Getting the Most out of Your Expert: Preparing and Cross-Examining Experts on Competency and other Mental Health Issues

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Useful Books
Handouts

• Pirelli, Gottdiener, & Zapf (2011) Meta-Analytic Review
  – Summary of CST research to 2011

• Zapf & Roesch (2000) Court Review article
  – Overview of what to expect in a CST evaluation report

  – Information about what to expect from your CST expert
Resources

• National Judicial College’s Best Practices Model
  www.MentalCompetency.org

• AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial (2007)
  – Nice summary of relevant legal cases (before Edwards)

• www.concept-ce.com/virginia
DECIDING ON AN EXPERT
Do your Research & Ask Questions

• Research your possible experts
  – Decide whether you will need a clinical-expert, consultant-expert, or both
  – Consider the reputation of your prospects, ask around
  – Consider knowledge, training, education, skill set, experience

• Ask about the evaluation process
  • What tests, if any, do they typically use
  • What methods do they employ
  • Work samples

• Ask about understanding and interpretation of relevant statutes
  – Want breadth and depth of understanding
  – Should be able to discuss relevant legal cases and how they have impacted competency statutes
Relevant Case Law - Standards

- **Dusky v. United States (1960)**
  - Constitutional Minimum
- **Wieter v. Settle (1961)**
  - Delineated 8 functional abilities
- **Wilson v. United States (1968)**
  - Functional and contextual nature of the inquiry
- **Drope v. Missouri (1975)**
  - “assist in preparing his defense”
- **Godinez v. Moran (1993)**
  - No higher standard for waiving counsel or pleading guilty; affirms that decision making is part of the competency standard
- **Indiana v. Edwards (2008)**
  - Higher standard for proceeding *pro se*

• In 1960 and 1975 the Court’s basic definition of competence centered on whether the accused had
  – a combination of situational awareness, and
  – a basic ability to deal with counsel

• In the 1990s/2000s the Court more fully described its view of the ingredients of the necessary interaction between client and lawyer
  – with “the assistance of counsel, the defendant is also called upon to make myriad smaller decisions [than those discussed in the basic competence definitions] concerning the course of his defense” –Cooper v. Oklahoma
Current Standards for Competence

• U.S. Supreme Court cases from the 1990s/2000s are an important part of the current definition of competence
  • This becomes clear upon review of secondary sources (ABA National Benchbook)
  • State courts have acknowledged that controlling case law from the U.S. Supreme Court must guide the review of competence inquiries at the trial level (*People v. Jones*)

• Philipsborn warns that other sources of standards have not kept up (such as state statutes)
  • “These statutory definitions exemplify part of the problem—understanding competence to stand trial requires understanding all currently applicable law and is beyond any one basic local statutory source”
DO NOT RETAIN AS AN “EXPERT” SOMEONE WHO CANNOT SPEAK WITH BOTH BREADTH AND DEPTH ABOUT COMPETENCY ISSUES AND CASE LAW
THE COMPETENCY EVALUATION
Best Practices / Professional Standards

- Best Practices Series by Oxford
  - Evaluation of Competence to Stand Trial (2009)
- Specialty Guidelines for Forensic Psychology (2013)
Competency Evaluation

• Data sources:
  – Interview
  – Testing
  – Collateral information

• Nature: Functional / Contextual

• Purpose: Assess Congruence v. Incongruence
Grisso (2003) Evaluating Competencies

“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.” (p. 32-33)
Contextual & Functional Nature

• Case law & legal statute have attempted to elaborate on the specific abilities required for competency
  – Some states have developed articulated standards for CST
  – Competency is an open-textured construct (not a bright line construct); not defined by a fixed set of criteria since it is contextual in nature

“Mere presence of severe disturbance 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.”

Golding & Roesch (1988)
Context Matters

• Evaluator’s role is to *describe* for the court the degree of congruence/incongruence between the defendant’s functional abilities and the abilities required of the defendant to proceed with his/her case

• Competency cannot really be assessed independent of the context of the case
  – Need to find out as much as possible about what is expected of the defendant for his/her particular case
Defense Expectations of the Expert

• Crucial to get info from defense counsel about required abilities, expected outcomes, and case-specific details

• Expect evaluators to ask detailed information about:
  – Abilities required of D for the specific case
  – Possible penalties, pleas, defense strategy, likely outcome
  – Anything relevant for guiding competence-related inquiries

• Expect evaluators to ask about interactions with D and to request the opportunity to observe
The list of tasks that a defendant might be called upon to make (relying on *dicta* from leading cases, which, he argues, would hold more weight with a judge than secondary sources); arguably all of these matters are either covered or closely related to the decision-making elements described in the most recent competence-related cases (see p. 428)

- What is the spectrum of defenses available in this particular case?
- How will the defenses be presented, and which witnesses will be involved?
- How could the prosecution’s cross-examination, or rebuttal, influence the guilt and penalty phase outcomes?
- What are the legal, strategic, and tactical implications of proceeding with a mental state expert at the guilt phase?
- If a particular defense theory is not developed during the guilt phase, will the jurors accept it during the penalty phase—for example, evidence of mental impairment not amounting to a full guilt phase defense?
- Can a specific defense, such as imperfect defense or mental disorder aggravated by voluntary intoxication, be presented to jurors without testimony from the accused?
- If so, will calling an expert who has interviewed the client present the prosecutor with a basis for widening the stream of evidence of penalty-related aggravating circumstances beginning in the guilt phase?
Philipsborn (2004)

• Some court decisions suggest that it is incumbent on defense counsel to seek out the expert to relay this pertinent and relevant information about the case and abilities required of the accused, rather than wait for the expert to seek out defense counsel on these matters.

• *Duhan*: “one of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would go into the defense of a case”
  
  – Expert and lawyer need to work together to ensure that the expert has a full understanding of the case and the abilities to be evaluated in the particular defendant.
## Attorney CST Questionnaire

### Telephone

Agency & Address

Who brought your client’s competency to the attention of the court?
- [ ] Myself
- [ ] Prosecuting Attorney
- [ ] Cow’s own attorney
- [ ] Probation officer
- [ ] Detention staff
- [ ] Assessing officer
- [ ] Client’s family
- [ ] Other

What factors, if any, contributed to the perceived need for a competency evaluation?

- [ ] History of recent illness
- [ ] History of psychiatric medication
- [ ] History of psychiatric hospitalization
- [ ] History of counseling therapy
- [ ] History of social substance
- [ ] Difficulty communicating with client
- [ ] Client’s unusual behavior
- [ ] Other

Our assessment of your client’s understanding of the charges and the associated possible dispositions. To assist us in evaluating this, please describe:

The charges against your client:

The nature of the disposals that your client might face, given these charges and your client’s past record:

<table>
<thead>
<tr>
<th>Question</th>
<th>No</th>
<th>Uncertain</th>
<th>Likely</th>
<th>Definite</th>
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<tbody>
<tr>
<td>1. Is likely to have to make a decision about a plea agreement</td>
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<td>2. Evidence against client is unclear and the defense largely depends on the client's ability to provide information</td>
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<td>3. Case will involve many adverse witnesses</td>
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<td>4. Client will need to testify in the case</td>
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<td>5. The pre-adjudication process will be lengthy</td>
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<td>6. The adjudicatory hearing will be lengthy</td>
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BE WARY OF AN EVALUATOR WHO DOES NOT ASK ABOUT THE ABILITIES THAT ARE EXPECTED OF THE DEFENDANT

IF THIS OCCURS...RAISE THE ISSUE WITH YOUR EXPERT!
INTERVIEW CONSIDERATIONS
Preparing for the Interview

• Minimum requirements:
  – The charges; Police/arrest report(s)
  – Reason(s) for referral
  – Background information from defense counsel on case specific details and considerations

• Expert will look to defense counsel for this information

• Defense counsel should also assist expert in obtaining additional collateral information/records
Obligations of the Expert

• Response style
  – Denial, minimization, exaggeration
  – Malingering (Psychiatric symptoms, cognitive deficits)

• Cultural considerations
  – Cultural context & degree of acculturation, language
  – Cultural perceptions of mental illness

• Incriminating evidence
  – D’s account should not be included in written report
Functional Evaluation

• Evaluate the ability of the D to perform specific tasks at trial by engaging in those tasks during the interview
  – Discuss the specific nature of D’s case
  – Engage the D in discussions that allow the assessment of rational decision making abilities

• Observe interactions between defense counsel and D
  – Ask defense counsel to discuss possible case strategies, pleas, consequences, outcomes, etc.
THE ISSUE OF TESTING
Testing

- Forensic Assessment Instruments
  - Specific to the focus of legal inquiry
  - Lots of these for CST
  - Nomothetic v. Idiographic

- Forensically Relevant Instruments
  - Evaluate characteristics relevant to the legal inquiry
  - Malingering

- Psychological Testing
  - Specific to a psychological issue or construct (WAIS, MMPI)
  - Neurocognitive or language-specific evaluation instruments
Testing in CST Evaluations

- Forensic Assessment Instruments
  - Standardize the assessment process
  - Reduce error and bias
  - Promote meaningful comparisons across time
  - Allow for comparisons between examiners
  - Help to improve communication in legal settings

- Evaluators are being encouraged to use CAIs and should be questioned about their rationale for choosing not to do so
Testing

• Select tests on the basis of the information they provide
  – Consider how well D fits with standardization samples
  – Consider the limitations of the instrument for this D

• Expert should be familiar with the psychometric properties of any test/instruments they use
  – Reliability, validity, standardization/norming samples
  – Easy target of inquiry for cross-examination
COLLATERAL INFORMATION
Collateral Contacts / Records

- Collateral information should be obtained to determine the veracity of D’s self-report
  - Records
  - Interviews with collateral informants

- Expert should speak with defense counsel before contacting any collateral informants
Guideline 9.02: Use of Multiple Sources of Information

• Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.
Areas of CST Inquiry

- Capacity to understand the arrest process
- Capacity to understand/appreciate the charges or allegations
- Capacity to disclose to counsel pertinent facts, events, and states of mind
- Capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings
- Capacity to appreciate the likely outcome of the proceedings
- Basic knowledge of legal strategies and options
- Capacity to engage in reasoned choice of legal strategies and options (decision making)
Areas of CST Inquiry

• Capacity to understand the adversary nature of the proceedings
• Capacity to manifest appropriate courtroom behavior
• Capacity to participate in trial
• Capacity to testify relevantly
• Relationship with counsel
• Medication effects on CST
• Any other case-specific area of relevance
Steps in Opinion Formation

1. Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis)

2. Evaluate relevant functional abilities and deficits (Understanding, Appreciation, Reasoning, Decision Making, Consulting, Assisting)

3. Determine whether there is a causal connection between any noted deficits and mental disorder/cognitive impairment

4. Specify how these deficits might impact functioning at trial (or for proceeding to next stage)
1. Threshold Issue

- Mental disease or defect = threshold issue
- Diagnosis ≠ incompetence
  - Incompetent D’s 8 x more likely to have psychotic disorder
  - Symptoms more important that diagnosis
  - Incompetence associated with
    - Formal thought disorder (disorganized speech, incoherence, word salad)
    - Concentration deficits
    - Rate of thinking (abrupt, rapid changes or profound slowing of speech / thought)
    - Delusions (strongly held irrational beliefs that are not based in reality)
    - Hallucinations (sensory perceptions in the absence of a stimulus)
    - Intellectual or Developmental Disability (MR)
2. Psycholegal Abilities

- **Understanding**
  - Factual understanding of general, legally relevant information
- **Appreciation**
  - Rational application of factually understood information to own case
- **Reasoning**
  - Use appropriate reasoning processes (weigh, compare, evaluate) in a rational manner (focus on process, not outcome)
- **Consulting & Assisting**
  - Engage with counsel in a rational manner; communicate coherently
- **Decision Making**
  - Consider specific, contextually-relevant aspects of the case
3. Demonstrate Causal Connection

Mental Disorder / Cognitive Impairment

Deficits in Psycholegal Abilities
90% of respondents agreed that detailing the link between MI and deficits was essential or recommended (Borum & Grisso, 1996)

27% of reports provided an explanation regarding how the defendant’s mental illness influenced his or her abilities/deficits (Robbins, Waters, & Herbert, 1997)

10% of competency evaluation reports reviewed provided an explanation regarding how the defendant’s psychopathology compromised his or her abilities (Skeem, Golding, Cohn, & Berge, 1998)
4. Functional Deficits at Trial

Mental Disorder / Cognitive Impairment

Deficits in Psycholegal Abilities

Functional Deficits/Impairments at Trial
Research Findings

• The link between functional abilities and required abilities is rarely addressed in competency evaluation reports.

• 12% of reports delineated the congruence between the defendant’s abilities and his/her case context (Skeem, Golding, Cohn, & Berge, 1998).

• 0% of reports delineated the congruence between the defendant’s abilities and his/her case context (Robbins, Waters, & Herbert, 1997).
Process of Opinion Formation

• Consider all the various data sources
  – Weight according to credibility
• Consider alternative hypotheses
• Multiple, convergent pieces of information
  – Always some outlier data (data that doesn’t conform)
  – Ask your expert about this data!
Written Report

- Expert should provide an oral report of
  - Defendant’s presentation style
  - Mental status
  - Opinion regarding competence and basis for incompetence
  - Any incriminating evidence or insurmountable obstacles
- Defense counsel should ask about anything that is not clear
  - Underlying bases for any noted deficits; degree of impairment; how impairments will translate into functional impairment at trial
- Ultimate issue discussion
  - Counsel should provide guidance regarding how the competency opinion be presented
Report Characteristics

• Purpose: document relevant information regarding assessment & procedures; communicate conclusions and opinions as well as the bases for these

• Nature: thorough yet concise; scope limited to the legal issue at hand; clear, relevant, informative, defensible
Guideline 11.02: Differentiating Observations, Inferences, and Conclusions

• In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.
Guideline 11.03: Disclosing Sources of Information and Bases of Opinions

• Forensic practitioners are encouraged to disclose all sources of information obtained in the course of their professional services, and to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion, or other professional product.
Guideline 11.04: Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

• Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law (EPPCC Standard 4.04).
Report Contents

• Identifying Information
• Source of referral, reason for referral, statement of the charges
• Relevant legal standards and criteria
• Notification/Informed consent/Statement of non-confidentiality
• Data Sources/Sources of Information
• Background Information
• Psychological Test Results, if any
• Mental Status at Interview
• Clinical Assessment/Conclusions/Diagnoses
• Forensic Assessment/Formulation and basis for opinion regarding competency
• Opinion on restorability or other statutorily required information
• Summary and Recommendations
Inappropriate Report Contents

• Defendant’s version of the circumstances surrounding the offense
• Other legal issues
5 Common Deficiencies that Set the Best Apart from the Rest

• Demonstrate an understanding of evolving standards
• Expert should seek out pertinent and relevant information about proceedings from defense
• Focus on rational decision making
• Delineate all linkages: substantiate conclusions
• Communicate prescriptive remediation strategies
Preparing your Expert for Testimony

• Report serves as the basis so ensure it is complete
  – Ask questions about anything you don’t understand
• Ask your expert what the weaknesses are
  – There are always pieces of outlier information—ask about these
• Ask your expert to compare data sources with opposing expert’s report
  – Were different sources used? Implications?
Preparation - What to Ask your Expert

- How was response style evaluated?
- What are the relevant cultural considerations, if any?
- What alternative hypotheses did you consider?
- How does D compare to the standardization/norming samples for any test/instruments used?
- What are the limitations of your evaluation/report?
- What are D’s competence-related abilities and deficits?
- What is the basis for any noted deficits?
Keys for Preparing Cross-Examination

• Request raw test data
  – Can be released to you or your expert

• Request copies of evaluation notes
  – Expert can assist in interpretation

• Obtain copies of test manuals
  – Expert can obtain any protected manuals

• Examine the literature on scoring, norms, and psychometric properties for any tests / instruments used
  – Expert can assist with obtaining & interpreting**
Using your Expert to Prepare Cross

- Did the opposing expert ask about specific abilities required of defendant?
- Were the same data sources used by both sides?
- What are the limitations of the opposing expert’s evaluation?
- What are the limitations of the test/instruments used?
- What are the strengths of the opposing expert’s opinion?
- Did the opposing expert consider anything that you did not?
THANK YOU!

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