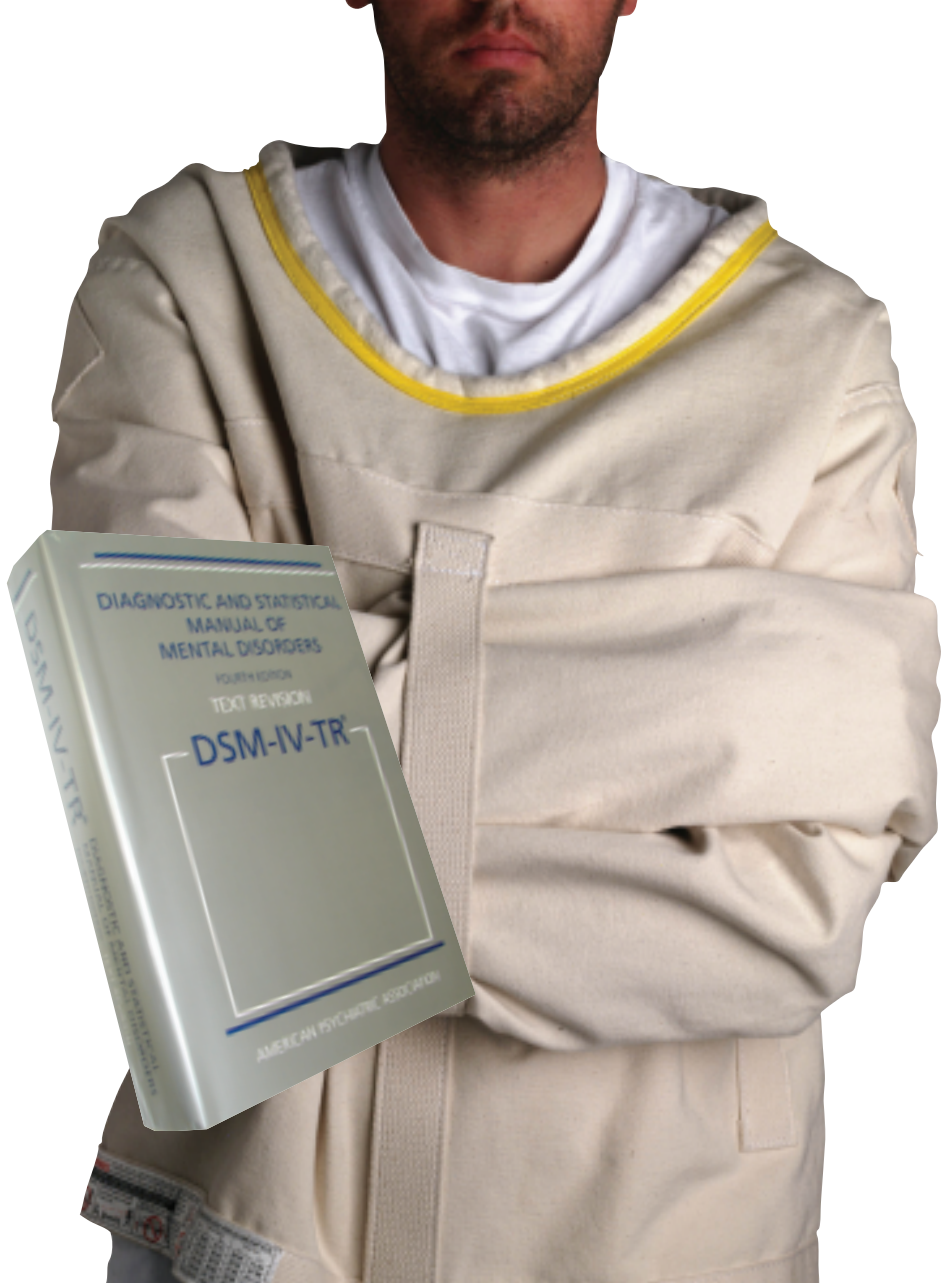

Dealing With Experts on Competence to Stand Trial: Suggestions and Approaches — Part Two

Standards Related to Experts and Opinions

In many court systems, the same experts are involved in competence assessments time and time again. A number of lawyers hold the view that judges and juries (where juries make competence determinations) generally disfavor contested competence adjudications, in part because they are viewed as an unnecessary challenge of a usually familiar expert's views by the defense. Thus, some lawyers counsel against contesting a client's incompetence even where it likely could be contested because the systemic "realities" are felt to work against the defense. A similar, though more strategic, issue raised by lawyers concerned with the competence adjudication process is that the state (or federal government) obtains insight into the client that would otherwise not have been provided had there been no competence inquiry.

It appears that some of these concerns are raised because lawyers feel they cannot control the competence assessment process well enough to ensure the correct outcome where the client is indeed incompetent.

Some of this lack of "control" is attributable to lawyers' lack of familiarity with the standards of practice and ethical rules pertinent to psychiatry and psychology. While there are indeed many variables in any given case that lawyers cannot control, they *can* point out where mental health professions do not adhere to their own rules in conducting an assessment, in arriving at a diagnosis or opinion, or in offering courtroom testimony. Armed with some sense of how to define proper from improper practice in the mental health professions, lawyers can more effectively address the process and outcome of a competence assessment.

The Ethical Principles of Psychologists and Code of Conduct, published by the American Psychological Association, covers a number of issues involved in the practice of psychology, including the assessment process, bases for assessments, test construction, and interpretation of test results. *Ethical Principles* defines a number of the limitations that psy-

Editor's Note: Part One appears in the January/February 2008 issue. The first part of this article emphasized the importance of a defense lawyer understanding the training and professional credentials of psychologists and psychiatrists when issues arise involving the assessment of competence to stand trial. The second part of this piece discusses: (1) the advantage of a lawyer's familiarity with the ethical standards for mental health professionals, and (2) the necessity of counsel having a basic, fact-driven explanation of how a client's mental state has compromised the conduct of criminal proceedings.

BY JOHN T. PHILIPSBORN

chologists should reflect in stating opinions depending on what data is available.

Similarly, for psychiatrists, the *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* is viewed as defining standards of practice applicable to the profession. It has been referred to not only in some of the leading publications, but also in rulings of the U.S. Supreme Court.[1]

A legitimate question can arise about how influential these organizational ethical principles are to an expert who professes not to belong to a given organization. Nevertheless, both in decisions of reviewing courts on constitutional law and criminal procedure issues, as well as in civil case decisions pertinent to practice and malpractice by psychologists and psychiatrists, courts have made reference to the predominant ethical codes and standards of practice of the dominant organizations. In specialty areas, several well known professional groups publish ethical guidelines or specialty guidelines. For example, the American Academy of Psychiatry and the Law publishes *Ethical Guidelines for the Practice of Forensic Psychiatry*. Likewise, guidelines are also published by organizations such as the American Academy of Forensic Psychology as well as the American Board of Forensic Psychology.

As is pointed out in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, the American Medical Association (AMA) issued a report and a set of recommendations to state licensing boards urging that erroneous testimony by physicians be included as a type of malpractice and be subject to discipline.[2] These recommendations clearly would affect psychiatrists. Indeed, the AMA and several states essentially define providing expert medical testimony as a form of medical practice. This is an important development, as it emphasizes the concern for adherence to standards.

The advantage of a lawyer's familiarity with ethical rules for psychology and psychiatry, as well as the announced standards of practice for these professions, is that they form the basis not only of establishing for the trier of fact that there is a baseline, but also that departure from these standards must be viewed as demonstrating questionable practices. For example, the evaluator of competence to stand trial who professes to function under pertinent rules should be the subject of a wide-ranging voir dire or cross-examination where he or she: (1) has not maintained his or her knowledge of the field, including knowledge of pertinent literature and case law, and (2) has failed to obtain continuing education on the assessment of competence to stand trial. Counsel who have previously asked limited questions on an expert's qualifications should prepare more detailed inquires and should obtain continuing education and professional certification records for the proposed expert. A surprising number of experts have simply not kept up.

A defense attorney should review foundational issues — even when making contact with a familiar expert. What literature on competence assessments does the expert use as standard references? Because a surprisingly high number of experts use a general understanding of the competence standards in the assessments, ask what statutory or case authority the expert keeps on hand. In some states, Florida and Nebraska for example, the "elements" of a competence inquiry as set forth in controlling law are more detailed than elsewhere. Moreover, other than Richard Rogers and Daniel Shuman, few publications address these differences.[3] How recently has the expert received training on competence to stand trial either as a subject or as an assessment process? It makes sense to ask these questions, and they provide the basis for counsel to provide a "packet" of information to the expert that includes pertinent literature, legal standards, and case-specific material. (*See* THE CHAMPION, January/February 2008 at 15.) This is true (tactical considerations aside) regardless of whether the expert is friendly or adverse.

In addition to the general standards of practice and generalized ethical standards pertinent to the mental health professions, there are a number of standards that govern in the arena of competence to stand trial assessments.

Standards Exist for Competence Assessments

Many mental health experts familiar with the courts will profess some knowledge of generally accepted literature. Experienced lawyers will seek to have an expert define how he or she approaches the assessment of competence. Is it done the same way in every case? Is the design of the assessment case specific? How did the examiner decide how to structure the examination or assessment in this case? This is not a matter of guesswork; it is a subject addressed in the literature. According to Gary B. Melton, while the assessment of competence to stand trial is rooted in the U.S. Supreme Court's definitions, it is conducted in a specific context:

> With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges . . . may be grossly insufficient when a more complicated offense is involved. . . .[4]

Melton is not alone in this observation. A similar observation appears in the *Comprehensive Textbook of Psychiatry*:

> The impairment must be considered in the context of the particular case or proceeding. For example, mental impairment that renders an individual incompetent to stand trial in a complicated tax fraud case may not render that individual incompetent for a misdemeanor trial.[5]

Because of the dearth of detailed analysis in the case law, it is hard to find language that specifically anoints this view of a competence assessment (though there is some in certain state court decisions). Since this is the literature often relied upon by the mental health professions, however, such language is important, if for no other reason than to establish what an expert knows or has not bothered to consider.

There is another important issue that often arises in a competence assessment, particularly when it is conducted by a court-appointed expert who is paid a flat (usually low) rate and thus can devote only little time to it. The issue arises even when the assessment is undertaken in a state hospital setting where time should not be as precious. The issue is whether contact should be made with the attorney of record to obtain data pertinent to competence. The literature recommends contact between the evaluator and the attorney representing the accused — particularly on the question of ability to assist counsel. Melton is quite clear:

> The consultation process should not be conceptualized as unidirectional, however. The clinician also needs to obtain information from the attorney. . . . More important, only the attorney can provide the clini-

cian with information about the length, substance, and nature of previous attorney-client contacts.[6]

Indeed, it is important to note that Melton acknowledges the phrasing contained in *Medina v. California* that it is defense counsel who will " . . . often have the best informed view of the defendant's ability to participate in his defense. . . ."[7]

This same point was made by Dr. Thomas Grisso in his 1988 pamphlet titled *Competency to Stand Trial Evaluations*, though at that point his view on the subject was narrower than as stated since. He noted that in attempting to obtain background information, " . . . the examiner should attempt to learn from the defendant's attorney those specific behaviors of the defendant that raised doubt concerning the defendant's competency."[8]

While other mental health professionals have published primers and practice guides related to the assessment of competence to stand trial, the above quoted sources are significant. It is surprising, particularly when the problem revolves around the accused's ability to assist counsel (or cooperate in the preparation of a defense), that lawyers do not focus on an expert's failure to contact them.

Many experienced lawyers will proactively contact competence examiners to try to spur communication, or at least to make a record that counsel tried to make the contact. Lawyers in those jurisdictions in which competence assessments are conducted in a hospital or locked ward setting, or where competence restoration "work" is done in such settings, should formulate a specific strategy on communication with the mental health experts. Today, however, the practices of the legal profession in this area vary a great deal. Clearly, examiners in state or federal hospital settings have no better gauge than do their colleagues in the community on what issues are encountered by defense counsel in a specific attorney-client relationship. They have little understanding of the demands of a specific case, or how the communication between the lawyer and client has occurred.

The lawyer who has created a trail of communication with the examining expert, or who has at least created a paper trail evidencing efforts at communication, is supported by the relevant literature with respect to significant omissions by the mental health experts.

Knowledge of Available Formats of Competency Evaluations

In establishing or testing expertise in this area, counsel should become familiar with the various approaches to competence evaluations. Richard Rogers and Daniel Shuman, two well known scholars in the field of forensic mental health, have noted that there are basically three approaches to the diagnostic process in forensic practice. The first is *unstandardized*, depending on a clinical interview, plus some record review and collateral interviews as well (i.e., interviews of people other than the defendants). An unstandardized approach emphasizes the "I know it when I see it" type of expertise. It is difficult to validate because it is dependent on one person's judgment. And it is not unusual for experts relying on an unstandardized approach not to write very detailed reports, making their opinions even more subject to individual judgment rather than verifiable work.

This unstandardized approach can be contrasted with the *standardized diagnosis* based on structured interviews empirically validated for use in competence assessments (and including collateral interviews and record review as well as examination of the accused). The notion is that these diagnoses are based in some verifiable methodology and in techniques that can be replicated by another examiner.

Third, according to the Rogers and Shuman view, there are *extrapolated diagnoses*. These are based on investigating the relationship between results on psychological tests designed and associated with broad diagnostic groups that are related to a clinical assessment process of the individual at issue.[9]

While other scholars have described the diagnostic process in other ways, the Rogers and Shuman description has a great advantage for lawyers. It is simple and easily establishes that a mental health evaluation is a process that can be subjected to some level of analysis. Lawyers often miss the point in this area. Lawyers often question how a mental health professional arrived at a given opinion, but they do not know how to ask what process was involved. Did you do something that another expert can review and try to validate? Did you use techniques that have been subject to research and review? Did you write a report according to any published standards or approaches? (Grisso points out the importance of standardized report writing methods.)

Having a compact and easy way to describe the diagnostic process is important in a hearing or competence trial. Counsel has to find a way to differentiate between the methods used by examiners, and to introduce language into the court hearing or trial that differentiates between approaches used by experts. Basically put, lawyers have to be able to explain why the "drive by" evaluation – consisting of some time spent with the accused and some time spent reviewing records — does not produce an easily verifiable opinion. Developing the ability to explain to the trier of fact with explanations of how a diagnostic process can be verified (and where it cannot) is what results from understanding the various approaches to competence assessments.

Competence to stand trial assessments often involve the use of fairly well known instruments that may be described as structured interviews, inventories, or tests. Usually, such instruments — such as the Competence Assessment Instrument (CAI), the MacArthur assessment tools (including the MacCAT), and Rogers' Evaluating Competence to Stand Trial-Revised (ECST-R) — are *an* ingredient in a more methodical process than the "drive-by."

Expertise is established when the following items are included as part of the statement of an expert's background: (1) knowledge of the different categories and types of assessments; (2) knowledge of the different assessment tools; and (3) varied opportunities for acquisition of information on competence to stand trial. (Conversely, when this information is used on cross-examination, it opens up the expertise to question.) Not only does this information establish expertise, it also serves to establish the strengths and weaknesses of any given competence to stand trial assessment process. It serves to establish a description of the science of competence evaluations, as well as their weaknesses — especially in the assessment of the so called "aid and assist" counsel element of the legal test of competence. There are no particularly well established or validated approaches in that area — particularly if one understands the need for examiner contact with counsel to mean that this is an area in

which examiners must at least try to acquire data from counsel.

Experts Offering 'Relevant' Evidence

Dr. Thomas Grisso has written that, historically, mental health examiners were viewed as failing to provide testimony that was relevant to the law's concerns, and also that many examiners seemed to be ignorant of the nature of the legal inquiry.[10] As he puts it:

> Something more is needed, therefore, than a mere diagnosis of mental disorder, a reference to an individual's inadequate contact with reality, or a statement about general mental retardation. For clinical information to be relevant in addressing legal questions of competence, *examiners must present the logic that links these observations to the specific abilities and capacities with which the law is concerned.*[11]

Others have explained that " . . . forensic clinicians must consider individually the clinical issues associated with each *Dusky* prong."[12] Attention needs to be paid to the "clinical operationalization of the competency standard."[13]

These comments frame some interrelated points that will be lost on lawyers who approach competence to stand trial hearings as though the objective were simply to present some expert opinions on an individual's disorders and how they are manifested — with the legal issues left to be explained through counsel's arguments. Even relatively experienced judges often do not have in mind all of the essential formulations and phrases of the U.S. Supreme Court's competence definitions. They may reference a statute, ruling, or (where employed) jury instruction that is clearly out of step with the Supreme Court's requirements. This is true, for example, of the California statutory definition that was formulated in 1967 but has not been updated. It is a significant oddity since the statutory definition has not been changed to incorporate the more recent rulings.

From a tactical standpoint, the failure to make use of an expert's understanding of the various competence to stand trial definitions, and to have the expert explain how each activity engaged in during the assessment (the interview, record review, testing, consultation with counsel, observation of the accused with counsel, etc.) relates to an understanding of *this* individual's competency to stand trial, represents a failure to explain basic linkages between definitions in an assessment process.

It is in part for this reason that counsel are urged to work carefully with experts to ensure that they are fully aware of the content of the case law. Counsel must make sure they have thought how their work as psychologists or psychiatrists in the particular case has addressed the salient questions set forth in the law.

Supporting the Basic Showing of Incompetence

It has been pointed out that the U.S. Supreme Court has never required proof of a specific disorder to establish incompetence or otherwise specified what evidence will establish incompetence. Some state statutes, however, create a linkage between proof of an underlying mental disorder or developmental disability and incompetence to stand trial. Whether this linkage would pass constitutional muster if properly challenged is beyond the scope of this piece. Suffice it to say that when contemplating the presentation of evidence of incompetence, lawyers often contemplate calling one or more mental health experts who are important to the process, in part because they provide the diagnostic information.

Some thorough examiners and lawyers will also call upon a variety of supporting witnesses to flesh out their understanding of the client's functioning, including family members; jail and prison visitors, inmates, staff, and mental health experts; witnesses (including experts) from prior hospitalizations; and prior diagnosticians.

It appears that in the cases in which counsel have been successful in establishing incompetence, the trier of fact was presented with ample, sometimes redundant, testimony from a wide variety of witnesses. Indeed, often the government will seek to rebut the defense evidence by calling the same types of witnesses the defense will call — notably jail, prison, or state hospital personnel who are often offered as sources of information about an individual's behavior when the light of a mental health examination is not on them, and when (according to the arguments usually proffered) the accused's guard is down. Clearly, proactive counsel who undertake the burden of demonstrating the existence of incompetence should avail themselves of this wide range of evidence.

Exercise care in choosing lay witnesses on competence. Without doubt, some triers of fact will believe a credible lay witness over an expert. But some care should be taken to develop specific parts of the evidence of incompetence through the corroborating witnesses. Often, these witnesses are called to establish that the accused is demonstrating confusion, incoherence, or paranoia (to name a few) even when no lawyers, doctors, or other "officials" are looking.

Several reported cases discuss, in some detail, the witnesses called on the issue of competence or restoration to competence in a way that may assist counsel in formulating plans. One series of such cases centered on New York's Vincent Gigante. Over a period of time, Gigante was the subject of several different competence adjudications.[14] The Gigante saga is of importance because it involved well known psychologists and psychiatrists who lined up on the two sides of the issue, and because it chronicled the various lay witness opinions that were introduced.

After the tortured litigation of the competence issues, Gigante eventually made certain admissions on the record in his federal case to the effect that he had been faking certain aspects of his apparent incompetence. This admission led, among other things, to editorials and commentaries by well known mental health professionals questioning (once again) the usefulness of the injection of mental health opinion evidence in forensic settings.

Another useful discussion of the subject is found in *United States v. Duhon*, another federal district court case that offers a rich discussion of competence law and literature pertinent to competence inquiries, as well as a review of the testimony of various witnesses in a competence restoration proceeding.[15] *Duhon* also involved the use of an attorney-expert, i.e., a lawyer called to explain how defense of the case necessitated attorney-client communication.

The suggestion to use lawyer-experts in competence proceedings has been made over a period of time.[16] The attorney-expert contemplated is one who would explain, either specifically (in the appropriate case) or generally: the demands placed on a client in that type of case; the components of the effective representation of an individual

given the charges; the existence of the various standards, including *ABA Standards* (or *ABA Guidelines* in death penalty cases) that require the lawyer to do specified things to assist the client; the various choices and decisions defined by the Fifth and Sixth Amendments that clients face; the nature of the discussions that take place between counsel and client in a given type of case; and the strategic decisions that would need to be discussed as well, according to the case law.[17]

Use of an attorney-expert provides an alternative for lawyers who are of the view that some evidence from counsel is needed but where counsel of record may not be an appropriate source of information.

Defining the Problem; Setting the Stage For a Solution

There is an overarching theme that defense counsel may need to address in a competence case. This involves describing how the competence issue impacts the integrity of the process, and what the prospects for restoration of competence may be. Indeed, many of the suggestions offered above might be viewed as secondary to the one discussed here, which is that counsel should have a basic, fact-driven, explanation of how a client's paranoia, psychosis, or other symptom has compromised the conduct of the criminal proceedings.

Focusing on this theme is particularly important when the issue of competence is left to a jury's determination, as well as where the case law requires proof of changed circumstances before a second or third competence to stand trial determination may be undertaken in the same case.

Lawyers who practice in jurisdictions (such as California) where a jury ultimately decides competence have expressed concerns that jurors will view the competence issue as a way of avoiding criminal liability. Surprisingly, however, counsel often do not elicit evidence (through mental health professionals, lawyers, or retired judges, all of whom have been called on such issues) that the systemic response to declarations of incompetence is to try to achieve restoration of competence with the aim of finishing the case. Such evidence would help defuse the notion that the process involves an "out" for the accused.

Counsel who are used to making proportionality and comparison of punishment arguments at sentencing often censor themselves in the presentation of data that can remind a trier of fact that the actuarial tables favor the resumption of the case when competence is at issue.

This theme may be less dubious to a trier of fact where the underlying disorder can be treated with medication, and where there is evidence that the accused has "gotten better" when medicated. Some experienced lawyers have recommended that their own experts consult with others who work in competence restoration programs that are likely to receive the accused. Competence restoration staffers are often more than happy to review their relative success rates, thus providing the foundation for some testimony on the issue. Hearsay objections can be circumvented through use of official records and official reports, as well as through the calling of administrators responsible for the programs at issue. This is not an area to neglect, as judges or jurors may have little idea what actually happens in the aftermath of a determination of incompetence.

It is also of some importance for counsel to be specific in describing how an accused's incompetence is compromising the defense — even if this statement is made in a submission under seal or in some other protected format. A generalized statement that the accused is unable to assist may be useful at an early time of crisis in the case, but it becomes less useful if it becomes necessary for the same lawyer to raise the client's incompetence a second or third time in the same case. Case law often requires a showing of change in circumstances, and the possibility that competence may have to be addressed again should be contemplated by counsel.

Conclusion

In many jurisdictions, the adjudication of an accused's incompetence to stand trial is taken care of through stipulations to the admission of experts' reports and other devices that have avoided the need for lawyers to get involved in and become acquainted with contested competence hearings or trials. Defense lawyers often assume that there is significant resistance to finding an accused incompetent even though the facts merit such a finding. While this may be a provable assumption, available evidence suggests that well-prepared lawyers have been able to demonstrate a client's incompetence by exhibiting care in preparing to present the relevant evidence. Some of the valuable lessons learned from successful competence litigations have been described in this writing in the hope of assisting other counsel when it comes to clients who are mentally incompetent to stand trial.

Excerpts from this piece appeared in Matthew Bender's California Criminal Defense Practice Reporter *in November 2006. They are reproduced by permission.*

Notes

1. In *Washington v. Harper*, 494 U.S. 210, 223 fn.9 (1990), the Court noted that it assumes psychiatrists (and other physicians) obey the ethics of the medical profession, citing specifically the "annotations especially applicable to psychiatry" of the American Psychiatric Association; see also the discussion of medical ethics in Virginia Sadock and Benjamin Sadock's *Comprehensive Textbook of Psychiatry* (8th ed.).

2. Federal Judicial Center, *Reference Manual on Scientific Evidence* 448 fn.37 (2d ed. 2000). The *Reference Manual* is considered an authoritative resource in the federal courts. It devotes an entire chapter to medical testimony.

3. Richard Rogers & Daniel Shuman, *Fundamentals of Forensic Practice* 157-161 (2005).

4. Gary B. Melton et al., *Psychological Evaluations for the Courts* 122 (2d ed. 1997). This subject is also covered in the new Third Edition.

5. Virginia Sadock & Benjamin Sadock, *Comprehensive Textbook of Psychiatry* 3285-86 (7th ed. 2000).

6. See Melton et al., endnote 4, at 150.

7. *Id.* at 130, relying on *Medina v. California*, 505 U.S. 437 (1992), which affirmed *People v. Medina*, 51 Cal.3d 870 (1990). The observation at issue was actually first set forth by the California Supreme Court in its *Medina* opinion.

8. Thomas Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* 41 (1988).

9. Rogers & Shuman, *Fundamentals of Forensic Practice* 405 (2005).

10. Thomas Grisso, *Evaluating Competencies* 12-13 (2d ed. 2002).

11. *Id.* at 13, emphasis in original.

12. Rogers & Shuman, *Fundamentals of Forensic Practice* 167 (2005); *see Dusky v. United States*, 362 U.S. 402 (1960).

13. *Id.* at 161.

14. *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997); *United States v. Gigante*, 996 F. Supp. 194 (E.D.N.Y. 1998).

15. *United States v. Duhon*, 104 F. Supp.

2d 663 (W.D. La. 2000). This is a very useful case that has been cited with approval, usually on other issues. See, for example, *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1227 (10th Cir. 2007).

16. The writer of this piece has been involved in several publications suggesting the use of attorney-experts. Fortunately, some of these writings have been supported by other established defense counsel. See, for example, Iversen, Thomson & Philipsborn, *1368 Revisited: Can Your Client Rationally Assist You?* (CACJ Forum, 1988, in two parts); Philipsborn, *Assessing Competence to Stand Trial: Re-Thinking Roles and Definitions* (American Journal of Forensic Psychiatry, Volume II, Issue One, 1990); Burt and Philipsborn, *The Assessment of Competence in Criminal Cases: The Case for Cooperation Between Professions* (published in the June 1998 issue of THE CHAMPION, as well as in CACJ Forum and California Death Penalty Manual. The last of these articles was cited by the U.S. District Court in *Duhon, see* endnote 15.

17. Many of the activities that would be contemplated to take place between a lawyer and client, including discussions of specific pleas, waivers of rights, and strategic decisions, are found in *Godinez v. Moran,* 509 U.S. 389 (1993). A useful discussion is also repeated in *United States v. Duhon, supra* note 15. The *ABA Standards* referred to here are the *Standards on the Defense Function*. The *ABA Guidelines* are the 2003 *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*.

About the Author

John T. Philipsborn has been a criminal defense lawyer for almost 30 years. For the past 15 years, he has been the amicus curiae committee chair for the California Attorneys for Criminal Justice. Philipsborn has authored (and co-authored) numerous publications on competence to stand trial, and has presented competence-related evidence in connection with several published cases.

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