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Dealing With Experts on Competence to Stand Trial: Suggestions and Approaches — Part One

Since the publication in 1988 of Dr. Thomas Grisso's discussion of the competence to stand trial assessment process, there have been a number of developments aimed at improving the performance of defense counsel in the competence assessment process.¹ The need for lawyers to be familiar with the definitions, assessment processes, and methods of adjudication of the accused's (in)competence to stand trial has been underscored by rulings from the U.S. Supreme Court on competence to stand trial definitions, the development of state-specific case law amplifying existing state statutory definitions of the competence assessment process, scholarly research on that process leading to several influential publications, and ongoing training for defense counsel.

The objective of this article is to review basic information that should be integrated into the evidence presented in a hearing or trial of a person's incompetence to stand trial. Part one of this article will emphasize background information that counsel should be aware of and should collect to better understand who conducts competence assessments, and how to probe the qualifications, professional competence, and methodology employed by experts. Part two will review how lawyers can "operationalize" the definitions of competence to stand trial and the standards applicable to the mental health assessment process in order to either effectively present evidence of incompetence or attack unreliable or invalid opinions of competence.

Participating in the Assessment Process

The basic premise is, admittedly, both simple and simplistic. When lawyers understand the educational and training foundations of mental health experts, the professional standards on which they rely, and the structure of the practice of competence assessment as defined in the literature, they can effectively present (or where necessary attack) competence assessment evidence. There is enough written about competence assessments to allow lawyers a measure of control over, and input into, the competence adjudication process. Conversely, problems arise where lawyers are unable to participate in a standardized assessment process and a knowledgeable adjudication of competence because they have failed to educate themselves.

Frequently, defense counsel in jurisdictions in which there is a centralized mechanism for competence evaluations — such as a designated forensic assessment center, a state hospital, or a court forensic assessment unit — will lament that their opportunity for input into the assessment process is minimal and access to qualified independent experts is limited. These complaints are often valid, though part of the problem is that the defense bar in a number of geographical areas has not developed a proactive approach to the competence assessment process. It often comes as a surprise to some members of the defense bar that their colleagues will make a record of communications with state hospital doctors while sending packets of information and referral questions

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to be addressed. Certain lawyers will make the effort to request to be present during “staffings” of particular clients. These lawyers will request the opportunity for input into the assessment process and an opportunity to present data. Where such legitimate requests are rebuffed, as noted below, the basis for foundational objections emerge, as do opportunities to attack the integrity and reliability of the process.

The approach encouraged here, besides advising defense counsel to be involved in the assessment process (whether as active participant or active observer is a strategic and tactical issue not addressed here), is for lawyers to carefully assess the principal foundational aspects of competence assessments so that valid and reliable work can be recognized, and “bad” science and unprofessional approaches can be unmasked and effectively challenged.

In order to deal effectively with the issue of (in)competence to stand trial, it is critical to understand: (1) how experts are trained; (2) how to assess the significance of their training and professional affiliations; (3) where to find the standards that apply to their work; and (4) how to prepare to present or challenge their opinions.

History of the Diagnostic And Forensic Assessment Process

One useful starting point to this discussion is the history of the endeavor. Competence to stand trial, according to the U.S. Supreme Court’s opinion in *Cooper v. Oklahoma*, is a concept that has been around our legal tradition for at least 300 years.² It was some time, however (and often not until the middle of 20th century in the United States), before legislatures enacted the “modern” competence tests in this country. Moreover, it was not until the latter part of the 20th century that the U.S. Supreme Court reiterated, in its current formulation, the basic elements of competence to stand trial.

The legal concepts have been around much longer than the sciences, diagnostic criteria, professional education curricula, and assessment methodologies in use by those charged with evaluating the competence to stand trial of defendants in criminal cases. Thus, it is helpful to have some notion of how well established some of these important aspects of the foundation for compe-

tence opinions are. For example, the lawyer who goes into session without the vaguest idea of the development of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM) may be surprised by a cross-examination that points out that when the *Manual* was first published in 1952 it covered a limited number of diagnostic criteria. The DSM underwent significant changes in each edition, most dramatically between the second and third editions — and it can be described as a work in progress not particularly well suited for literal use in courtrooms.

Therefore, one could use the DSM as a sword or a shield in the examination of an expert to point out that as the DSM has “aged,” it has changed. This demonstrates that mental illnesses and conditions are the subject of ongoing inquiry, and mental health experts continue to refine their approaches to them. Moreover, the DSM explains, when “. . . employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”³ And since many mental health evaluators use the DSM as a diagnostic gold standard, both the history of its evolution and knowledge of its stated limitations are important.

It is also important to know that there has been an evolution in the level of development and professional regulation of the forensic mental health sciences up to the present time. Having in mind a few significant historical reference points, and discussing them to provide a context to the assessment in the case in question, will be helpful.

Here are a few of these reference points.

- ❖ **1952** Publication of *DSM-I*.
- ❖ **1965** Robey’s Research and Basic Inventory on Competence to Stand Trial (one of the first instruments developed specifically for forensic mental health).
- ❖ **1967** Classification of psychiatric illnesses is addressed in the *Comprehensive Textbook of Psychiatry*.
- ❖ **1968** *DSM-II* published.
- ❖ **1968** The American Academy of

Psychiatry and the Law founded.

- ❖ **1969** The American Board of Forensic Psychology founded.
- ❖ **1973** *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* published by the American Psychiatric Association.
- ❖ **1980** *DSM-III* published, involves a large expansion of diagnostic categories.
- ❖ **1986-1988** Thomas Grisso begins publishing on the evaluation of competency to stand trial, and urges regard for standards in the assessment and report writing.
- ❖ **1987** Melton et al., publish updated edition of *Psychological Evaluation for the Courts*, covering protocols and methods to be applied to a wide variety of examinations (updated and newly published in 2003 in its Third Edition).

Concentrating on Education, Ongoing Training, and Experience

Every legal system in the United States has some basic statement of the requirements applicable to experts. Under the California Evidence Code, an expert is a person who has “. . . special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates.”⁴ The Federal Rules of Evidence set forth a similar threshold definition, providing that an expert is “a witness qualified . . . by knowledge, skill, experience, training, or education. . . .”⁵

Too many practitioners involved in the competence assessment process concede that a proffered expert is possessed of the basic qualifications to testify regarding the assessment of competence to stand trial — either in preparing to present, voir dire, or otherwise cross-examine that expert. Often they do so out of expediency, because the report is “favorable,” or so “negative” that it seems impossible (or impractical) to fight. But even an experienced mental health expert may be an inadequate and unqualified expert on trial competence.

A few observations are in order regarding the training and credentials of psychologists. Psychologists often have (though not always) a Ph.D. obtained

after completion of a course of graduate study of between five and seven years. A dissertation helps to define the expert's area of concentration as a doctoral student. Rarely will it have been on the subject of the assessment of competence to stand trial — or even on some related topic.

This observation leads to this point: other than obtaining some school-based training that provided a foundation for forensic work, little in the expert's academic education may have centered on material of direct use to forensic work, and especially to the assessment of competence to stand trial. The exception may be the graduate of some of the newer programs in forensic mental health.

But for the "mainstream" expert, the process of preparing for the hearing should include the careful review of the expert's course of study and consideration of its relevance to the establishment of expertise in competence assessments. With the exception of those who happened to have studied in areas that are obviously relevant, it is possible that either for the purposes of direct examination or cross-examination, the expert's academic training will prove to be of little use in establishing relevant expertise.

It was not until relatively recently that the American Board of Professional Psychology (ABPP) began awarding specialty certificates in several fields of psychology, including: clinical psychology; forensic psychology; clinical neuropsychology; counseling and school psychology. Those possessed of ABPP certificates demonstrate credentials including the appropriate doctorate; post-doctoral training in their area of specialty; at least five years of experience; recommendations and endorsements from people in the field; and suitable results on a field-specific examination.

Psychiatrists follow different courses of study than do psychologists. Many, though not all, study medicine and complete medical internships before going on to further study and residency programs in psychiatry as part of a course of medical studies. Not all psychiatrists, however, are licensed physicians. Training courses other than medical school education may provide a basis for practice as a psychiatrist, including (at least in some states) obtaining a final degree as a Doctor of Osteopathy.

Some physicians who completed residency programs in psychiatry may

not have received prolonged exposure to areas of study such as psychopharmacology or neurochemistry (beyond basic courses). Thus, these experts may not have easily demonstrable academic training in the effects of certain classes of medications that may be of issue in a given case. Their initial training and continuing education may not have emphasized areas that are critical to a given competency inquiry. These are matters into which counsel should inquire.

Several specialty organizations certify physicians in specialty areas. For example, the American Board of Psychiatry and Neurology certifies physicians in psychiatry, neurology, and child neurology. The American Academy of Psychiatry and the Law emphasizes forensic practice and forensic credentials. It is one of the organizations that has coordinated with the American Medical Association and the American Psychiatric Association in the development of sub-specialty expertise, specialty certificates, standards for education, and requirements for continuing education.

Each of the pertinent organizations or boards explains its relationship (if any) to the predominant organizations. Some of these credentialing bodies publish materials that are useful either in establishing or attacking the approaches and methods used by a given examiner. For example, the American Board of Psychiatry and Neurology commissioned reports on *Core Competencies for Psychiatric Practice*, which are published by the American Psychiatric Press. The title speaks for itself.⁶

Psychiatrists who have completed their residency in psychiatry and have acquired the relevant experience may develop sub-specialty expertise and be awarded either specialty certificates or Board certifications (depending on the credential-awarding organization). Not all of those who conduct forensic examinations will possess board certification or specific training in forensic psychiatry. Establishing how a given expert has demonstrated his or her expertise in forensic examinations may prove to be a critical part of the competence adjudication proceeding.

There are various groups providing credentials to psychiatrists and psychologists. Some are highly legitimate and professionally prized, and others less so. The major organizations mentioned here, including the American

Medical Association, American Psychiatric Association, and American Psychological Association, all have Web sites that explain the information set forth here (as does some of the pertinent literature).⁷ The American Academy of Psychiatry and the Law sets forth standards specific to forensic psychiatry. Similarly, Division 41 of the American Psychological Association provides a wealth of information about forensic psychology, including the standards applicable to forensic assessments.

The reason for this tour of the sources of information (and credentialing bodies) is that lawyers are sometimes not fully aware of what training psychiatrists or psychologists may have had. Both the American Psychiatric Association and American Psychological Association (and their sub-specialty affiliates) regularly publish practice-related standards and information about continuing education. They maintain and publish ethical codes and standards. The failure to pay attention to these sources of information will deprive a lawyer either of the ability to demonstrate a given expert's adherence to, or departure from, current standards of practice.

Academic programs in psychiatry and psychology changed over a period of time. The advent of programs that offer concentrated training in forensic psychiatry or forensic psychology has changed the educational "baggage" that experts possess, depending on when or where they were trained.

For example, many psychologists trained and licensed in clinical psychology, particularly more than 20 years ago, may have had no academic or supervised training at all in forensic psychology and no clinical experience that would have involved competence to stand trial examinations. Thus, their knowledge of the competence to stand trial assessment process may have been learned on the job and as a result of *some* continuing education. Indeed, it is surprising to note how many "experts" on competence assessments have little formal training of any kind specific to such endeavors. Similarly, psychiatrists may have had little or no forensic training. Furthermore, they may have had no exposure to the competence to stand trial assessment process until after they left their residency programs and were in practice — and they may not be able to establish any formal relevant training.

People v. Ary

The importance of inquiries into qualifications can be illustrated by a brief description of the evidentiary hearing held in *People v. Ary*, a case remanded by a California Court of Appeal to a trial court for a retrospective competence assessment.⁸ James Ary was evaluated at the time of his initial trial proceedings (though not specifically for his competence to stand trial). Evidence of his possible incompetence, however, was argued as a critical issue on appeal. During the post-conviction retrospective competence assessment, at least eight mental health professionals, the majority of them psychologists, gave an opinion about Ary's competence to stand trial. Some of the experts were retained by the state, others by the defense. Two were considered "court experts," though they were nominated by the parties. Not all of the experts actually examined Ary, but several did. All of the experts professed to have some opinion about his competence.

The most recently educated psychologist had obtained doctoral training (and a doctorate in clinical psychology), and then had completed a post-doctoral program in forensic psychology that added 2,000 hours of specific training in forensic issues, including the assessment of competence to stand trial. The majority of the other experts had obtained their doctoral degrees at least 20 years before the commencement of the hearing (one had been a practicing psychologist for at least 40 years). None of these experts had any training during the course of their education that touched either on forensic issues or on the assessment of competence to stand trial. Only three of the experts professed to have ever been asked about their training in, and knowledge of, the assessment of competence to stand trial in any detail during their careers prior to the hearing.

Four of the experts purported to have recently read cases involving the definition of competence to stand trial, though most recognized that *Dusky v. United States* and *Drope v. Missouri* were case names related to the definition of competence to stand trial.⁹ Only two of the eight could even state the formulation of the basic competence test by the U.S. Supreme Court. Three of the eight professed to be aware of the discussion of the attributes of competence as discussed in *Godinez v. Moran* — though all three had been asked to review the decision by counsel.¹⁰

Almost all of these experts were aware of and described Dr. Thomas Grisso as an acknowledged expert on the assessment of competence. Only three, however, professed any recent review of Grisso's *Evaluating Competencies*, Melton's *Psychological Evaluations for the Courts*, or Sadock and Sadock's *Comprehensive Textbook of Psychiatry* — and each of these had been asked about these sources in advance of the hearing.

Prior to the hearing, two of the experts indicated awareness of the research on the CAST-MR (the Competency Assessment for Standing Trial of Defendants with Mental Retardation). Half of the experts had reviewed literature pertinent to the CAST-MR (which had been administered to the accused). Only two of the experts professed to be conversant on the limitations of competency assessment instruments, including the CAST-MR.¹¹

All of the experts at issue had previously qualified as experts in criminal cases, some on many occasions. The experts quizzed on the reasons for the variation in their foundation noted the differences in the approaches of the lawyers they were working with to prepare their testimony.

Admittedly, evidence from one case is an insufficient basis from which to generalize. Anecdotal information from mental health experts and lawyers alike, however, suggests that both professions have highly varied knowledge of competence assessment tools and methodologies — to say nothing of the variations of knowledge about the combination of the definitions of (in)competence found in statutes and case law. There is some reason to be concerned that it is uninformed lawyering that is allowing uninformed experts to continue to operate without the need for current knowledge. Anecdotal information from lawyers handling criminal appeals indicates that it is relatively rare for there to be an extensive inquiry into the basic expertise of a psychiatrist or psychologist testifying on the question of competence to stand trial.¹²

Assuming that defense counsel prepares by reviewing relevant literature and case law, the defense can bear its burden of proof in part by defining the standard of practice that applies to an expert's assessment of competence to stand trial. The expert who can specifically link the elements of a given competence assessment to the U.S. Supreme Court's rulings on competence (as well

as to any seminal state rulings) and to the state statutory scheme will establish the necessary baseline.

Approaching the presentation of evidence of competence (at least from the defense's viewpoint) with these basics in mind has another advantage — it diminishes the possibility that counsel will rely on essentially uninformed experts to set the tone in the competence assessment adjudications. It is rarely helpful to endorse an expert's "I know it when I see it" approach. If an expert is unable during preparation sessions to make the basic connections between the legal definitions and the assessment process that he or she used, that expert is unlikely to make a good impression on cross-examination. Why do experts get away with displays of blissful ignorance of the legal definitions and contents of relevant professional literature? Part of the reason is that lawyers let them do so.

Prepare the Packet

There is a way to avoid the problem of the experienced expert whose foundation on competence issues seems weak. Counsel should prepare a relevant packet of information about the competence assessment process. The packet should include not only copies of the pertinent statutes and relevant case law, but also copies of the literature, including Grisso, Melton, and others whose information will be useful to establishing the adequacy of the work done by the defense expert and the standards that should be used in a competence assessment process. While this seems to be a basic insight into the obvious, few lawyers seem to do it. Unlike other areas of expertise that could involve extensive preparation, the task just outlined can be accomplished by accessing a few easily available legal standards and a few excerpts from widely available literature. Some lawyers will make it a point to make the packet part of the record so that the judge reviews it as well.

Using such a packet can also force opposing counsel to pay careful attention to phrasing questions in terms of the actual language of the cases and quoted literature. Also, it is a relatively easy way of showing a jury (in those jurisdictions that allow the question of competence to be tried by a jury) that there is a body of written information that plays a part in defining terms and processes applicable to competence to stand trial.

In addition to the materials just described, this packet might include materials on standards of practice applicable to the relevant areas of mental health expertise — an area often overlooked.

Conclusion

We have now looked at the basic issues that must be reviewed in dealing with an expert on the assessment of competence to stand trial. The emphasis here has been on understanding what background that expert brings to the assessment, and what gaps in the expert's understanding of the issues may have to be addressed early in the interaction between counsel and expert. In part two of the article, we will focus more specifically on methodology and approach, and how to ensure that an expert is either properly supported or appropriately challenged in rendering a competence-related opinion.

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Notes

1. Thomas Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* (1988).
2. 517 U.S. 348, 356-357 n.9 (1996), noting that the concept was recognized in reported cases in the 17th century, and embodied in the Criminal Lunatics Act of 1800.
3. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., text revision (DSM-IV-TR) at xxxii-xxxiii.
4. CAL. EVID. CODE § 720(a).
5. FED. R. EVID. 702.
6. *Core Competencies for Psychiatric Practice: What Clinicians Need to Know* (Stephen Scheiber et al. eds., 2003).
7. As with psychologists, a good primer on the credentials available to psychiatrists can be found in Virginia Sadock & Benjamin Sadock's *Comprehensive Textbook of Psychiatry* (8th ed.).
8. *People v. Ary*, 118 Cal.App.4th 1016 (2004).
9. *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975).
10. *Godinez v. Moran*, 509 U.S. 389 (1993).
11. See Richard Rogers & Daniel Shuman, *Fundamentals of Forensic Practice* 175-176 (2005).

12. The anecdotes were not collected in a methodical way, but involved the writer's contacts with lawyers litigating competence to stand trial issues in several California state and federal cases. ■

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