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Evaluation of Competence to Stand Trial in Adults

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This chapter provides a review of the legal context for competency evaluations and the relevant forensic mental health concepts, a discussion of the empirical foundations and limitations of competency evaluation, and information about the evaluation process, report writing, and testimony for legal professionals involved in cases where the competency issue is raised (see Zapf & Roesch, 2009, for a more detailed review).

LEGAL CONTEXT

The legal context for competency to stand trial in the United States can be traced back to English common law dating from at least the 14th century. The competency doctrine evolved at a time when defendants were not provided with the right to assistance of counsel and, in many cases, were expected to present their defense alone and unaided.

Various legal commentators have delineated several principles underlying the rationale for the competency doctrine. The Group for the Advancement of Psychiatry (1974) summarized four underlying principles: (1) to safeguard the accuracy of any criminal adjudication; (2) to guarantee a fair trial; (3) to preserve the dignity and integrity of the legal process; and (4) to be certain that the defendant, if found guilty, knows why he is being punished (p. 889). Bonnie (1992) explained that allowing only those who are competent to proceed protects the dignity, reliability, and autonomy of the proceedings. The underlying rationale, then, concerns both the protection of the defendant as well as the protection of the state's interest in fair and reliable proceedings.

Although the term *competency to stand trial* has been used for centuries, there has begun a recent shift in terminology to reflect the fact that the vast majority of cases are plead out before getting to trial and that the issue of "trial" competency can be raised at any stage of the proceedings—from arrest to verdict to sentencing. Bonnie (1992), Poythress and colleagues (1999, 2002), and others have suggested the use of terms such as *adjudicative competence* or *competence to proceed* to better reflect the reality of this doctrine. Throughout this chapter the terms *competency to stand trial*, *adjudicative competence*, and *competency to proceed* are used interchangeably.

Legal Standards for Competency

Legal standards for adjudicative competence clearly define competency as an issue of a defendant's present mental status and functional abilities as they relate to participation in the trial process. This distinguishes competency from *criminal responsibility*, which refers to a defendant's mental state at the time of the offense. In an extremely brief decision, the U.S. Supreme Court established the modern-day standard for competency to stand trial in *Dusky v. United States* (1960). Citing a recommendation of the Solicitor General, the Court held that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (p. 402).

Fifteen years after *Dusky*, the United States Supreme Court in *Drope v. Missouri* (1975) appeared to elaborate slightly on the competency standard by including the notion that the defendant must be able to "assist in preparing his defense" (p.171). Legal scholars, such as Bonnie (1993), as well as the *American Bar Association Criminal Justice Mental Health Standards* (1989), indicated that *Drope* added another prong to *Dusky* by requiring that defendant be able to "otherwise assist with his defense" (ABA, 1989, p. 170). Similarly, the addition of this "otherwise assist" prong to the *Dusky*

standard has been affirmed in cases such as *United States v. Duhon* (2000).

The federal standard for competency and each of the states' competency standards mirror *Dusky*, either verbatim or with minor revision, but at least five states (Alaska, Florida, Illinois, New Jersey, Utah) have also expanded or articulated the *Dusky* standard to include specific functional abilities. Since the definition of competency varies by state, it is necessary for an evaluator to consult the relevant competency statutes and definitions before proceeding with the evaluation of a defendant's competency. Legal professionals who retain competency evaluators may wish to confirm that the evaluator is familiar with the relevant jurisdictional standards and procedures.

Case Law Subsequent to *Dusky*

Case law subsequent to *Dusky* serves to offer some elaboration and interpretation of that competency standard. In *Wieter v. Settle* (1961), the United States District Court for the Western District of Missouri determined that it was improper to further detain a defendant who had been charged with a misdemeanor offense and held for 18 months for *competency restoration* since prosecution was no longer probable. In delivering the court's opinion, Chief Judge Ridge delineated a series of eight functional abilities related to *Dusky* that a defendant must possess to be competent (see p. 320).

The U.S. Court of Appeals considered the relevance of amnesia to adequate participation in legal proceedings in *Wilson v. United States* (1968). The court, in *Wilson,* delineated six factors that need to be considered (see pp. 463–464). The *Wilson* factors clearly specify a functional approach to evaluating competency, in which the specific deficits of a defendant would be related to the legal context.

All defendants are provided the Constitutional right to assistance of counsel; however, defendants may choose to waive this right and represent themselves (to appear *pro se*). This raises the question of whether competence to waive counsel should be evaluated separately from competency to stand trial. The U.S. Supreme Court considered the issue of whether a higher standard should apply for waiving counsel or pleading guilty in *Godinez v. Moran* (1993). The U.S. Supreme Court rejected the argument that although the defendant was found competent to stand trial, he was not competent to waive his right to counsel and represent himself, and held that "while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial…Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights" (p. 2686). Thus, the Court in *Godinez* indicated that the *Dusky* standard is the Constitutional minimum to be applied, regardless of the specific legal context, and that a defendant's decision-making abilities appear to be encompassed within this standard.

The Supreme Court revisited the issue of competency to represent oneself (proceed *pro se*) in *Indiana v. Edwards* (2008), where it considered the issue of whether a State, in the case of a criminal defendant who meets the *Dusky* standard for competence to stand trial, can limit a defendant's right to self-representation by requiring that the defendant be represented by counsel at trial. The Court answered in the affirmative, thereby establishing that competence to proceed *pro se* requires a higher level of competence than competence to stand trial, but was silent on the issue of how this should be determined. The Court was clear to make the differentiation between their decision in *Edwards* and that in *Godinez* by stating that the issue in *Godinez* was whether the defendant was competent to waive counsel, not represent himself.

Competency Procedures

Legal procedures are well established to ensure that defendants are competent to proceed. In *Pate v. Robinson* (1966), the Supreme Court held that the competency issue must be raised by any officer of the court (defense, prosecution, or judge) if there is a *bona fide* doubt as to a defendant's competence. The threshold for establishing a *bona fide* doubt is low, and most courts will order an evaluation of competence once the issue has been raised. Commenting on its decision in *Pate*, the Supreme Court in *Drope v. Missouri* (1975) noted that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some

circumstances, be sufficient" (p. 180). The *Drope* Court added that even when a defendant is competent at the outset of trial, the trial court should be aware of any changes in a defendant's condition that might raise question about his competency to stand trial. Thus, the issue of competency can be raised at any time prior to or during a trial.

Mental health professionals are called upon to evaluate defendants with respect to their competency and once the evaluation has been completed and a report submitted to the court, a hearing is scheduled to adjudicate the issue of competence (these hearings usually take place in front of a judge but a few jurisdictions allow for a jury to hear the issue of competency in certain circumstances). *Cooper v. Oklahoma* (1996) established that incompetency must be proved by a preponderance of evidence, and not the higher standard of clear and convincing evidence. The evaluator's report is highly influential in the court's decisions. Often, the opinion of a clinician is not disputed, and the court may simply accept the recommendations made in the report. Indeed, research has shown that the courts agree with report recommendations upwards of 90% of the time (Hart & Hare, 1992; Zapf, Hubbard, Cooper, Wheeles, & Ronan, 2004). Thus, this appears to be the norm in those jurisdictions in which the court orders only one evaluator to assess competency. Hearings on the issue of competency appear to occur more often, although still relatively infrequently, in those jurisdictions where two experts are asked to evaluate competency.

Defendants determined to be competent may then proceed with trial or with another disposition of their criminal case. The trial of defendants found incompetent is postponed until competency has been restored or, in a small percentage of cases, until a determination is made that the defendant is unlikely to regain competency.

Competency Restoration

Until the landmark case of *Jackson v. Indiana* (1972), most states allowed the automatic and indefinite confinement of incompetent defendants. This resulted in many defendants being held for lengthy periods of time, often beyond the sentence that might have been imposed had they been convicted. This practice was challenged in *Jackson*. The U.S. Supreme Court in *Jackson* held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future" (p. 738). The Court did not specify limits to the length of time a defendant could reasonably be held, nor did it indicate how progress toward the goal of regaining competency could be assessed. Nevertheless, this decision resulted in changes to state laws regarding confinement of incompetent defendants.

Many states now place limits on the maximum length of time a defendant can be held and, if a defendant is determined to be unlikely to ever regain competency, the commitment based on incompetency must be terminated. However, in many states the actual impact of *Jackson* may be minimal (Morris, Haroun, & Naimark, 2004). State laws regarding treatment of incompetent defendants vary considerably, and Morris and colleagues found that many states ignore or circumvent *Jackson* by imposing lengthy commitment periods before a determination of unrestorability can be made, or tie the length of confinement to the sentence that could have been imposed had the individual been convicted of the original charge(s). Even after a period of confinement and a determination that competency is unlikely to be restored in the foreseeable future it is possible that such defendants could be civilly committed, but *United States v. Duhon* (2000) makes clear that defendants who are not dangerous must be released. Charges against defendants who are not restorable are typically dismissed, although sometimes with the provision that they can be reinstated if competency is regained.

Medication

Medication is the most common and arguably most effective means of treatment for incompetent defendants; however, defendants do have the right to refuse medication. There have been two major cases decided by the U.S. Supreme Court dealing with the issue of the involuntary medication of defendants who had been found incompetent to stand trial. In *Riggins v. Nevada* (1992), David Riggins had been prescribed Mellaril® and found competent to stand trial. He submitted a motion requesting that he be allowed to discontinue the use of this medication during trial, in order to show jurors his true mental state at the time of the offense since he was raising an insanity defense. His motion was denied and he was convicted of murder and sentenced to death. The U.S. Supreme Court

reversed his conviction, holding that his rights were violated. Specifically, the Court found that the trial court failed to establish the need for and medical appropriateness of the medication. In addition, the Court also addressed the issue of whether the involuntary use of antipsychotic medications may affect the trial's outcome (see p. 127).

The U.S. Supreme Court further specified the criteria to determine whether forced medication is permissible in the case of *Sell v. United States* (2003). In *Sell* the Supreme Court held that antipsychotic drugs could be administered against the defendant's will for the purpose of restoring competency, but only in limited circumstances. Writing for the majority, Justice Breyer noted that involuntary medication of incompetent defendants should be rare, and identified several factors that a court must consider in determining whether a defendant can be forced to take medication, including whether important governmental interests are at stake; whether forced medication will significantly further those interests (i.e., the medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to interfere significantly with the defendant's ability to assist counsel); whether involuntary medication is necessary to further those interests (i.e., alternative, less intrusive treatments are unlikely to achieve substantially the same results); and whether administering drugs is medically appropriate (see p. 167).

FORENSIC MENTAL HEALTH CONCEPTS

Evaluation of a defendant's psychological functioning is an essential component of the assessment of competency. Though not clearly specified in the *Dusky* decision, most state laws require that a finding of incompetence be based on the presence of a mental disorder. Once the presence of mental disease or defect has been established, the following must ensue: (1) evaluation of relevant functional abilities and deficits; (2) determination of a causal connection between any noted deficits and mental disorder; and (3) specification of how these deficits may have an impact upon functioning at trial.

Mental Illness as a Prerequisite for Incompetence

Determination of serious mental disorder, cognitive deficit, or mental retardation is merely the first step in finding a defendant incompetent to stand trial. As Zapf, Skeem, and Golding (2005) noted, "the presence of cognitive disability or mental disorder is merely a threshold issue that must be established to 'get one's foot in the competency door'" (p. 433). Although evaluators a few decades ago appeared to base competency decisions largely on a finding of *psychosis* or mental retardation (see Roesch & Golding, 1980, for a review), it is now recognized that the presence of a diagnosis, even severe mental disorder, is not by itself sufficient to find a defendant incompetent. Psychosis is significantly correlated with a finding of incompetence; that is, a majority of incompetent defendants are diagnosed with some form of psychosis (mental retardation and organic brain disorders account for most of the remaining diagnoses). However, only about half of evaluated defendants with psychosis are found incompetent (Nicholson & Kugler, 1991), a clear indication that incompetence is not equated with psychosis. Rather, it is necessary for the evaluator to delineate a clear link (causal connection) between a defendant's mental impairments and his ability to participate in legal proceedings. This is referred to as a *functional assessment of competency*.

Before turning to a discussion of functional assessment, it is important to note that a defendant may have clearly demonstrable pathology, but the symptoms or observable features may be irrelevant to the issue of competency. Such features would include depersonalization, derealization, suicidal ideation, and poor insight. Even a person who meets civil commitment criteria may be considered competent to stand trial, although there does appear to be a strong relationship between incompetence and commitability. For the most part, evaluators will need to determine that the level of mental disorder is severe enough to affect a defendant's ability to proceed with trial. A diagnosis is useful in this regard, but more attention should be paid to symptoms rather than broad diagnostic categories. Many incompetent defendants have a diagnosis of schizophrenia, for example, but it is the specific symptoms that will be relevant to the competency evaluation.

It is most helpful to evaluators if legal counsel is able to provide information regarding the types of symptoms (behaviors, observations) that appear to impair or limit his or her discussions or interactions with the defendant. Any observations regarding the defendant and his or her demeanor, thoughts, actions, or behaviors should be passed along to the evaluator. Although relevant symptoms can vary

widely, there are a few that tend to be more prevalent in incompetent defendants. These include formal thought disorder (as indicated by disorganized speech, loose associations, tangentiality, incoherence, or word salad); concentration deficits; rate of thinking (abrupt and rapid changes in speech or profound slowing of thought or speech); delusions (strongly held irrational beliefs that are not based in reality); hallucinations (sensory perceptions in the absence of a stimulus); memory deficits; and mental retardation or intellectual or developmental disability.

Psycholegal/Competence-Related Abilities

A review of competency case law (including *Dusky*, *Drope*, *Wieter*, *Godinez*, *Edwards*, and other relevant cases), legal commentary (such as Bonnie's reconceptualization of the construct of competence, 1992, 1993), and the available body of literature on competency evaluation and research indicates a number of psycholegal abilities relevant to the issue of competence. These include understanding, appreciation, reasoning, consulting with counsel, assisting in one's defense, and decision-making abilities. Each of these areas will be an important and relevant area of focus for an evaluation of competency.

Understanding

Within the context of competence to stand trial, factual understanding generally encompasses the ability to comprehend general information about the arrest process and courtroom proceedings. The defendant's factual understanding of the legal process includes a basic knowledge of legal strategies and options, although not necessarily as applied to the defendant's own particular case (case-specific understanding usually is encompassed by appreciation [rational understanding]; see next section). Thus, the competence-related ability to understand involves the defendant's ability to factually understand general, legally relevant information.

Appreciation

Appreciation generally refers to a defendant's rational understanding and encompasses specific knowledge regarding and accurate perception of information relevant to the role of the defendant in his or her own case. Within the context of competence to stand trial, appreciation encompasses the ability to comprehend and accurately perceive specific information regarding how the arrest and courtroom processes have affected or will affect the defendant. The defendant's appraisal of the situation must be reality-based, and any decisions that he or she makes about the case must be made on the basis of reality-based information. Thus, the competence-related ability to appreciate involves the application of information that the defendant factually understands to the specific case in a rational (i.e., reality-based) manner.

Reasoning

Reasoning generally refers to a defendant's ability to consider and weigh relevant pieces of information in a rational manner in arriving at a decision or a conclusion. To demonstrate appropriate reasoning ability the defendant must be able to communicate in a coherent manner and make decisions in a rational, reality-based manner undistorted by pathology. It is important to distinguish between the outcome of a decision and the process by which the decision is made. What is important is not the outcome of the decision but that the defendant be able to use appropriate reasoning processes—weighing, comparing, and evaluating information—in a rational manner. In the case of a defendant who is proceeding with the assistance of an attorney, reasoning encompasses the ability of the defendant to consult with counsel and to make rational decisions regarding various aspects of participation in his or her defense.

Consulting and Assisting

Although the *Dusky* standard indicates that the defendant must be able to "consult with his lawyer," the U.S. Supreme Court in *Drope v. Missouri* (1974) used the terminology "assist in preparing his defense" and the Federal standard (U.S. Code Annotated, Title 18, Part III, chapter 13, section 4241) indicates that the defendant must be able to "assist properly in his defense." Thus, the defendant's ability to consult with and assist counsel must be considered as part of the competency assessment. The defendant must be able to engage with counsel in a rational manner; thus, effectively assisting counsel requires that the defendant be able to communicate coherently and reason.

Decision Making

Closely tied to the abilities to appreciate, reason, and assist counsel is the ability to make decisions. The U.S. Supreme Court decision in *Cooper v. Oklahoma* (1996) appeared to equate a defendant's

inability to communicate with counsel with incapacity to make fundamental decisions. In addition, the Supreme Court in *Godinez* incorporated decision-making abilities about the case into the standard for competence. Thus, a defendant's decision-making abilities with respect to specific, contextually relevant aspects of the case need be considered in the trial competency evaluation. It is important to note that research examining the content of competency evaluation reports has shown that certain abilities important and relevant to competence to stand trial, such as decision-making abilities, have rarely been addressed by evaluators in their reports (LaFortune & Nicholson, 1995; Skeem, Golding, Cohn, & Berge, 1998). Thus, legal counsel should ensure that competency evaluators are including this information in their evaluation reports.

Functional and Contextual Nature of Competency and its Evaluation

A functional assessment dictates that competency to stand trial cannot simply be assessed in the abstract, independent of contextual factors. Thus, an evaluation of contextual factors should always take place. This is the essence of a functional approach to assessing competence, which posits that the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. The open-textured, context-dependent nature of the construct of competency to stand trial was summarized by Golding and Roesch (1988):

> Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing* evidence, anticipating the substantial effort of a *particular* attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome. (p. 79)

The importance of a person–context interaction has also been highlighted by Grisso (2003), who defined a functional assessment in the following manner:

> A decision about legal competence is in part a statement about *congruency or incongruency between (a) the extent of a person's functional ability and (b) the degree of performance demand that is made* by *the specific instance of the context in that case.* Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for competence decisions. (pp. 32–33)

Obviously, a functional assessment requires evaluators to learn about what may be required of a particular defendant. Some of this information may be provided by the defendant but other information will need to come from court documents and from the defendant's legal counsel. Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. As Rogers and Mitchell (1991) note, the requisite level of understanding for a complex crime is higher than for a less complex one. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In cases in which a trial is likely, a defendant's demeanor in court and the ability to testify will certainly be of relevance. A defendant who is likely to withdraw into a catatonic-like state if required to testify, or one who may appear to jurors as not caring or not paying attention to the trial due to medication side effects, may not be capable of proceeding. But these same defendants may be able to proceed if the attorney intends to plea bargain.

Unfortunately, research has indicated that evaluators often fail to relate specific abilities and deficits to the particular case (Heilbrun & Collins, 1995) and that they often fail to provide a discussion of the link between symptomatology and legal abilities in their evaluation reports (Skeem et al., 1998). Legal counsel should expect an evaluator to ask for detailed information regarding those abilities that will be required of the particular defendant in the particular case so as to guide their competency-related inquiries. In addition, legal counsel should expect that evaluators might ask to observe their interactions with the defendant so as to truly perform a functional evaluation of the defendant's ability to relate to counsel, communicate with counsel, and participate in his or her own defense. If these requests do not occur, legal counsel should feel comfortable in raising these issues with the evaluator so as to ensure that a contextual and functional evaluation, in line with current best practices, is conducted.

EMPIRICAL FOUNDATIONS AND LIMITS

Prior to 1980, research on competency to stand trial was limited; however, the past few decades have witnessed a surge in research on this issue and there currently exists a robust literature in this area. In addition to research on various aspects of competency, structured and semi-structured instruments for assessing competency to stand trial have been developed. A review of this literature is well beyond the scope of this chapter, but this section will highlight those areas in which a literature base exists and attempt to provide a representative sample of the findings. More detailed information about all aspects of this section can be found in Zapf and Roesch (2009).

Research on Adjudicative Competence

The available research on adjudicative competence has mainly focused on procedural and assessment issues, the characteristics of referred and incompetent populations, the reliability and validity of competency evaluation, and the development and validation of instruments for the evaluation of competency. In addition, a limited but growing literature is developing on the restoration of competence. We will attempt to highlight representative findings in each of these areas.

Procedural Issues

Poythress and colleagues (2002) reported a series of studies of defense attorneys in several jurisdictions who responded to questions about their perceptions of the competence of their clients. These researchers found that the lawyers had concerns about the competency of their clients in 8% to 15% of the cases; however, competency evaluations were requested in less than half of these cases (in some of those cases where competency evaluations were not requested, the attorney tried to resolve the concerns through informal means, such as including a family member in the decision-making process). Poythress and colleagues noted that the attorneys indicated that their concerns were based on the functional abilities of the clients, such as communicating facts and decision-making capacity.

Reasons other than a concern about a defendant's competency may at least partially account for the consistent finding that only a small percentage of defendants referred for competency evaluations are found incompetent. Roesch and Golding (1980) reported on 10 studies conducted prior to 1980 and found an average incompetency rate of 30%. They also noted a considerable range of rates, with some jurisdictions finding almost no referred defendants to be incompetent while others reported rates as high as 77%. A recent meta-analysis of 68 studies found the rate of incompetence to be 27.5% (Pirelli, Gottdiener, & Zapf, 2011).

Characteristics of Referred and Incompetent Defendants

A vast amount of the competency research has examined the characteristics of both referred individuals as well as those found incompetent. Defendants *referred* for competency evaluations are often marginalized individuals with extensive criminal and mental health histories. Research has indicated that the majority of these defendants tend to be male, single, unemployed, with prior criminal histories, prior contact with mental health services, and past psychiatric hospitalizations. Viljoen and Zapf (2002) compared 80 defendants referred for competency evaluation with 80 defendants not referred and found that referred defendants were significantly more likely to meet diagnostic criteria for a current psychotic disorder, to be charged with a violent offense, and to demonstrate impaired legal abilities. In addition, referred defendants were less likely to have had previous criminal charges. Notably, approximately 25% of non-referred defendants demonstrated impairment on competence-related abilities. In addition, approximately 20% of referred defendants either did not meet criteria for a mental disorder or demonstrated no impairment of competence-related abilities.

With respect to the characteristics of defendants found incompetent, a recent meta-analysis found that unemployed defendants were twice as likely to be found incompetent as those who are employed and those diagnosed with a psychotic disorder were approximately eight times more likely to be found incompetent as those without such a diagnosis (Pirelli et al., 2011).

Reliability and Validity of the Evaluation Process

Since evaluators are assessing a defendant's present ability to perform a series of relatively clearly defined tasks, it seems reasonable to expect that competency evaluations would be highly reliable. In fact, this is precisely what the numerous studies on reliability have shown, with agreement about

the ultimate opinion regarding competency being reported in the 90% range (Golding et al., 1984; Rosenfeld & Ritchie, 1998; Skeem et al., 1998). However, a reliable system of evaluation is not necessarily a valid one. For example, at one time it was the case that evaluators equated psychosis with incompetency (Roesch & Golding, 1980). Thus, if clinicians agreed that a defendant was psychotic they would also agree that the defendant was incompetent. As noted in this chapter, while psychosis is highly correlated with incompetency, it is also the case that a large percentage of competent defendants experience psychotic symptoms. The view that psychosis and incompetency are not inextricably entwined has changed as evaluators have become better trained and more research is available to guide decisions.

The problem of evaluating validity is that there is no gold standard for competence against which to compare evaluator decisions/opinions. Relying on court decisions is not particularly helpful since agreement rates between evaluator recommendations and court determinations have been shown to be well over 90% (Cox & Zapf, 2004; Cruise & Rogers, 1998; Hart & Hare, 1992). How, then, can the issue of construct validity be assessed? Golding and colleagues (1984) suggested the use of a panel of experts, referred to as a "blue ribbon panel," to serve as an independent criterion. In their study, they asked two experts to make judgments about competency based on a review of records, reports from hospital evaluators, and evaluations using the Interdisciplinary Fitness Interview (IFI). Golding and colleagues found that "for the 17 cases seen by the blue-ribbon panelists, they agreed with the IFI panelists 88% of the time, with the hospital staff 82% of the time, and with the courts 88% of the time" and they concluded that "on the basis of these data it would be hard to argue for one criterion definition over another" (p. 331).

The aforementioned study illustrates the methodological problems inherent in studies of competency evaluations, particularly in terms of the lack of a "correct" outcome against which to compare different methods of decision making. We are left with the reality that there can be no hard criterion against which to test the validity of competency evaluations because we do not have a test of how incompetent defendants would perform in the actual criterion situations. Since incompetent defendants are not allowed to go to trial until competency is restored, there is no test of whether a defendant found incompetent truly would have been unable to proceed with a trial or other judicial proceedings. Short of the provisional trial, the ultimate test of validity will never be possible.

Restoration of Competence

Empirical research on competency restoration indicates that most defendants are restorable: Nicholson and McNulty (1992) reported a restoration rate of 95% after an average of two months; Nicholson, Barnard, Robbins, and Hankins (1994) reported a rate of 90% after an average of 280 days; Cuneo and Brelje (1984) reported a restoration rate of 74% within one year; and Carbonell, Heilbrun, and Friedman (1992) reported a rate of about 62% after three months. Thus, regardless of the upper time limits on competency restoration allowed by state statute, it is now the case that most incompetent defendants are returned to court as competent within six months (Bennett & Kish, 1990; Nicholson & McNulty, 1992; Pinals, 2005; Poythress et al., 2002) and the vast majority of incompetent defendants are restored to competency within a year.

Research has also examined the issue of nonrestorability. Mossman (2007) found that individuals with a longstanding psychotic disorder with lengthy periods of prior psychiatric hospitalizations, or irremediable cognitive deficits such as mental retardation, were well below average in terms of their chances of restoration.

The most common form of treatment for the restoration of competence involves the administration of psychotropic medication. Some jurisdictions have also established educational treatment programs designed to increase a defendant's understanding of the legal process or individualized treatment programs that confront the problems that hinder a defendant's ability to participate in his or her defense (Bertman et al., 2003; Davis, 1985; Siegel & Elwork, 1990). In addition, some jurisdictions have implemented treatment programs specifically targeted towards those defendants with mental retardation who are found incompetent to proceed.

The success of treatment programs for the restoration of competence is variable and dependent upon the nature of the treatment program and the type of defendant targeted. Anderson and Hewitt (2002) examined treatment programs designed to restore competency in defendants with mental retardation and found that only 18% of their

sample was restored. Treatment programs that target defendants with various other types of mental disorders have met with more success in that larger proportions of the defendants are restored to competency; however, it is not clear that individualized treatment programs that target specific underlying deficits for each defendant are any more effective than educational programs that teach defendants about their legal rights (Bertman et al., 2003). What appears to be accurate is that successful restoration is related to how well the defendant responds to psychotropic medications administered to alleviate those symptoms of the mental disorder that initially impaired those functional abilities associated with trial competency (Zapf & Roesch, 2011).

Competency Assessment Instruments

Prior to the 1960s no *forensic assessment instruments* (a term coined by Grisso in 1986) existed to assist experts in the evaluation of various legal issues. Trial competency was the first area for which forensic assessment instruments were developed. The evolution of forensic assessment instruments for the evaluation of competency has gone from early checklists (e.g., Robey, 1965) and sentence-completion tasks (e.g., Lipsitt, Lelos, & McGarry, 1971) to self-report questionnaires (e.g., Barnard et al., 1991) to interview-based instruments without, and then with, criterion-based scoring. Suffice it to say, this is a large area of research and the interested reader should consult the following resources for more information: Grisso (2003); Melton, Petrila, Poythress, and Slobogin (2007); Zapf and Roesch (2009); and Zapf and Viljoen (2003).

Three instruments show a great deal of promise in terms of their utility in the evaluation of competency to stand trial: the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA; Poythress, et al., 1999), the Evaluation of Competency to Stand Trial—Revised (ECST-R; Rogers, Tillbrook, & Sewell, 2004), and the Fitness Interview Test—Revised (FIT-R; Roesch, Zapf, & Eaves, 2006). Each of these instruments can be used to assist in the evaluation of a defendant's competency status and each has its strengths and weaknesses. All three of these instruments show evidence of sound psychometric properties.

The MacCAT-CA uses standardized administration and criterion-based scoring, which increases its reliability and provides scores on three competence-related abilities—understanding, reasoning, and appreciation—that can be compared to a normative group of defendants. The methodology used, however, involves a vignette format that limits the ability to extrapolate to a defendant's own particular case.

The ECST-R uses a hybrid interview approach, containing both semi-structured and structured components, designed to assess competency to stand trial generally as well as specific competencies such as competency to plead and competency to proceed *pro se*. The ECST-R yields scores in four different areas—rational understanding, factual understanding, consulting with counsel, and overall rational ability—and also includes scales that screen for feigned incompetency.

Like the MacCAT-CA, the ECST-R is a norm-referenced instrument, which means that the scores obtained by a particular defendant can be compared to a normative group of defendants to provide an indication of how this particular defendant compares to other defendants on the various abilities measured. The structured approach of these two instruments limits the types of questions that can be asked of a particular defendant (of course, the evaluator should ask about all relevant contextual issues in addition to administering either the MacCAT-CA or the ECST-R).

The FIT-R provides an interview guide for assessing the relevant competency-related issues in three different areas—factual understanding, rational understanding (appreciation), and consulting/decision making. Its semi-structured format allows for broad discretion in the types of inquiries made so all contextual elements can be evaluated for each defendant.

THE EVALUATION

Selecting an Evaluator

Legal counsel able to select and retain forensic evaluators of their choice (as opposed to having them court-ordered) will want to consider the potential evaluator's knowledge, training, and education as well as his or her skill set and experience. The evaluation will typically consist of three elements—an interview, testing, and collateral information review—and so legal counsel may wish to inquire with potential experts regarding the methods they use for conducting competency evaluations, the instruments that they typically use (if any), their experience with competency evaluation in general, as well as their experience in the relevant jurisdiction.

Defense Counsel's Role in the Evaluator's Preparation

There are four ways in which defense counsel will play a role in the competency evaluator's preparation and evaluation. First, defense counsel should expect the competency evaluator to clarify the referral question. This is one of the first tasks that an evaluator should complete and so it will require a conversation with the referring party (which we assume to be the defense counsel since this is the most common referral source) about the basis for the referral. The evaluator will want to know what defense counsel has observed about his or her interactions and conversations with the defendant, whether the defendant has displayed any odd or unusual behaviors or beliefs, whether the defendant has been communicative with counsel, whether the defendant holds any animosity or mistrust for defense counsel, and the extent of the defendant's understanding of his or her charges as displayed to defense counsel. In addition, defense counsel should be prepared to provide information regarding why the referral for competency evaluation was requested.

Aside from information needed to clarify the referral question, evaluators will also look to defense counsel for specific information regarding the defendant's current charges and allegations. Providing information to the evaluator about the formal charges as well as a police report or some other report regarding the allegations for those charges will be an important initial step in assisting the evaluator in his or her preparation. Along with this, the evaluator will require information about the nature of the dispositions that the defendant might face in light of any previous criminal history, the likelihood of the defendant begin acquitted or convicted, and the likelihood of a plea deal being offered. This information will assist the evaluator in determining whether the defendant is able to provide a realistic view of his or her case and the possible outcomes. In addition, current best practices for competency evaluation require that the evaluator be able to assess the degree of congruence or incongruence between the defendant's capacities and the abilities required of him or her at trial (or for his or her relevant adjudicative proceedings). Thus, in order to do so, the evaluator must collect information regarding what will be required of the defendant for his or her proceedings. Defense counsel should expect the evaluator to ask a series of questions or obtain information using a standardized questionnaire regarding whether the defendant will be expected to make a decision regarding a plea bargain; whether evidence against the defendant is such that mounting a defense will depend largely on the defendant's ability to provide information (or whether there are additional information sources, aside from the defendant, that can be used); whether the case will involve a number of adverse witnesses; whether the defendant will be required to testify; whether the adjudication process will be lengthy; whether the adjudication hearing will be lengthy; and whether the adjudication hearing will be complex (i.e., difficult to follow, complicated evidence). Any information that the defense counsel can provide to the evaluator regarding the abilities that will be required of the defendant will assist in guiding the evaluation process.

The third way in which defense counsel will play a role in the evaluation process is by assisting the evaluator in obtaining relevant collateral records and information. Every competency evaluation requires that the evaluator review collateral information and/or interview collateral information sources to determine the weight to be given to the defendant's self-report. Competency evaluators are expected to go through legal counsel to obtain this information so as to meet the relevant requirements for discovery and attorney work product. Even in those situations where records are to be released directly to a mental health professional (as is sometimes the case with psychological test results), the initial request for information should be funneled through the defense attorney (the mental health professional can provide a release-of-information form to be signed by the defendant and used by the attorney to obtain the relevant documents).

Finally, the evaluator may request that he or she be allowed the opportunity to observe interactions between the defendant and defense counsel. This is to satisfy the functional component of competency evaluation whereby direct observation of the defendant and defense attorney engaging in discussion of the defendant's charges or defense strategy allows for a direct assessment of the defendant's abilities in this regard. Defense counsel can, of course, decide whether he or she will grant this request, but direct observation of these interactions will assist the evaluator in extrapolating to the trial context. Of note here is that information about the specific *content* of these discussions would be left out of the evaluation report; rather, observations regarding the *process* is the focus of these interactions.

The Goal of the Evaluation

The goal of the evaluation is for the evaluator to assess the degree of congruence or incongruence between the defendant's capacities and the abilities required of the defendant at trial (or his or her proceedings). To do this, the evaluator will assess the defendant's current mental status and his or her competence-related capacities (i.e., understanding, appreciation, reasoning, assisting/consulting, and decision making) within the specific context of the defendant's case (thus including any relevant abilities that will be required of the defendant for his or her proceedings); determine whether the cause of any noted deficits is a result of mental illness or cognitive impairment; and specify how the defendant's mental illness or cognitive symptoms may interact or interfere with his or her competence-related abilities by describing how this may present at trial. In addition, the evaluator should delineate the ways in which the court or defense counsel can assist the defendant in his or her functioning at trial (i.e., providing prescriptive remediation such as instruction regarding how best to work with the client to improve his or her functioning). Finally, many jurisdictions require the evaluator to include information regarding the likelihood and length of restoration and treatment recommendations for those defendants who appear to be incompetent.

The evaluator will use the data gathered through the evaluation process (interview, testing, and collateral information review) to arrive at a conclusion regarding the defendant's competency status; however, many evaluators believe that it is beyond their role to explicitly state their opinion regarding the defendant's competency status. That is, many evaluators are hesitant to speak to the ultimate legal issue, believing instead that this is for the court to determine. While the ultimate legal issue (competency status) is certainly a legal issue for the court to decide, counsel who desire the evaluator to provide an ultimate opinion should feel comfortable in making this request of the evaluator. Many evaluators will not provide such opinions unless explicitly asked or statutorily required to do so.

REPORT WRITING AND TESTIMONY

Court-ordered evaluators are required to complete a written report of their evaluation along with their opinions regarding the defendant's mental status and competence-related abilities. In most jurisdictions these written reports will be distributed to the prosecution and the defense as well as the court. In situations where the evaluator has been privately retained, however, there is no requirement for a written report and so the determination of whether a written report is to be provided is left with defense counsel. In these situations, the evaluator is expected to provide an oral report of his or her findings and opinions to defense counsel and await further instruction from counsel as to whether a written report is desired. Regardless of whether the evaluator was court-ordered or privately retained, the expectation is that the evaluator is an objective, neutral party who will include all relevant information in the written report. If the privately retained evaluator uncovers information that could be damaging or detrimental to the defense, he or she should provide this information to counsel in an oral report. If a written report is requested, it would be unethical for the evaluator to leave out relevant information not favorable to the defense.

Report Contents

Although there are numerous different ways to organize a forensic evaluation report, any competency evaluation report should contain the following types of information: relevant case and referral information; a description of the notification of rights provided to the defendant; a summary of the alleged offense (this should be from official documents and not the defendant's self-report); the data sources that were used or reviewed for the purposes of the evaluation (including any collateral interviews and the dates on which they occurred); background information on the defendant (typically a social history); a clinical assessment of the defendant (typically this will include a mental status exam as well as any relevant information or observations about the defendant's mental health and functioning); a forensic assessment of the defendant (with all relevant information regarding the defendant's competence-related abilities and/or deficits); and a summary and recommendations section (including any prescriptive remediation or information regarding treatment recommendations).

Forensic Evaluation

The forensic evaluation component of the written report is perhaps the most relevant and important to legal counsel and the court. This section of the

report should include a description of the defendant's competence-related abilities and deficits; the cause for any noted deficits; the impact of symptoms on the defendant's performance or participation in the case; possible prescriptive remediation; conclusions or opinions regarding each of the jurisdictional criteria; and the prognosis for restorability.

The best forensic evaluation reports are those that explicitly delineate the linkage between the defendant's mental illness or cognitive impairment and any noted competence-related deficits *as well as* describe how these deficits might affect the defendant's functioning at trial. For example, it would not be enough to simply state that the defendant has delusional disorder and therefore is unable to rationally understand (appreciate) his or her role as a defendant. Instead, the evaluator should clearly delineate the necessary linkages for the court and describe how these might affect the defendant's functioning at trial. For example, the defendant displays a fixed delusional belief system whereby he believes that his father "owns" all of the judges in the State and therefore no judge in the State would ever convict him. This delusion compromises the defendant's ability to make rational decisions regarding his defense.

In addition to a clear delineation of the linkage between any mental illness or cognitive deficit and any noted deficits in competence-related abilities and a description of how these could affect the defendant's functioning at trial or in various relevant proceedings, the report should also include some form of prescriptive remediation for any noted deficits. For example, the evaluator might indicate that the defendant demonstrates lower cognitive functioning, which might affect his ability to fully understand and engage in his defense strategy, and then indicate that the defendant's understanding might be improved by using concrete, as opposed to abstract, examples and by using shorter sentences with smaller words.

Most jurisdictions require that the evaluator include additional information in the report for those defendants opined incompetent. This additional information typically includes the cause of the incompetence, the probability and estimated length of restoration, and treatment recommendations for restoration. Evaluators are expected to understand and abide by the various jurisdictional requirements for competency evaluation reports; however, legal professionals should be aware that some research has indicated that not all evaluation reports include these statutorily required elements (Zapf et al., 2004). Legal consumers should not hesitate to bring any missing elements to the attention of the evaluator.

Inappropriate Report Contents

Two types of content are not appropriate for inclusion in a competency evaluation report. The first is the defendant's version of the circumstances surrounding the offense. A functional evaluation of competency requires that the evaluator inquire about the charges and allegations; however, evaluators are expected to exercise caution when writing the evaluation report so as not to include potentially incriminating information provided by the defendant. General statements regarding whether the defendant's account of events differs substantially from official accounts and whether this reflects an incapacity or deficit on the part of the defendant should be used instead of a summary of the defendant' s account or the defendant's verbatim answers. Similarly, the *content* of observed interactions and/or discussions between defense counsel and the defendant is not appropriate for inclusion in the written report; rather, a description of the *process* of these interactions is what should be highlighted.

The second type of inappropriate report content involves the inclusion of information or opinions related to other legal issues. Evaluators should be careful to address only those referral questions that have been asked and to refrain from offering unsolicited information about other, possibly relevant, legal issues in the competency evaluation report. Opinions or conclusions regarding a defendant's future risk for violent behavior, or any other legal or psychological issue, have no place in a competency evaluation report. In many jurisdictions, competency evaluations and assessments of mental state at the time of the offense are often ordered simultaneously. In this situation, the evaluator may choose to prepare a separate report for each referral question or to address both referral questions within the same report. Legal consumers desiring two separate reports in this instance should make this clear to the evaluator.

Importance of Providing the Bases for the Opinion/Conclusions

The importance of delineating the linkages between mental illness, competence-related deficits, and functional abilities at trial (or for the purposes of

the defendant's proceedings) has been highlighted throughout this chapter but with good reason. In a survey of forensic diplomates of the American Board of Forensic Psychology (ABPP), Borum and Grisso (1996) found that 90% of respondents agreed that detailing the link between mental illness and competence-related deficits in competency reports was either recommended or essential. However, an examination of competency-to-stand-trial reports from two states indicated that only 27% of the reports provided an explanation regarding how the defendant's mental illness influenced his or her competence-related abilities (Robbins, Waters, & Herbert, 1997). Further, in another study, only 10% of competency-evaluation reports reviewed provided an explanation regarding how the defendant's psychopathology compromised required competence-related abilities (Skeem et al., 1998). In addition to the issue of the linkage between mental illness and competence-related deficits, the extant research also indicates that examiners rarely (Skeem et al.) or never (Robbins et al.) assess the congruence between a defendant's abilities and the specific case context. Thus, legal consumers should be aware of the necessity for evaluators to provide the bases for their opinions and conclusions through clear indication of these linkages in the written report.

Testimony

In the majority of cases where the issue of competency is raised, a legal determination is made without a competency hearing (both parties typically stipulate to the evaluator's report). When a competency hearing is necessary, the forensic evaluator(s) will be called to testify about the evaluation. If the evaluator was privately retained, as opposed to court-ordered, it is helpful for the defense attorney to conduct a pretrial conference to inform the evaluator about relevant issues, such as the theory of the case, how the attorney would like the evaluator's testimony presented, and any relevant information about what the opposing side may try to prove. During this conference (if not before), the evaluator should inform the retaining attorney about any possible weaknesses in his or her evaluation methods, opinions, or conclusions as well as any possible weaknesses with the opposing side's opinion (if known). It is helpful to the evaluator if defense counsel also share issues that may be subject to scrutiny or become the focus of cross-examination. In complex or high-profile cases the legal defense team may wish to ask the evaluator practice questions (both direct and cross-examination) to assist in preparing the evaluator for his or her testimony.

The evaluator should have provided a copy of his or her curriculum vitae to defense counsel (when privately retained) or the court (for court-ordered evaluations) prior to the day of the competency hearing, but he or she should also come prepared to testify with multiple copies of his or her CV. In cases where the evaluator was privately retained, the defense team may wish to go over the evaluator's CV with the evaluator ahead of time so the evaluator can highlight relevant experiences and qualifications to smooth the process of becoming qualified as an expert.

Regardless of whether the expert was court-ordered or privately retained, he or she is required to remain objective and neutral and to answer all questions in a straightforward manner. The evaluator should be well prepared to take the stand, having reviewed all relevant materials to the competency evaluation in addition to his or her written report.

SUMMARY

The purpose of this chapter was to present material relevant to legal consumers regarding the evaluation of competency to stand trial (adjudicative competence). The interested reader is directed to additional resources for further discussion of the information contained within this short chapter, including Grisso (2003); Melton, Petrila, Poythress, and Slobogin (2007); Pirelli, Gottdiener, and Zapf (2011); and Zapf and Roesch (2009).

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