

COMPETENCY TO STAND TRIAL

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The notion that defendants must be capable of assisting in their defense and participating in the legal process can be traced to at least the 14th century, when Common Law courts refused to proceed against defendants considered to be incompetent as a result of mental disorder or mental defect (Poythress, Bonnie, Monahan, Otto, & Hoge, 2002). Using an approach to forensic assessment introduced and refined by Grisso (1986; 2003), this chapter first reviews the legal framework for the competence question, next offers a template for assessing defendants whose competence to proceed¹ with the criminal process has been raised as an issue, and finishes with a discussion of special topics and issues relevant to the competence question.

LEGAL FRAMEWORK

Common Law Conceptions

As noted above, the criminal courts have long required that defendants accused of offenses and appearing in court be capable of understanding and participating in legal proceedings. This requirement is considered to serve multiple purposes including promoting dignity, accuracy, and autonomy (Poythress et al., 2002; Wulach, 1980). First, the dignity and fairness of the criminal jus-

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1. Although the reader may be more familiar with the concept of “competence to stand trial” the term used to refer to this issue throughout this chapter will be competence to proceed because this more accurately reflects the legal requirement that a criminal defendant have the capacity to participate in the legal proceedings throughout, from the time of his detention and arrest, until the time of his disposition.

tice system demands that persons who are subject to the resources of the state during the course of a criminal prosecution have an awareness of the proceedings. Trying those who are so impaired that they cannot aid in their defense or are unaware of the nature and purpose of the proceedings against them is considered to challenge both the dignity of the legal process and conceptions about fundamental fairness. Additionally, both the accused and the criminal justice system's investment in accurate decision making is considered to preclude involvement in criminal proceedings of those deemed to lack basic capacities. A criminal defendant's ability to provide information helpful to his or her defense and challenge allegations made against him or her may be compromised by an underlying mental disorder, and result in less accurate and just verdicts and outcomes. Finally, the law's recognition that it is ultimately the accused who is to make decisions about important legal strategies and decisions and his or her involvement in the legal system (with the assistance of an attorney) requires that the defendant have the capacity to do so.

Constitutional Contours

A comprehensive review of the law regarding competence to proceed in the criminal process is beyond the scope of this chapter. The interested reader is directed to review Melton, Petrila, Poythress, & Slobogin (1997), Stafford (2003), and Grisso (2003) for reviews of Constitutional issues, and Texas Code of Criminal Procedure Art. See 46B.003 and Shuman (1997) for a detailed review of the Texas legal process. Reviewed below are those legal issues most pertinent to conducting competence to proceed evaluations in the state of Texas.

Consistent with Common Law underpinnings, the Constitution requires that defendants be competent to participate in the criminal justice process. In *Dusky v. United States* (1960) the Supreme Court ruled that a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...[and have a] rational as well as factual understanding of the proceedings against him..". Although Dusky

identified that which the Constitution requires as a minimum in order for a criminal prosecution to proceed, most states have adopted some variant of the *Dusky* language and approach (Grisso, 2003).

As is often the case, analysis of the legal standard enunciated in *Dusky* suggests a more complicated landscape than a quick review of the holding would suggest. Perhaps most significant is that the standard does not delineate or describe any predicate conditions that may be responsible for any deficits in capacity (e.g., mental illness, mental retardation, normal “limitations” associated with youth—see Otto & Borum, 2004; Otto & Goldstein, 2005; Grisso, 1997; Grisso, 2003, and Cruise, this vol., for further discussion of competence issues as they relate to youth). However, essentially all states limit findings of incapacity to those that are considered to flow from a mental impairment (i.e., mental illness, mental retardation or other cognitive impairment). The *Dusky* language referring to “sufficient” ability and a “reasonable” degree of understanding suggests that the defendant’s abilities need not be complete and without impairment. Reference to “present” ability makes clear that considerations should be based on a defendant’s competence related abilities in the present and the immediate future, whereas the reference to “capacity” suggests that factors such as a lack of knowledge about the proceedings or process, or an unwillingness to participate in the proceedings or work with one’s attorney do not render a defendant incompetent to proceed. Finally, the test’s reference to both “factual” and “rational” understanding on the part of the defendant indicates that the competence requirement demands more than simple knowledge of facts and factors relevant to the proceedings, but also an ability to appreciate and consider those facts that is not significantly impaired by mental disorder.

Competence is ultimately a legal issue that is to be decided by the legal decision maker. Although the mental health professional may be able to provide the legal decision maker with information that it can rely on with respect to considering the defendant’s competence to proceed, it is ultimately a moral-legal decision (also see below). Competence can also be context specific, so

that a defendant might be incompetent to stand trial on one charge (e.g., an allegation of complicated security fraud) and, at the same time, be competent to stand trial on another charge (e.g., a simple charge of driving with a suspended license) (Roesch, Zapf, Golding, & Skeem, 1999).

Texas Law and Procedure

Texas, like many states, has adopted the *Dusky* language *in toto* (Tex. Crim. Proc. 46B.003), although it uses the more specific “competence to stand trial” language as opposed to the more generic “competence to proceed” language (see footnote 1).

The Texas Legislature has recently attempted to operationalize the competency construct beyond simply the *Dusky* standard. Specifically, Texas law mandates that any evaluation of competence to stand trial consider the defendant’s capacity to: 1) rationally understand the charges against him and the potential consequences in pending criminal proceedings, 2) disclose to counsel pertinent facts, events, and states of mind, 3) engage in reasoned choice of legal options and strategies, 4) understand the adversarial nature of criminal proceedings, 5) exhibit appropriate courtroom behavior, and, if necessary, 5) testify (Tex. Crim. Proc. 46B.024). The Competency to Stand Trial Assessment Instrument (CAI; Laboratory for Community Psychiatry, 1973) is not a test, but rather, an instrument designed to structure clinical assessment of trial competence (see the Appendix following this article for a description of this and other instruments designed to assess competence to proceed.) The CAI, developed by an interdisciplinary group of mental health and legal professionals, was based on their clinical and courtroom experience and a review of appellate cases and the legal literature. The CAI directs the examiner to assess the defendant’s 1) appraisal of available legal defenses, 2) behavior as it might affect participation in the trial or interactions with others, 3) ability to relate to and interact with his or her attorney, 4) ability to deliberate and consider legal strategies with his or her attorney, 5) understanding of the roles of the main actors in the process including defense counsel, the prosecutor, the judge, the jury, the defendant, and witnesses, 6) understanding of court procedure, 7) appreciation of the charges, 8) appreciation of the range and nature

of possible penalties, 9) appraisal of likely case outcomes, 10) ability to disclose pertinent facts surrounding the offense including his or her behavior at and around the time of interest, 11) capacity to challenge adverse witnesses, 12) capacity to testify relevantly, and 13) motivation to act in his or her own best interests during the proceedings. Although not all of the capacities considered in the CAI have been identified in Texas law as factors to be addressed when assessing a defendant's competence to proceed, they likely are part of the general construct as it has been defined more broadly (Grisso, 2003), and Texas examiners should assess the degree to which a defendant's mental state affects these additional abilities too.

Once the issue of the defendant's competence to stand trial is raised, the court can appoint a mental health or mental retardation professional to examine the defendant at the request of the defendant, defense, counsel, the prosecution, or *sua sponte* (on its own) (Tex. Crim. Proc. 46B.004). The court is to provide to the examiner documents outlining the charges against the defendant and any available mental health evaluation and treatment records (Tex. Crim. Proc. 46B.021(D)). Although the defendant can be forced to undergo and submit to an evaluation of his or her competence to proceed (Tex. Crim. Proc. 46B.151(B)) statements made by the defendant during the examination or hearing on his or her competence to proceed cannot be admitted into evidence against the defendant on the issue of guilt in any criminal proceeding unless first introduced into evidence by the defendant (Tex. Stat. 46B.007). This protection has important implications for the evaluation process that is discussed below.

Unless good cause is shown for not doing so, the appointed expert must submit to the court, within 30 days of completing the examination, a report that includes 1) an opinion as to the defendant's competence, 2) identification and discussion of any specific issues referred to the examiner by the court, 3) documentation of appropriate disclosures made to the defendant about the evaluation and the report, 4) a listing of procedures, techniques, and tests used in the evaluation and the purposes of each, 5) observations, findings, and conclusions on each issue referred for evaluation (or a

statement of the reasons why such findings could not be made), and 6) if the defendant is considered by the expert to be incompetent, a description of the deficits and their relationship to the functional abilities required for competence, as well as treatment recommendations.

Given the contours of Texas law, the task facing the mental health professional assessing a defendant's competence to stand trial can be deconstructed into three responsibilities: 1) assess and describe the defendant's capacity to understand and participate in the legal proceedings, 2) identify and describe any mental disorders and impairments, broadly defined, that may be responsible for impaired capacities that are noted and described, and 3) in that subset of cases in which a finding of incapacity may occur, identify if the mental disorder(s) or impairment(s) that are considered responsible for the observed and described deficits can be treated so as to restore the defendant's capacity (and identify those treatments).

THE CLINICAL FORENSIC EVALUATION OF COMPETENCE TO PROCEED

Provided below is a recommended format for conducting competence evaluations. Because there is more than one way to conduct a competence evaluation, the format suggested below is simply one approach for the reader to consider.

Gather Relevant Third Party Information

Before meeting with the defendant and starting the evaluation, the prudent examiner will first *gather any relevant third party information* that may be helpful with respect to assessing the defendant and his or her involvement in the legal system. As described by Conroy in her article on report writing elsewhere in this issue, accessing third party information is especially important in all forensic evaluations because examinees may be less than completely candid in an attempt to gain a desired legal outcome, and assessment of response style is particularly important. (Also see Committee on Specialty Guidelines for Forensic Psychologists,

1991; Otto, Slobogin, & Greenberg, 2006; Heilbrun, 2001; and Heilbrun, Warren, & Picarello, 2003 for a discussion of the value of third party information.)

Criminal justice records including the arrest report and the criminal indictment or information are helpful with respect to informing the examiner about the nature of the charges and allegations and, as noted above, should be made available to the examiner by the court. After all, if the examiner does not know and appreciate the charges and allegations, how can he or she assess the defendant's capacity in this regard? Medical, mental health, and school records oftentimes are valuable in identifying underlying conditions that might be responsible for any competence related deficits that are observed, and they also provide a way of assessing the accuracy of the defendant's self report with respect to a variety of issues. A brief conversation with the party who initiated the evaluation (almost always the defense attorney) also provides important information insofar as the source of the referral can identify for the examiner the behaviors, symptoms, or deficits in capacity that resulted in the competence evaluation referral. The defense attorney can also provide other information with respect to the nature and quality of interactions with the client that may provide some insight into the defendant's ability to work with counsel. At this point, it can also be helpful to ask that the defense attorney notify the defendant to expect the examiner and cooperate with the evaluation process.

Ideally, the examiner can request that the party who retained or appointed him gather much of this third party information, but in some cases the examiner may have to seek such information. Although a discussion of use of third party information is beyond the scope of this article, it is noted here that accessing third party information is sometimes more complicated than it appears, and it can be affected by a variety of factors including how the examiner is retained in the case (e.g., appointed by the court or confidentially retained by the defense attorney and covered under the umbrella of privilege as a result) and the type of information that is sought (e.g., confidential medical records versus the correctional officer's observations of the defendant in the dining room).

Notification

Once armed with necessary background information the examiner is ready to meet with the defendant. Prior to initiating the evaluation the examiner is obligated by law and ethics to notify the examinee of the nature and purpose of the evaluation. This task is best considered to be one of *notification* rather than informed consent or a *Miranda* warning as some describe it. Informed consent is not appropriate in all cases because competence evaluations can sometimes be completed over the objections and without the consent of the defendant. Referring to notification as providing the defendant with a *Miranda* warning is another misnomer for a number of reasons. First, the examiner is not a law enforcement officer interrogating or questioning the examinee who is in his or her custody. But more importantly, a *Miranda*-like warning (e.g., you have the right to remain silent, anything you say can and will be used against you in a court of law”) is inaccurate because, in Texas and as noted above, the defendant can be forced to undergo and submit to an evaluation and statements made by the defendant during the competence examination *cannot* be admitted into evidence against the defendant on the issue of guilt in any criminal proceeding, unless first introduced into evidence by the defendant, as noted above (Tex. Stat. 46B.007).

The examiner should instruct the defendant about how he or she is involved in the case, how the results of the examination will be used, and who will have access to the information. Discussion of the lack of confidentiality, privilege (when indicated), and the non-therapeutic nature of the encounter is also necessary. As noted above, the examiner’s report must document this disclosure process, and examiners would do well, in addition to documenting the notification they offer, to also describe the defendant’s understanding and appreciation of such.

In some cases the examiner may have questions about the defendant’s capacity to understand this notification and consent to the evaluation. The appropriate response depends, in part, on how the examiner is involved in the case. If the examination has been ordered by the court, then the defendant’s inability to understand

or consent to the evaluation does not bar the examination from going forward, because it has been ordered by the court and could even be conducted over the objections of the defendant. If, however, the examination has not been ordered by the court but has been requested by the attorney, the examiner could consider going forward, based on the assumption that the attorney is acting on behalf of the defendant. Absent such an approach, the examiner would be forced to go back to the retaining attorney and request that either 1) a court order be issued directing the evaluation to occur, or 2) proceedings be initiated to have the defendant declared incapacitated to consent to or refuse the evaluation (perhaps via guardianship).

Although it is rare, in some cases the examiner may come into contact with a defendant who understands the notification but simply refuses to participate. In such cases the examiner should try to identify the defendant's concerns and allay them if possible. The examiner may have the defendant contact his or her attorney to discuss the evaluation in order to gain the defendant's cooperation, and the examiner can also inform the defendant about implications of his refusal to participate in the evaluation. Those examiners who, as suggested above, ask the defense attorney to notify the defendant to expect the examiner and cooperate with the evaluation process prior to meeting with the defendant, may preclude some of these difficulties.

Social History

Once the defendant has been apprised of its nature and purpose the evaluation can begin. It is recommended that examiners begin by collecting a Social History that includes relevant information regarding the defendant's family, medical, academic, mental health, substance abuse, and criminal justice experience. As this information is relayed to the examiner he or she can begin to 1) assess the defendant's general mental status, cognitive functioning, and communication abilities 2) identify possible mental disorders or cognitive impairments that might be responsible for any competence related deficits that are later observed, and 3) assess the defendant's response style and candor by comparing this self report to accounts offered in third party sources. (see Kwart-

ner & Conroy, this issue; Rogers, 1997, and Rogers & Bender, 2003 for a review of assessment of response style in forensic evaluations.) Information regarding the defendant's history of mental disorder and successful treatments may be particularly helpful if competence related deficits are observed and the examiner must draw some conclusions about whether the defendant can be treated in order to restore his or her competence to participate in the process. An additional benefit of starting the competence evaluation with a social history is that, as a general rule, discussion of much of the information included in the history may be less threatening and anxiety arousing than discussion of the index offense and associated charges. This may assist in establishing rapport early on in the process and reducing any general anxiety the examinee may be experiencing.

Assessment of Competence to Proceed

Once the Social History has been gathered the examiner can begin to focus on assessment of the defendant's competence to proceed. Before discussing the evaluation process in detail, it is important to review three overriding issues that were addressed above. First, the test of competence is one of capacity, as distinguished from knowledge or willingness. Thus, defendants who are simply ignorant about their charges, possible penalties, or the legal system and its operation are not incompetent to proceed providing that they are able to incorporate and utilize such information in their decision making process once such information becomes available. An important corollary, of course, is that simple rote knowledge does not equate to capacity given the requirement of a rational, as well as factual, understanding (see above). Some defendants with limited intellectual abilities may answer questions about the legal system correctly but may still show no true or meaningful understanding or appreciation of the topic at hand. Similarly, defendants who exhibit disordered thought content (i.e., delusional thinking) may be able to offer organized factual accounts and depictions, but their appreciation of the same factors may be limited by specific delusions. Second, defendants who are capable of working with their attorneys or otherwise participating in the legal process but who choose not to do so for reasons other than those that might be attributed to mental disorder, mental re-

tardation, or other impairment have the *capacity* to participate. And finally, the capacity required to be competent to proceed is not absolute as indicated by the Texas legislature's references to "*sufficient* present ability" and "reasonable degree of rational understanding."

Given the complexity and importance of the evaluation, the beginning examiner is well advised to use the CAI or any of a number of similar devices (e.g., Interdisciplinary Fitness Interview; Golding, Roesch & Schreiber, 1984; Fitness Interview Test, Roesch, Zapf, Eaves, & Webster, 1998; Juvenile Adjudicative Competence Interview, Grisso, 2005) to organize the competence evaluation as such structured assessment instruments ensure that the examiner addresses all potentially relevant issues. Also proving of some value-particularly for novice examiners-may be other existing measures of competence related abilities that allow for norm-based descriptions of the examinee's competence related abilities (e.g., MacArthur Competence Assessment Tool-Criminal Adjudication; Poythress, Nicholson, Otto, Edens, Bonnie, Monahan, & Hoge, 1999; Evaluation of Competence to Stand Trial-Revised, Rogers, Tillbrook, & Sewell, 2004).

It may be easiest and least threatening to begin the specific competence inquiry with an assessment of the defendant's understanding of the legal process, those involved in it, and its adversarial nature. This inquiry may be started by assessing the defendant's ability to identify the various actors in the legal process (defense attorney, prosecutor, witnesses, judge, jury) and their roles, the operation of the legal process, and one's rights as a defendant. Impaired capacity may be manifested by defendants whose ability to understand and relay this information is limited as a function of a disordered thought process, or mental retardation or other cognitive impairments. Defendants whose thought content is affected by a mental disorder (e.g., a defendant with paranoid or grandiose delusions) may also show impaired capacity with respect to understanding the motivations of those in the process, their rights and entitlements, and the likely outcomes. Given that in excess of 90% of criminal defendants never go to trial but enter a plea (Melton et al., 1997), assessment of the defendant's appreciation of the plea

agreement process, the rights that are relinquished, and the factors that are of most relevance when considering a plea (likelihood of conviction, quality of the state's evidence, sanctions associated with a conviction versus a plea) is also indicated.

The examiner may next consider assessing the defendant's understanding of courtroom procedure and protocol, and his or her ability to participate in and understand any future legal proceedings. In addition to specific inquiries focused on the above, the examiner should be able to draw some conclusions about the defendant's abilities in this sphere based on behavior observed during the interview. For example, does the defendant understand information provided by the examiner, does the defendant behave during the interview in a way that would be acceptable in legal proceedings? Of course, it is important that the examiner keep in mind whenever making inferences about legally relevant behaviors based on the defendant's behavior during the evaluation that the contexts of the evaluation and legal proceedings vary in important ways. An examinee may be much more anxious during the trial process than he or she is in a one-on-one interview with the mental health professional who actually may act in a way to maximize the defendant's comfort and performance. To take these differences into account, the examiner, at some point during the evaluation, may choose to approximate more closely the more challenging conditions a defendant may face in a variety of ways and gauge the examinee's response, say, by speaking more rapidly or using more sophisticated language, or by adopting a confrontational approach. When necessary, examiners should consider adopting a more adversarial or anxiety-arousing tone or stance during the latter part of the evaluation so as not to risk alienating or upsetting the defendant before important information is gathered.

Assessment of the examinee's understanding and appreciation of the charges, allegations, and possible penalties requires that the examiner have his or her own understanding of these factors based on a review of the arrest reports, the indictment or criminal information, and/or discussion with the defense attorney or prosecutor. Sophisticated examiners know that charges listed by law enforcement officers in their arrest reports are sometimes dropped,

and charges are sometimes added by prosecutors. Thus there may be discrepancies between the charges listed in the arrest report(s) and those in the indictment. When in doubt about the charges and allegations that are current, examiners should contact the defense attorney or prosecutor.

It is important to distinguish between charges, the formal offense, and allegations, that is exactly what the defendant is accused of doing that resulted in the more general charges. Oftentimes, defendants may know what they are accused of but not know the specific charges. In such cases, simply revealing to them the charges may be adequate. Some less sophisticated defendants may refuse to discuss the charges or allegations based on the belief that acknowledging such constitutes an admission of responsibility, while other defendants may simply repeat that they are not guilty of anything with which they are charged. In such cases, it may be helpful to distinguish for the defendant between acknowledging awareness of the charges and admitting responsibility by simply stating to the defendant, "I know you are telling me that you did not do anything wrong, but what do the police *say* you did?"

Determining the possible sanctions that may be imposed (so that one can assess the defendant's understanding of such) is almost always more complex than determining the charges and allegations since penalties can vary according to the defendant's criminal history, the defendant's willingness to admit wrongdoing and enter a plea, the actual offense for which the defendant is convicted and so on. Although basic rules of thumb provide some direction (for example, the maximum penalty for a misdemeanor is 1 year in county jail, the minimum penalty for capital murder is life in prison) it may be helpful for the examiner to contact the defense attorney or prosecutor to gain an idea of possible or likely sanctions. In many cases, the defendant will offer that she has little idea of possible penalties because she has had minimal opportunity to meet with the defense attorney. Again, such lack of knowledge, in and of itself, does not indicate that the defendant lacks the capacity to understand and appreciate possible sanctions. As is always the case, when the defendant reports a lack of knowledge, the examiner should provide relevant information and assess the de-

fendant's ability to incorporate and make sense of it. A follow-up inquiry into these same issues later in the interview, to assess the defendant's ability to retain the information provided, then provides helpful information about the defendant's capacities.

It is important to remember that a factual understanding of the charges, allegations, or penalties may not necessarily reflect a rational understanding. A paranoid defendant may fully understand what he is accused of and for what he was arrested, yet delusions that he is being conspired against by the police department and district attorney's office may color his appreciation of why he was arrested and charged. Similarly, a grandiose defendant may know that she is facing a sentence of up to 10 years, but her grandiose beliefs that she will finally be recognized as the next Son of God in two years, be crowned King of the World, and immediately be released from prison may color her true appreciation of the sentence she is facing.

Crucial to participating in the criminal process is effective interaction with one's attorney. Defendants can ideally provide their attorneys with information about offense related events (e.g., their whereabouts, the behaviors of the alleged victim or arresting officers) that is helpful with respect to considering defenses and responding to the state's evidence and witnesses. Defendants should also be able to consider a variety of legal strategies with the assistance of counsel (e.g., whether to testify, whether to enter a guilty plea to a lesser charge) and make an informed decision about the best course of action in their case. These abilities, however, can be limited by mental illness, mental retardation or other cognitive impairments. With respect to considering these issues it is often beneficial to talk with the attorney, and gain his or her opinion about the nature and quality of interactions with the defendant. It may even be helpful to observe the attorney and defendant interact with each other.

The examiner can also make inferences about the defendant's ability to work and cooperate with his or her attorney based on the defendant's behavior during the assessment. With some exceptions, the examiner may reasonably infer that a defendant

who is able to assess and consider various legal strategies during the evaluation could do the same when meeting with the defense attorney. Similarly, the examiner may reasonably infer that a defendant who is able to provide him or her with an account of his behavior and that of significant others at and around the time of the alleged offense, or who is able to challenge the state's witnesses and allegations in a conversation with the examiner during the evaluation process, should be able to do so with his or her attorney.

In many cases the defendant may claim to lack any memory for the events surrounding the arrest, which arguably precludes him or her from providing potentially exculpatory information, and also limits the defendant's ability to challenge the state's allegations. It is important to know that, for obvious reasons, amnesia for events surrounding the alleged offense is not an automatic bar to competence, although it may render a defendant incompetent to proceed (*Wilson v. United States*, 1968). And although the examiner may be able to offer some expert opinion regarding whether amnesia might be expected given the particular insult, injury or impairment that is alleged to be the cause of the claimed amnesia, whether or not reported amnesia renders the defendant incompetent to proceed is ultimately left to the legal decision maker, and is based on consideration of six factors that may include: 1) the extent to which the amnesia affected the defendant's ability to consult with and assist his or her attorney, 2) the extent to which the amnesia affected the defendant's ability to testify, 3) the extent to which relevant evidence could be extrinsically reconstructed despite the defendant's amnesia, 4) the extent to which the prosecutor assisted the defense in reconstructing relevant information that may not be otherwise available because of the amnesia, 5) the strength of the prosecution's case, and 6) any other factors of relevance operating in the case at hand.

Related to the above inquiry is assessment of the defendant's ability to testify, should he and his attorney decide that it is in his best interests to do so. Like the above, assessment of this capacity may primarily be based on the defendant's behavior and responses during the interview process. With some exceptions, the examiner may reasonably infer that a defendant who is able to an-

swer questions about his behavior and that of significant others at and around the time of the alleged offense should be able to do so when on the witness stand. As noted above, of course, it is important to remain cognizant of differences between the forensic examination and testimony contexts, and consider them accordingly. A defendant who is able to answer an examiner's questions about his behavior at and around the time of the alleged offense may show diminished ability when facing the stressors associated with undergoing direct or cross examination. Thus, as described above, the examiner may choose to approximate more closely the more challenging courtroom conditions a defendant may encounter by using a more challenging tone, or by pointing to any inconsistencies or weaknesses the defendant displays in response to questions, and then assess his or her response accordingly.

Assessment of Mental State

Once the defendant's competence related abilities have been assessed, a more formal mental status examination should be conducted to aid in identification of symptoms and diagnostic decision making. Although the examiner may have developed some diagnostic impressions based on observations of the defendant and any relevant third party records, a mental status examination and more focused inquiry into the defendant's current adjustment and functioning will also be necessary.

Access Additional Third Party Information

Finally, at the end of the evaluation the examiner may have identified other sources of third party information that will prove of some help in the overall assessment. In some cases the defendant's assistance can be enlisted by providing the phone number of a spouse for example, or by signing a records release authorizing access to medical or mental health records that were not previously available. At this time, the examiner may also wish to obtain third party information from informants who are readily available at the time of the evaluation such as the jail officer assigned to the defendant's unit, or the parent who accompanied the defendant to the evaluation.

REPORT WRITING

In some cases the examiner may not write a report, but in the majority of competence evaluations conducted by mental health professionals in Texas, a report must be written and submitted within 30 days of completing the evaluation. There is no one format for reports that are designed to summarize the findings of a competence evaluation, but some basic components should be included in any report, regardless of the format (see Table 1 for a recommended report format).

Under Texas law, the examiner is required to identify and address any specific issues referred to the expert for evaluation, and to document that the evaluator explained the purpose of the evaluation, the persons to whom a report will be provided, and the limits of confidentiality and privilege. The writer must also describe all procedures, techniques, and tests used in the evaluation (Tex. Crim. Proc. 46B.025) and list all sources of information on which his or her opinion is based. When writing the report, the examiner should always keep in mind the audience. Judges, attorneys, and jurors typically know little about mental health issues. Jargon should be avoided when possible and explained when its use is necessary. Finally, statute requires that the expert state the clinical observations, findings, and opinions on each specific issue referred by the court, and identify specifically any issues on which the expert was unable to provide an opinion (Tex. Crim. Proc. 46B.025). In cases where the examiner is of the opinion that the defendant is not competent to proceed, he or she must describe the exact nature of the deficits resulting from the defendant's mental illness or mental retardation and how these impact the major abilities needed for competence to proceed (Tex. Crim. Proc. 46B.025). The evaluator should then describe the likelihood of the defendant regaining competence, identify any treatments likely to facilitate such improvement, and the setting in which such treatment must take place. It is particularly important that examiners clearly identify that subset of defendants who cannot be restored to competence due to the static or untreatable nature of the underlying dis-

order responsible for their impaired abilities since the Constitution precludes their commitment as incompetent to proceed (*Jackson v. Indiana*, 1972, also see Melton et al. 1997, Stafford, 2003, and below for further discussion). By the time the reader comes to the end of the examiner's report, the conclusions regarding the defendant's competence, restorability (when indicated) and treatment needs (when indicated) should be obvious. Finally, Texas law specifically prohibits offering an opinion on sanity or mental state at the time of the alleged offense if, in the evaluator's opinion, the defendant is incompetent to proceed.

SPECIAL ISSUES IN COMPETENCE ASSESSMENT

A number of special issues arise in the course of a competence assessment and some of the more compelling are considered below.

Systems Issues

Assessment of competence to proceed in the criminal justice process has been identified as the "most significant mental health inquiry pursued in the system of criminal law" (Stone, 1975, p. 200). Although Steadman et al. (1982) estimated that more than 25,000 defendants were evaluated for trial competence in 1978, the number of competence evaluations conducted each year is significantly greater, based on estimates that competence evaluations are sought in between 2% and 8% of all felony cases (LaFortune & Nicholson, 1995; Golding, 1993; Hoge, Bonnie, Poythress, & Monahan, 1992), and by the fact that many defendants are evaluated multiple times.

Although obtained rates vary from study to study and across jurisdictions, it is generally agreed that between 20% and 30% of all defendants who are assessed for competence to proceed are eventually adjudicated incompetent (Stafford, 2003; Roesch, Zapf, Golding, & Skeem, 1999). These findings suggest that the threshold or bar for raising issues of competence is low, and this is certainly consistent with Constitutional law directing that such matters should be considered whenever there is a "bona fide

doubt” about the defendant’s capacity to proceed (*Pate v. Robinson*, 1966).

Incompetent defendants are typically diagnosed with more severe disorders (such as schizophrenia, bipolar disorder, or schizoaffective disorder), while less than 10% who have been adjudicated incompetent and are committed for treatment have a diagnosis of mental retardation, although these data are considerably different for juveniles who have been adjudicated incompetent to proceed (McGaha, McClaren, Otto, & Petrila, 2001).

The state may only detain as incompetent those persons who have a reasonable expectation of restoration to competence (*Jackson v. Indiana*, 1972). Thus, as noted above, defendants who are determined to be incompetent and unrestorable cannot be held nor treated under that section of the law that provides for commitment or treatment of incompetent defendants. In such cases, the criminal proceedings may not move forward, and the state may either keep the charges in place or dismiss them. It may, however, seek alternative dispositions for the defendant (e.g., civil commitment, guardianship) providing he or she meets the specific provisions of the relevant law.

Ultimate Issue Issues

Too much ink has been spent discussing the “ultimate issue” in a variety of contexts. For the uninitiated, some in the field (e.g., Melton et al., 1997; Slobogin, 1989) argue that mental health professionals should avoid offering opinions about legal issues (e.g., whether a defendant is competent or incompetent, whether a defendant is sane or insane) because these issues are ultimately moral-legal ones (not scientific ones), that are to be decided by the judge or jury. Others (e.g., Rogers & Ewing, 1989) argue that such advisory opinions are not harmful as long as the mental health professionals offering them remember that the ultimate decision maker is the legal decision maker, and make clear the rationale and reasoning underlying each opinion. Those who see nothing wrong with mental health professionals offering such opinions also argue that, in some cases, mental health professionals must also form opinions about legal issues if they are to comply

with the law and are to be most helpful to the decision maker. Texas competence law is a case in point. As noted earlier, the report generated from court ordered evaluations must contain the examiner's opinion as to the defendant's competence or an explanation as to why such opinion could not be stated.

The "ultimate issue issue" debate will never be settled. Most important for the mental health professional conducting competence to proceed evaluations is to be aware of the issue and debate, to recognize that the decision about competence is ultimately a legal one that is informed by the expert opinions of mental health professionals, to avoid offering only conclusory opinions in reports and testimony, and always to make clear the facts and rationale underlying advisory opinions that may be offered regarding the defendant's competence.

Use of Psychological Testing in Competence Evaluations

Historically, psychologists conducting competence evaluations relied heavily on clinical assessment instruments and measures that assessed general clinical constructs such as intelligence, psychopathology, and academic achievement. See Heilbrun, Rogers, & Otto, 2002 and Otto & Heilbrun, 2002 for further discussion. There is, of course, no clear and direct relationship between any clinical construct and competence to proceed in the criminal process. Because the test for competence is a functional one, mental health professionals should consider the use of clinical assessment instruments carefully. To the degree that a clinical assessment instrument validly measures and helps the examiner identify or understand a construct (depression, intelligence) that may be causally related to and help explain the defendant's functional competence deficits, then that measure may be of some value. The potential utility of clinical assessment instruments is limited, however, because they will not prove of any use with respect to assessing the specific competence abilities of the defendant.

Some clinical assessment instruments and "forensically relevant instruments" (i.e., instruments that assess constructs that are most relevant in forensic contexts such as response style, psychopathy (see Heilbrun, Rogers, & Otto, 2002 for further discus-

sion) may also prove of some value with respect to assessment of the examinee's response style. As noted above, in all forensic assessments, including competence-to-proceed evaluations, given the increased likelihood of a less than candid approach to the process, the examiner must pay special attention to the response style of the examinee (Rogers, 1997; Rogers & Bender, 2003; also see Conroy & Kwartner, this Issue.)

Over the course of the past 40 years a number of instruments have been developed to assist forensic examiners assess criminal defendants' competence related abilities. These measures range from checklists or structured assessment instruments simply designed to ensure a comprehensive consideration of all competence related abilities, to tests that have been developed and normed on a number of relevant populations such as, defendants adjudicated incompetent to stand trial, or defendants with a mental disorder for whom competence was not raised as an issue. All of these measures are best described as "forensic assessment instruments" (see Grisso 1986/2003, and Heilbrun, Rogers, & Otto, 2002 for further discussion) because they were specifically designed to assess a psycholegal issue (see Appendix A.) Comprehensive reviews of these instruments are available (see, e.g., Melton et al., 1997; Grisso, 2003; Stafford, 2003).

It is important to understand when considering the use of competence assessment instruments that none of the measures can be used to classify defendants as "competent" or "incompetent." The most any of these measures do is provide information about the defendant's competence abilities or structure the examiner's inquiry and judgments in some way. Use of any of these instruments, therefore, must be incorporated into a more complex competence evaluation that the examiner still must conduct.

The Utility of Diagnosis

Diagnosis, in and of itself, provides little information about a defendant's competence to participate in the criminal process, and decisions about competence based solely on diagnosis are likely to result in considerable errors. Although, as noted above, persons with more severe disorders like, schizophrenia are over-

represented among persons who have been adjudicated incompetent to proceed, the majority of persons with these diagnoses are competent to proceed. Evaluators of a generation ago have been faulted for painting with such a broad diagnostic brush, but research indicates that few evaluators today make this basic mistake, and instead, correctly focus on the specific deficits in competence related abilities that may be attributed to an underlying mental disorder (Heilbrun & Collins, 1995; Nicholson, LaFortune, Norwood, & Roach, 1995; Roesch et al., 1999; Skeem, Golding, Cohn, & Berge, 1997).

Although decisions about competence cannot be based simply on diagnosis, diagnosis is not wholly irrelevant to the competency question because Texas law requires that deficits identified in these evaluations must in turn be linked to a mental illness or to mental retardation. The diagnostic picture may also be important for the competence examiner to consider when making specific treatment recommendations, and diagnosis can be important in assessment of competence insofar as it has implications for restorability since persons whose incompetence is attributable to more static or unremitting disorders may require a different disposition from those whose predicate disorders are more responsive to treatment and show a better prognosis.

Mental Retardation and Competence

Persons diagnosed with mental retardation may demonstrate specific competence related deficits, and some issues related to defendants who are considered to be incompetent due to mental retardation are deserving of special attention. Persons with mental retardation may be more likely to acquiesce and claim they possess knowledge that they do not in an attempt to appear in control and capable. Additionally, they may be particularly vulnerable to displaying a *factual* understanding or knowledge (particularly after rote training) without an accompanying *rational* understanding and appreciation (Stafford, 2003). As a result, those assessing defendants with mental retardation should be particularly careful to avoid “yes/no” questions and be sure not to simply infer rational appreciation of legal issues based on an ability to recite factual material or information.

Because many of the basic deficits associated with mental retardation are considered to be static and non-changing, the term “treatment” is not typically used when referring to interventions designed to bring about capacity. Persons with mental retardation can show greater and lesser abilities, however, depending on the training, education, and habilitation opportunities provided to them. Thus, in the case of a defendant who is adjudicated incompetent to stand trial due to mental retardation, “treatment” designed to result in “restoration” is not an accurate depiction of what is occurring because 1) the underlying deficits are not being “treated” and 2) the defendant may never have had the necessary capacity. Although some persons with more severe mental retardation may show deficits that cannot be habilitated, some can show improvement in competence related abilities with appropriate and specialized interventions.

Inquiring About the Defendant’s Behavior at and Around the Time of the Alleged Offense

There exists disagreement in the field regarding whether mental health professionals conducting competence evaluations should query defendants about their behavior at and around the time of the offense, as well as the behavior of relevant third parties like, the alleged victim, or the arresting officers. A more conservative approach dictates that examiners not address these issues with defendants because gaining such information may result in revelation of incriminating information. An alternative approach suggests that such an inquiry is appropriate and necessary because it can provide the examiner with helpful information about the defendant’s ability to provide his or her attorney with helpful information or to testify, to work with his or her attorney, to identify inaccurate claims made by the state, and to challenge adverse witnesses. It is also argued that this latter approach is permissible since the law precludes use of incriminating information gained in the competence context for purpose of proving guilt. Such inquiries and discussions should not provide the state with incriminating information if the examiner, while inquiring about offense related specifics with the defendant, simply summarizes the defendant’s communication capacity rather than the details he or she relates.

For example, “The defendant offered a coherent and logical account about her behavior at and around the time of the alleged offense, as well as the behavior of others including the arresting officers and alleged victim”, a report might state, and “Her responses to questions about such were relevant and informative, and she was able to distinguish relevant from irrelevant information”.

Those uncomfortable with the above described approach but who nonetheless recognize the need to assess the defendant’s capacity to relate information about the events in question to the defense attorney, as well as testify, may choose to ask the defendant about his ability to relate such events to his attorney and testify about such, and follow this up with a discussion with the defense attorney, who can apprise the examiner of the defendant’s abilities in this arena, based on their prior interactions.

SUMMARY

Given the stakes involved in criminal proceedings, and the justice system’s investment in accuracy, fairness, and autonomy, all defendants who are subject to criminal proceedings must be competent to proceed. Although competence to proceed with the criminal process is ultimately a legal issue, mental health professionals can be of considerable assistance to legal decision makers by 1) assessing and describing the defendant’s capacity to understand and participate in the legal proceedings, 2) identifying and describing any mental disorders and impairments, broadly defined, that may be responsible for impaired capacities, and 3) in that subset of cases in which a finding of incapacity may occur, determining if the mental disorder or impairment that may be responsible for the reported deficits can be treated so as to restore the defendant’s capacity (and identify those treatments). The examiner should make clear in any reports or testimony the assessment techniques utilized and the factual basis and reasoning underlying any opinions.

Assessment of a defendant’s competence to proceed requires knowledge of the law, as well as expertise with respect to

mental conditions that may affect competence related abilities, and interventions designed to treat and habilitate these underlying conditions. The mental health professional conducting competence evaluations must rely on traditional clinical techniques, as well as approaches that are unique to forensic practice so as to best inform the legal decision maker about the defendant's capacities and needs.

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APPENDIX A
ADULTS' COMPETENCE TO STAND TRIAL

A. Competency to Stand Trial Assessment Instrument (CAI)

This is an instrument, which is designed to structure examiners' assessments and ratings of defendants' competence related abilities, was developed at Harvard Medical School by Lipsitt and Lelos in 1970. It has been widely used and covers 13 areas essential to trial competence. It comes with a handbook which includes specific suggested questions and response examples.

Reference: Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments* (2nd ed.). NY: Kluwer Academic/Plenum Publishers.

Source: Laboratory of Community Psychiatry, Harvard Medical School (1973). *Competency to stand trial and mental illness*. Rockville, MD: NIMH, DHEW Publication No. (AMD) 77-103.

B. Competency Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)

This measure was developed by Everington and Dunn at Miami University of Ohio in the late 1980s. It contains 50 items divided into three sections. The first two sections are multiple choice. Administration generally requires 30 to 45 minutes.

Reference: Everington, C. T. (1995). A second validation study of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). *Criminal Justice and Behavior*, 22, 44-59.

Source: *Competence Assessment for Standing Trial for Defendants with Mental Retardation: CAST-MR Test Manual*. Worthington, OH: International Diagnostic Services.

C. Competency Screening Test (CST)

This measure was developed by Lipsitt and McGarry at Harvard Medical School in 1971. It is a two-page sentence completion test which can be quickly completed by a literate defendant. However, it was developed strictly as a screening device to determine which defendants were clearly competent and which warranted a thorough competency evaluation. It should not therefore be used to demonstrate that a defendant is not competent.

References: Lipsitt, P. D., Lelos, D., & McGarry, A. L. (1971). Competency for trial: A screening instrument. *American Journal of Psychiatry*, 128, 105-109.

Laboratory of Community Psychiatry, Harvard Medical School (1973). *Competency to stand trial and mental illness*. Rockville, MD: NIMH, DHEW Publication No. (AMD) 77-103.

D. Georgia Court Competency Test—Mississippi State Hospital (GCCT-MSH)

This measure is a version of the Georgia Court Competence Test that was developed at the Mississippi State Hospital. In either the original or revised version, it is best applied only as a screening device.

References: Ustad, K. L., Rogers, R., Sewell, K. W., & Guarnaccia, C. A. (1996). Restoration of competence to stand trial: Assessment with the Georgia Court Competency Test and the Competency Screening Test. *Law and Human Behavior*, 20, 131-148.

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E. Interdisciplinary Fitness Interview Revised (IFI-R)

This is another assessment tool that is designed to structure examiners' assessment and judgments' about defendant's competence to proceed. Its first iteration was developed by Golding and Roesch at the University of Illinois, and later revised by Golding.

References: Golding, S., Roesch, R., & Schreiber, J. (1984). Assessment and conceptualization of competency to stand trial: Preliminary data on the IFI. *Law and Human Behavior*, 8, 321-334.

Golding, S. (1993). *Manual for the Interdisciplinary Fitness Interview—Revised*. Salt Lake City, UT: Author.

F. MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)

This is a 22-item, structured, normed, measure which can be administered in less than an hour. It has three sections designed to assess a defendant's understanding, reasoning, and appreciation, with heavy reliance on hypothetical defendant.

References: Otto, R., Poythress, N., Edens, J., Nicholson, R., Monahan, J., Bonnie, R., Hoge, S., & Eisenberg, M. (1998). Psychometric properties of the MacArthur Competence Assessment Tool—Criminal Adjudication. *Psychological Assessment*, 10, 435-443.

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G. Fitness Interview Test—Revised (FIT-R)

The FIT-R is yet another structured professional judgment tool, like the CAI and IFI-R. It focuses the examiner's inquiry on 16 areas including the defendant's 1) understanding of the circumstances of the arrest, associated charges, possible penalties, legal actors, the legal and court process, and available pleas and defenses; and 2) capacity to appreciate likely outcomes, work and communicate with defense counsel, plan legal strategies, assist in one's defense, challenge witnesses, and manage courtroom behavior.

References: Zapf, P., Roesch, R., & Viljoen, J. (2001). Assessing fitness to stand trial: The utility of the Fitness Interview Test (Revised Version). *Canadian Journal of Psychiatry, 46*, 426-432.

Roesch, R., Zapf, P., Eaves, D., & Webster, C. (2006). *Fitness Interview Test (Revised Edition)*. Sarasota, FL: Professional Resource Press.

H. Evaluation of Competency to Stand Trial—Revised (ECST-R)

This is a semi-structured interview which requires that the examiner rate the examinee's competence related abilities. It includes scales focused on the examinee's factual understanding of the proceedings, rational understanding of the proceedings, and rational ability to consult with counsel, as well as embedded measures of response style.

References: Rogers, R., Sewell, K., Grandjean, N., Vitacco, M. (2002). The detection of feigned mental disorders on specific competency measures. *Psychological Assessment, 14*, 177-183.

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Table 1: Report Format

Identifying Information/Referral Question/Notification
Relevant History
Social and Family History
Educational History
Employment History
Medical History
Mental Health and Substance Use History
Legal History
Mental Status/Current Clinical Functioning
Competence to Proceed
Appreciation of Charges and Allegations
Appreciation of the Range and Nature of Possible Penalties
Understanding of the Legal Process and its Adversary Nature
Capacity to Work with Attorney and Provide Relevant Information
Ability to Manifest Appropriate Courtroom Behavior
Ability to Testify Relevantly
Opinion Regarding Competence to Proceed and Need for Treatment/Restoration