-client contacts. n47 They make the following important observation:

n47 *Id.* at 122.

"Points of misunderstanding about charges and the legal process will be interpreted differently depending on whether they occur after hours of counseling from the lawyer or, as may often be the case given the press of dockets and lawyers' caseloads, after a five-minute meeting at a preliminary hearing. And, as noted previously, information about the quality of the relationship is crucial in addressing this second *Dusky* prong and in fulfilling the consultation role." n48

n48 Page 150.

Another source that defense counsel should be thoroughly aware of in approaching competence assessments are the pertinent works of Dr. Thomas Grisso. His 1988 workbook entitled *Competency to Stand Trial Evaluations: A Manual for Practice* is useful, though now not only supplanted by some of his own work, but that of other reputable scholars as well. The 1988 work includes a few important observations, particularly where a lawyer is preparing to cross-examine a mental health examiner who has performed a "drive by" examination -- characterized by a brief review of a few records, and by one relatively quick interview with the accused, which may or may not have included some competence-specific assessments.

One characteristic of a "drive by" of this type is that often the examiners neither taperecord the sessions nor use a methodical way of documenting both their competence-pertinent questions and the specific answers given. Often, these "drive bys" contain a brief summary of the charges, some anecdotal patient history, notations concerning any records reviewed, and a series of observations about competence. As Dr. Grisso points out, they may not even have a specific methodology that will allow their opinion to be compared with those of other examiners. The end product of these sad professional exercises is a conclusion by the examiner largely based on a statement of the examiner's professional qualifications, and an "I know it when I see it" type of assessment.

Noting that mental health professionals have an obligation to keep themselves informed of new developments that arise in their field of practice, n49 Dr. Grisso points out that a defendant may be legally competent for one purpose but not for another, and that the examiner must be careful to have used a method that can be validated for the competence inquiry to which it has been applied. n50

n49 *Id.* at 150.

n50 Introduction, p. xvi.

Thus, in this early work, Dr. Grisso noted that a competency assessment might include five objectives, focused on the description of the defendant's strengths and deficits; a causal explanation for the deficits in abilities that are known to define legal competence to stand trial; a description of mental disorder; possible causes of incompetence, including malingering, or the purposeful faking or exaggerating of deficiencies; the establishment of a relationship between the causal conditions and the deficits in competency abilities; and the [*20] interactive significance of deficits in competence abilities.

Dr. Grisso has pointed at one of the great deficits in the competence assessment process, which is that mental health examiners are not held, even in their professional circles, to particular methodologies in competence to stand trial procedures. Thus, it is rare that two examiners use the same methodologies, questions, response formats, and ways of evaluating the examinee's responses. n51

n51 At page 4.

In a more recent work published in 2003, Dr. Grisso wrote that while mental health professionals have contributed to some improvements in the assessment of legal competencies, there continues to be a level of ignorance of the legal standards, the relevant professional literature that leads to irrelevance in courtroom testimony. At the same time, be-

cause courts and lawyers are often not sufficiently knowledgeable about competence issues, they allow the intrusion of psychiatric and psychological concepts into legal matters such as the definition of competence. Dr. Grisso observed that there is still a problem with the sufficiency and credibility of information provided to the courts to allow reliable competence assessments, while applauding the fact that there are guidelines published by various mental health profession groups that should help improve the panorama. n52

n52 Grisso deals with this issue at p.25 of his 1988 pamphlet.

From a practitioner's viewpoint, there are a number of useful points made in Dr. Grisso's work that should be of value to lawyers of all levels of experience. For example, he reiterates the distinction between "screening evaluations," which may consist of an interview, or the administration of one test, and assessments conducted over time, noting the quality and extent of data that one might get through various inpatient or extended out-patient assessment processes. n53

n53 The comments made in the foregoing paragraph are based on Dr. Grisso's writings in EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed.) at pp. 10-11. Readers should be aware that the writer of this piece has mixed his own commentary with that of Dr. Grisso, who may not view the foregoing text as representative of his thinking.

Moreover, he makes a point that is of great significance, particularly where the objective of the cross-examination is to point out the inherent problems in the competence assessment process. He observes that "little is known empirically about the methods that clinicians actually use in collecting data for competence to stand trial evaluations." n54 There are still a significant number of areas in which the mental health professions have yet to achieve consensus, which result in a lack of standardization and approaches to report writing on the one hand, or the assessment process on the other. n55

n54 *Id.* at 79.

n55 *Id.* at 79-80.

Grisso repeats the area in which ". . .almost all texts describing pre-trial competence evaluations have agreed [, which is] that examiners need structure and a clear conceptualization of their objective, as well as appropriate methods, in order to perform evaluations that will have clinical quality, legal relevance, and practice utility to the courts." *Id.* at 82.

Helpfully, especially for lawyers, Grisso outlines his view of how the various available forensic instruments relate to the assessment process as he understands it. From defense counsel's viewpoint, he offers a very useful "critique" of a number of the standard instruments. n56

n56 Page 81.

In addition to the several already discussed, there are a number of other valuable works that address competence to stand trial and competence assessments. Well-known scholars have been working in the area for some time. For example, Professors Golding and Bonnie have separately published a number of works pertinent to competence, as have several researchers who have worked on the various MacArthur mental health projects, some of whom have addressed competence issues over the years. Bruce Winnick has for years dealt with various competence assessment issues. He wrote some of the scholarship that dealt with medication and competence issues dating back to the 1970s, and continues to publish today.

Dr. Richard Rogers' work on the assessment of malingering, and on forensic assessments generally, is reflected in several well-received books that he has authored. He has developed and recently published an approach to competence assessment. In addition, several researchers have been working on the issue of competence regarding juveniles, and the need to address (and for lawyers to understand) the important differences between the assessment of adult and juvenile

competence. Look for a new Rogers book in 2005 that will offer a very useful addition to the literature on competence assessments.

As a number of mental health professionals point out to lawyers, studies funded by the MacArthur Foundation have produced valuable literature. n57

n57 *Id.* beginning at 89.

Strengths And Limitations Of Competence Assessment Devices

There are several sources that discuss the generally accepted structured interviews, assessment inventories, and instruments specific to the assessment of competence to stand trial. A number of these have been described, at least by name, in the above review of the pertinent literature. Moreover, these items are all best seen in their original formats, and are more knowledgeably commented upon by the authors whose works have been mentioned at some length in this piece than they are by the present author.

For example, it does not take a great deal of time to review the Competency Screening Test, or any of the other much used competence assessment tools. What is commonly known as "The MacArthur" is an example of a "new generation" assessment tool that requires the uninitiated lawyer to be briefed by a mental health professional who has both the manual and knowledge of the relevant literature, as well as a copy of the screening device available. n58

n58 See the compendium of recent literature produced the MacArthur Adjudicative Competence Study updated through May 2004 at www.macarthur.virginia.edu. For understandable reasons, however, at least some of the emphasis of the MacArthur work, which has included well known mental health experts such as Drs. Bonnie, Monahan, Poythress, Otto, and others focus on the interests of the group of mental health experts who have worked together on, among other things, the MacArthur competence assessment tools such as the MacCAT-CA.

The MacArthur uses scenarios presented to the examinee to elicit responses, which are then integrated into the assessment process. The MacArthur Competence Assessment Tool is described as divided conceptually into what the law might describe as separate capability or ability areas, allowing the examinee to be assessed in those specific areas as he or she navigates various scenarios presented.

A number of the older assessment devices clearly concentrate on situational awareness, emphasizing questions such as What does the judge do?, Who is the judge?, What does the jury do?, What does your lawyer do?, etc.

There are new assessment devices being published, and in use, constantly. There are in-patient programs whose clientele involves a large number of persons there for competence assessment, or competence restoration, that have adapted and "retooled" a number of the published instruments and assessment devices. Thus, a practitioner who acquires an understanding of the panorama of assessment tools and devices from the literature may be surprised to find that at a given state hospital, the competence inventory administered for a "situational awareness" is not one of the "standard" and well-known devices.

Not all useful competence assessment inventories are extremely recent. For example, some time ago, Dr. Stephen Lawrence from Southern California, developed what he called the "Lawrence Psychological-Forensic Examination for Use within the [*21] Criminal Justice System." This structured interview was designed for a California competence inquiry, but it is well suited, from a lawyer's viewpoint, to help organize a number of areas that involve or implicate competence to stand trial. n59 This instrument is mentioned here as an example of a useful tool that is, in a sense, "off the radar" of mainstream mental health competence assessment tools, but useful for lawyers to review. It is certainly not unique, in that sense. Other experts have also developed worthy materials. It is an example of an inventory that a lawyer can use to gauge how thorough a competence assessment process has been in a given case.

n59 A number of mental health professionals will not share a competence assessment tool, or any other kind of an instrument, with a lawyer whose case is pending, and whose client may be "briefed" or otherwise impacted by the lawyer's acquired understanding of the materials reviewed. That said, a number of qualified mental health

> professionals are more than willing either during training sessions, or on a one-on-one basis, to brief lawyers with whom they are working for any number of valid and useful reasons.

From a lawyer's viewpoint, an examiner's use of a given competence-specific assessment device is only part of the concern. Given that the case law and literature encourage trial lawyers to have input into a client's competence assessment, it makes little sense for lawyers to defer the responsibility of a competence assessment exclusively to a mental health expert. Moreover, as pointed out above, it is unclear that such experts have any foundation for opining on the significance of attorney-client communications in the absence of consultation with trial counsel.

Without counsel's input, mental health professionals can only provide general information on the accused's "ability to assist in the defense" and, indeed, most mental health professionals do not inquire sufficiently into the characteristics of a given case, the nature of attorney-client communications, and the specific defense strategies (and legal defenses) available, to understand the accused's situational awareness and ability to assist.

It is for this reason, as previously indicated, that it is important for lawyers to understand the accepted protocols for competence assessments, *including* the place that specific competence assessment tools, structured interviews, and situational awareness "tests" used by mental health experts should occupy. No one test or structured interview device is going to provide a sufficient basis for a defensible competence assessment. A competence assessment is contextual, and counsel should treat it as such. Counsel should certainly interact with competence examiners to have input on the elements of a given competence assessment.

Developing A Client -- And Case -- Specific Competence Approach

While the case law places *at least* the ability to monitor competence (and in some states, the responsibility to monitor competence) on defense counsel, it is relatively rare for a defense lawyer to have developed a defensible understanding of what goes into a competence assessment. Here, the understanding referred to is not what a mental health professional does in assessing competence, but rather what defense counsel needs to know to assess whether, when, and how to raise the question of a client's incompetence.

A number of well-qualified and well-intentioned lawyers will point out that there are a variety of strategic and tactical reasons for not "fronting" a client's incompetence where there would, in general, be some case-related "loss" for the client. This view is legitimate in the following respects. First, it may be that an amazingly good settlement opportunity is being presented to a client who, in a lawyer's judgment, is marginally competent. The settlement possibility will be eclipsed if a competence question is raised, and therefore, with the long view in mind, the lawyer [*22] decides not to raise the issue.

There may be other serious concerns about raising competence questions. For example, in a death penalty case, or in other cases involving mental state issues, raising a competence question will give both the trial court and the prosecution, insight into a client that neither would normally have. In some jurisdictions the prosecution is able to essentially control the nature and extent of the competence assessment. Therefore, a competence inquiry amounts to a combination prosecutorial discovery and prosecution evidence, notwithstanding the rules of judicial immunity that may limit the collateral uses of a client's statements during a competence assessment. Careful planning of a prosecution competence assessment may allow the prosecutor to assemble ammunition to rebut a mental state defense, and perhaps also in a death case, to assemble facts in aggravation, or rebut an *Atkins* claim.

Indeed, because of the U.S. Supreme Court's ruling in *Atkins*, there are even more refined questions asked of a capital case defender today than previously. For example, it may be that the lawyer who suspects that his or her client is likely both mentally retarded and incompetent will feel that the presentation of a competence question will trigger an examination of the client intended to neutralize defense evidence of mental retardation. Thus, a death penalty defense team might delay the raising of the competence question until the assessment, and even the adjudication, of the *Atkins* issue takes place -- knowing that such an adjudication may actually have a bearing (either useful or useless) on the later competence adjudication. Indeed, there has already been litigation on the type of protocol that should be used in an *Atkins* examination to differentiate such an assessment from a competence assessment.

Undoubtedly, from a practitioner's viewpoint, outcome-oriented, competence-related decision making is legitimate, and discarding a competence question in favor of obtaining what is defined as a "better" outcome for a client is difficult to argue against. Moreover, it may be that the defenders will be guided by the viewpoint that in any event a competence claim cannot really be waived. This is a risky outlook, however. Indeed, some of the retrospective competence assessment cases demonstrate how difficult it is to prove a client's incompetence during a trial that occurred several and, in

some cases, many years ago, especially where trial counsel did little to document the evidence of incompetence. For that reason, especially where the competence "punch" is being pulled, counsel should carefully think through how to memorialize concerns about incompetence so that if a case "blows up," the reality of the client's incompetence is not lost.

A Competence Issues Checklist

Assuming that the lawyer has arrived at the conclusion that the competence issue must be raised, a number of attendant questions need to be answered. First, in addition to collecting the relevant case law and mental health literature, counsel should begin to define whether the competence question centers around situational awareness, including awareness of procedural and substantive rights, case outcomes, and the like, or the ability to communicate with, and assist counsel, or both.

Second, while considering the practical and strategic issues involved in the release of various forms of client history, counsel should outline what in the available records, including the available medical, psychological and psychiatric treatment records (if there are any), institutional behavior, and attorney-client related interaction records, may either support or undermine a claim of incompetence.

Third, counsel should identify *all* persons who are possible sources of information, and available witnesses, on competence questions, including family, friends, custodial personnel, medical personnel, court staff, and jail visitors.

Fourth, together with one or more mental health professionals, the lawyer should arrive at an understanding of what testing and assessment protocols are indicated, including whether basic psychological testing is needed; whether some understanding of the implications of medication or medical/psychiatric issues is required; and how the examiners propose to use the broad range of competence assessment tools available.

Fifth, the lawyer also should consider what position he or she needs to occupy in the proceedings -- whether to remain as counsel of record, or essentially to become a witness. Obviously, there are some dangers in selecting the latter course, but note: the literature on competence clearly assigns an information sharing role to the lawyer of record. Moreover, at the high end, lawyers who have litigated competence issues where the issue centers on attorney-client communication and ability to assist are aware that counsel of record's input is critical.

A lawyer's role can be variable. On the one hand, it can involve discussions with a designated attorney-expert who becomes the lawyer's surrogate (and is a likely witness) during the course of the litigation of the competence question. There is a wide variety of formats used in connection with this type of approach. Counsel of record may allow the attorney expert (who is retained or appointed solely for that purpose) to communicate directly with the client, or to communicate with the client, lawyer, and a wide range of sources of information. In the alternative, counsel of record may use the attorney-expert only to explain: the duties of defense counsel; the requirement of competence and the attributes of competence; how a competent client and defense counsel interact in the defense of that particular type of case. Often the in-court examination of such an attorney-expert involves a series of hypothetical questions.

Sixth, counsel of record must not only plan how his or her own information will be presented to the trier of fact, but also how to interact with mental health professionals on the case. There are a number of different formats that have been used in this respect. Some lawyers have gone so far as to videotape their interaction with the client, knowing that the video tape would be produced to the prosecution, and eventually to the court. However, the videotape, usually covering a discussion involving both situational awareness and ability to communicate issues, provides a unique insight into the nature of the communication problems that may be raised in a given case.

In other settings, counsel have provided experts with a diary, or chronicle of communication issues and problems, together with jail records evidencing a client's psychological deterioration, and increasingly incoherent conversations and statements. A clear record of the transmission of these materials is made so that when mental health professionals testify in proceedings, and essentially base their views on material other than that, counsel can successfully examine to point out that sources of information acknowledged both in U.S. Supreme Court opinions (remember *Medina v. California*), and accepted mental health literature clearly delineate and define the defense lawyer as a valuable front line source of information on trial competence.

Elsewhere, it has proven possible [*23] for a mental health professional to essentially serve as the surrogate for the lawyer, by not only using the arsenal of tools available to mental health professionals, but also by videotaping interaction with the client that involves a carefully planned set of questions designed to demonstrate the client's responses to questions involving situational awareness, and ability to assist in the conduct of the defense. On occasion, incidentally, the record of either attorney meetings, or mental health professional meetings, has proven to be extremely long -- in part

in order to assure the trier of fact that the possibility or hypothesis of malingering, and exaggeration of symptoms was considered.

Some Pertinent Legal Issues

At the beginning of this writing, emphasis was placed on the usefulness of the district court's restoration to competence-related ruling in *U.S. v. Duhon.* n60

n60 The author thanks Michael Burt, his periodic co-author, and occasional co-counsel, and a well-recognized capital case defender from San Francisco for pointing out Dr. Lawrence's work.

For those whose cases involve presentation of evidence under the guidance of the Federal Rules of Evidence or similar rules, the reality is that psychological or psychiatric evidence often falls into a "soft science" area. For example, in federal courts, since *Daubert,* there have been a number of rulings on the threshold for the admission of psychological or psychiatric evidence that is not itself dependent on some new technique. n61

n61 *Supra,* 104, F.Supp.2d 663.

Under *Daubert,* a central question was "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." n62 Several federal courts have indicated that the "non-scientific expertise" threshold for the presentation of expert testimony found in *Kumho Tire* is applicable to psychological, psychiatric, and social sciences. n63 Indeed, during the years between *Daubert* and *Kumho Tire,* several circuit courts had already decided that psychological and psychiatric testimony was really "specialized expertise" rather than testimony that was the product of a specific scientific theory. n64

n62 *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).*

n63 *Id. at 592-94.*

n64 *See Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137, 150-51 (1999).*

Thus, in a number of jurisdictions, where psychiatric and psychological expertise is at issue, the question is whether the expert has the appropriate qualifications; sufficient special knowledge, skill, experience and training to formulate the competence opinion; and generally employed methodologies and techniques that render the evidence sufficiently reliable to be proffered. n65

n65 *See U.S. v. Bighead, 128 F.3d 1329, 1330 (9th Cir. 1997).*

Thus, in addition to having reviewed the literature on competence, and competence-specific definitions, counsel should be acquainted with the evidentiary tests, thresholds, and standards applicable to the introduction of expert testimony on competence -- carefully differentiating those instances in which an examiner is relying on "a classic" combination of interviews and assessment devices that are recognized in the pertinent literature from those instances in which the examiner has either clearly done insufficient work (according to the literature) or has combined techniques, methods, and tests in a way that is novel and not supported in the literature.

A basic survey of reviewing court decisions where competence was at least one of the issues considered indicates that it is rare that counsel will have made an extremely thorough record where "bad science" has been involved. Thus, we have few opinions that cover research specific to the admission of psychological and psychiatric testimony in a given competence assessment process.

Every Case

In 2004, the United States Supreme Court unexpectedly issued a ruling (*Blakely v. Washington*) that has raised substantial questions about sentencing processes around the United States, and may change the way that criminal trials are conducted in certain instances, as well. n66 While astute commentators and scholars may well have predicted that after

the seminal *Apprendi* ruling, the Court would be headed towards *Blakely*, before 2004 most practitioners certainly were not litigating their cases as though *Blakely* was looming large on the legal horizon.

n66 See a discussion in *U.S. v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000). See, also, Wilson v. Woods, 163 F.3d 935 (5th Cir. 1999). See also* the Second Circuit's opinion in *U.S. v. Hall, 93 F.3d 1337 (2d Cir. 1996)* involving testimony about the symptoms of PTSD. But see, as well, rulings like *Usher v. Lakewood Engineering and Manufacturing Co., 158 F.R.D. 411,* N.D. III., 1994) holding results of an MMPI-2 inadmissible because of insufficient correlation and validity proof.

n67 *Blakely v. Washington, 124 S.Ct. 2531 (2004).*

It is unclear whether the United States Supreme Court intends to tinker much with the current definition of trial competence, or with the procedures for the assessment of competence. Nonetheless, in subtle ways, since the Court's ruling in *Godinez v. Moran,* it has grown increasingly expansive in its dealings with certain aspects of trial competence. But, the criminal defense bar has continued to treat trial competence almost as a passing matter, a question that is easily addressed. Indeed, there are probably more opportunities for criminal defense lawyers to be trained on the vicissitudes of fingerprint examination than on the requirement of each and every client's competence to stand trial.

With competence, we have used a sort of "learn as we go" approach. Unless a lawyer has taken an accidental interest in learning about competence, or is faced with a competence assessment requiring a fast self-study course on competence issues, many lawyers remain barely acquainted with what competence means, how it should be assessed, and when a client's incompetence should be raised.

The requirement of competence is sufficiently important that we should be learning about it at the same time that we learn trial techniques and the basic skills of criminal defense lawyering. Unlike many aspects of the lawyer's case-specific knowledge, knowing about competence is not something that may be of benefit in only one case in a lifetime. Knowledge of competence and incompetence to stand trial is a factor that plays a part in every case that we handle.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePretrial MotionsCompetency to Stand TrialCriminal Law & ProcedureCounselGeneral OverviewCriminal Law & ProcedureAppealsStandards of ReviewGeneral Overview